



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Dumping and Subsidizing

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## ORDER AND REASONS

Expiry review RR-2021-004

Gypsum Board

*Order issued  
Wednesday, October 19, 2022*

*Reasons issued  
Thursday, November 3, 2022*

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IN THE MATTER OF an expiry review, pursuant to subsection 76.03(3) of the *Special Import Measures Act*, of the finding made by the Canadian International Trade Tribunal on January 4, 2017, in inquiry NQ-2016-002, concerning:

**GYP SUM BOARD ORIGINATING IN OR EXPORTED FROM THE UNITED STATES OF AMERICA**

**ORDER**

The Canadian International Trade Tribunal, pursuant to subsection 76.03(3) of the *Special Import Measures Act* (SIMA), has conducted an expiry review of its finding made on January 4, 2017, in inquiry NQ-2016-002, concerning the dumping of gypsum board, sheet, or panel (“gypsum board”) originating in or exported from the United States of America, imported into Canada for use or consumption in the provinces of British Columbia, Alberta, Saskatchewan, and Manitoba, as well as the Yukon and Northwest Territories, composed primarily of a gypsum core and faced or reinforced with paper or paperboard, including gypsum board meeting or supplied to meet ASTM C 1396 or ASTM C 1396M or equivalent standards, regardless of end use, edge-finish, thickness, width, or length, excluding:

- (a) gypsum board made to a width of 54 inches (1,371.6 mm);
- (b) gypsum board measuring 1 inch (25.4 mm) in thickness and 24 inches (609.6 mm) in width regardless of length (commonly referred to and used as “paper-faced shaft liner”);
- (c) gypsum board meeting ASTM C 1177 or ASTM C 1177M (commonly referred to and used primarily as “glass fiber re-enforced sheathing board” but also sometimes used for internal applications for high mold/moisture resistant applications);
- (d) double layered glued paper-faced gypsum board (commonly referred to and used as “acoustic board”); and
- (e) gypsum board meeting ISO16000-23 for sorption of formaldehyde.

All dimensions are plus or minus allowable tolerances in applicable standards.

Pursuant to paragraph 76.03(12)(b) of SIMA, the Tribunal continues its finding in respect of the aforementioned goods.

Cheryl Beckett

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Cheryl Beckett  
Presiding Member

Georges Bujold

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Georges Bujold  
Member

Serge Fréchette

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Serge Fréchette  
Member

The statement of reasons will be issued within 15 days.

Place of Hearing: Ottawa, Ontario  
Dates of Hearing: August 15–17, 2022

Tribunal Panel: Cheryl Beckett, Presiding Member  
Georges Bujold, Member  
Serge Fréchette, Member

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**PARTICIPANTS:****Domestic Producers**

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Cabot Manufacturing ULC

CGC Inc.

Atlantic Wallboard Limited Partnership

**Importers/Exporters/Others**

Canadian Home Builders' Association

Teamsters Local 213

International Brotherhood of Boilermakers

Georgia-Pacific Gypsum LLC

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## STATEMENT OF REASONS

### INTRODUCTION

[1] The Canadian International Trade Tribunal, pursuant to subsection 76.03(3) of the *Special Import Measures Act*<sup>1</sup> (SIMA), has conducted an expiry review of its finding made on January 4, 2017, in inquiry NQ-2016-002, concerning the dumping of certain gypsum board originating in or exported from the United States of America (U.S.) and imported into Canada for use or consumption in the provinces of British Columbia, Alberta, Saskatchewan and Manitoba, as well as the Yukon and Northwest Territories (Western Canada) (the subject goods).

[2] Under SIMA, findings of injury or threat of injury and the associated protection in the form of anti-dumping or countervailing duties expire five years from the date of the finding or, if one or more orders continuing the finding have been made, the date of the last order made under paragraph 76.03(12)(b), unless the Tribunal initiates an expiry review before that date. The finding in inquiry NQ-2016-002 was scheduled to expire on January 3, 2022.

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

### PROCEDURAL BACKGROUND

[4] The Tribunal issued its notice of expiry review on December 13, 2021. This notice triggered the initiation of an investigation by the Canada Border Services Agency (CBSA) on December 14, 2021, to determine whether the expiry of the Tribunal's finding was likely to result in the continuation or resumption of dumping of the subject goods.

[5] On May 12, 2022, the CBSA determined, pursuant to paragraph 76.03(7)(a) of SIMA, that the expiry of the finding was likely to result in the continuation or resumption of dumping of the subject goods.<sup>2</sup>

[6] Following the CBSA's determination, the Tribunal began its expiry review on May 13, 2022, pursuant to subsection 76.03(10) of SIMA, to determine whether the expiry of the finding was likely to result in injury to the domestic industry.

[7] The period of review (POR) for the Tribunal's expiry review covered three calendar years, from January 1, 2019, to December 31, 2021, as well as the interim period of January 1 to March 31, 2022 (interim 2022). For comparative purposes, information was also collected for the period of January 1 to March 31, 2021 (interim 2021).

[8] The Tribunal asked known domestic producers and importers of gypsum board meeting the product definition, and known foreign producers of the subject goods, to complete questionnaires.

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<sup>1</sup> R.S.C., 1985, c. S-15. Certain SIMA provisions were amended by the *Budget Implementation Act, 2022, No. 1*, S.C. 2022, c. 10 (BIA 2022), which came into force on June 23, 2022. Pursuant to the transitional provision in section 211 of the BIA 2022, this expiry review is conducted under SIMA as it read before June 23, 2022.

<sup>2</sup> Exhibit RR-2021-004-03 at 4.

[9] The Tribunal received one response to the domestic producers' questionnaire from a company producing gypsum board in Western Canada, two responses to the domestic producers' questionnaire from firms producing gypsum board in Eastern Canada, three responses to the importers' questionnaires as well as four responses to the foreign producers' questionnaire.<sup>3</sup>

[10] Using the questionnaire responses and other information on the record, staff of the Secretariat to the Tribunal prepared public and protected versions of the investigation report, which were placed on the record and distributed to parties on July 4, 2022. Revised versions of the investigation report were likewise placed on the record and distributed to parties on July 18 and August 9, 2022.

[11] CertainTeed Canada Inc. (CertainTeed), the domestic producer of gypsum board situated in Western Canada, and Cabot Manufacturing ULC, a domestic producer located in Eastern Canada, filed written submissions in support of the continuation of the finding, as did the Teamsters Local 213 (Local 213) and the International Brotherhood of Boilermakers (IBB), trade unions with members employed by CertainTeed.

[12] Joint submissions opposing the continuation of the finding were filed by CGC Inc. (CGC), a domestic producer and importer located in Eastern Canada, and USG Corporation (USG), a foreign producer of subject goods. Joint opposing submissions were also filed by Georgia-Pacific Gypsum LLC (GP U.S.), a foreign producer of subject goods and Georgia-Pacific Canada LP (GP Canada), its affiliated importer (collectively, GP). Opposing submissions were also filed by the Canadian Home Builders' Association (CHBA), an association representing professionals, contractors and trades involved in the residential construction industry. Atlantic Wallboard Limited Partnership, a domestic producer located in Eastern Canada, and Gold Bond Building Products LLC, a foreign producer, filed notices of participation but did not file any submissions during the expiry review.

[13] The Tribunal received a request for a product exclusion from CGC on July 11, 2022. CertainTeed, Local 213 and the IBB replied to the product exclusion request on July 18, 2022. CGC then provided a response to these replies on July 26, 2022.

[14] On July 12, 2022, CertainTeed filed protected and public requests for information (RFIs) with the Tribunal. CertainTeed directed two RFIs to CGC, one to USG, and one to GP U.S. On July 15, 2022, CGC and USG, collectively, filed objections to one of CertainTeed's RFIs directed to CGC. GP U.S. did not file an objection to the RFI directed to it.

[15] Having considered the RFIs and the objections that were raised, the Tribunal issued directions to the parties on July 20, 2022, identifying which of the RFIs required responses. The responses were received on July 26, 2022, and placed on the record.

[16] On July 19, 2022, in its public case brief and in a letter dated July 29, 2022, GP submitted that the volumes of subject imports in interim 2021 and interim 2022 appearing in the investigation report, which are based on CBSA enforcement data, appear to be significantly overstated because they include all imports into Canada (i.e. into both Eastern and Western Canada). To verify the submission by GP, the Tribunal made calculations using Facility for Information Retrieval Management (FIRM) data but were unable to match the volume to the CBSA enforcement data. The Tribunal concluded that the subject import volumes in the CBSA enforcement data are incorrect but not necessarily for the reason identified by GP. Accordingly, the Tribunal decided to rely instead on subject import volume data provided in the questionnaire replies for the interim periods, which

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<sup>3</sup> Exhibit RR-2021-004-05.B at Tables 1–3.

corresponds to the volumes of exports to Western Canada reported by foreign producers in Table 63 of the investigation report. Based on the FIRM data, questionnaire respondents were responsible for 100 percent of the imports from the U.S. into Western Canada. Therefore, the Tribunal considers the sum of the information reported in the questionnaire replies to be reliable.

[17] A hearing with public and *in camera* sessions was held by videoconference on August 15, 16 and 17, 2022. The Tribunal heard evidence from witnesses called by CertainTeed, GP, Local 213 and the IBB. Cabot Manufacturing ULC, the CHBA, CGC and USG presented arguments but did not call any witnesses.

## PRODUCT

### Product definition

[18] The subject goods are defined as follows:

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

### Additional product information<sup>4</sup>

[19] For greater certainty, the gypsum board considered to be subject goods includes but is not limited to:

- i. **Abuse-resistant gypsum board** offering greater resistance to surface indentation, abrasion and penetration than standard gypsum board.
- ii. **Eased edge gypsum board**, which has a tapered and slightly rounded or bevelled factory edge. It may be used as an aid in custom finishing of joints.
- iii. **Gypsum base** for veneer plaster serves as a base for thin coats of hard, high strength gypsum veneer plaster.
- iv. **Impact-resistant gypsum board** offers greater resistance to the impact of solid objects from high traffic and vandalism than standard gypsum board.

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<sup>4</sup> Exhibit RR-2021-004-03.A at paras. 18–19.



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

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

## PRELIMINARY ISSUE

[21] On October 13, 2016, at the same time as the original inquiry was proceeding, the Governor in Council directed the Tribunal to consider specifically whether the imposition of provisional duties or duties applicable to gypsum board imported from the U.S. for markets in Western Canada had or would have the effect of substantially reducing competition in this market or causing significant harm to consumers of those goods or to businesses who use them. In a report dated January 4, 2017, the Tribunal made several recommendations to the Governor in Council, including that the amount of final duties be reduced and that the reduction in the amount of duties be reviewed at the appropriate time.<sup>5</sup>

[22] The Governor in Council subsequently issued the *Gypsum Board Products Anti-dumping Duty Remission Order, 2017*.<sup>6</sup> The remission order allows for the remission of anti-dumping duties that are in excess of the difference between reference values, which are 32.17 percent lower than the normal values for the gypsum board products established by the CBSA in its dumping investigation, and the export prices of the imported goods. The reference value for each gypsum board product is indexed to the Industrial Product Price Index for gypsum product manufacturing on an annual basis, beginning on January 1, 2018.

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<sup>5</sup> *Gypsum Board* (4 January 2017), GC-2016-001 (CITT).

<sup>6</sup> SOR/2017-28.

[23] The parties in this review have made various submissions regarding the remission order and its impact on the Western Canadian market for gypsum board. Local 213 and the IBB argue that the remission order diluted the impact of the finding and allowed U.S. producers to continue to sell goods into Western Canada at what are effectively dumped prices, and requested that the Tribunal extend the finding in an “undiluted manner”.<sup>7</sup> CertainTeed also made submissions about the continued dumping of subject goods under the remission order and Mr. Juggery, witness for CertainTeed, testified about its effects on the performance of the company.<sup>8</sup>

[24] The Tribunal is mindful of the circumstances that led to the enactment of the remission order following the reference it received from the Governor in Council, the recommendations that were made by the Tribunal following that inquiry, and the content of the remission order that was ultimately adopted by the Governor in Council following that process. Even though it will not pronounce on their merit, the Tribunal also understands the representations that were made by the IBB, Local 213 and Teamsters, and by CertainTeed, during this review about what they characterize as the continued dumping of subject goods under the remission order.

[25] However, the Tribunal wishes to indicate that it has no jurisdiction to rescind or amend the remission order, or to revisit the recommendations made in its report. In accordance with section 76.03 of SIMA, its jurisdiction is limited to the consideration of whether the expiry of the existing finding in respect of the subject goods is likely to result in injury. This does not include any authority in respect of the existence or application of the remission order.

## LEGAL FRAMEWORK

[26] The Tribunal is required, pursuant to subsection 76.03(10) of SIMA, to determine whether the expiry of the finding in respect of the subject goods is likely to result in injury or retardation for the domestic industry.<sup>9</sup> Pursuant to subsection 76.03(12), if the Tribunal determines that the expiry of the finding is unlikely to result in injury, it is required to rescind it. However, if it determines that the expiry of the finding is likely to result in injury, the Tribunal is required to continue it, with or without amendment.

[27] Before proceeding with its analysis of the likelihood of injury, the Tribunal must first determine what domestically produced goods are “like goods” in relation to the subject goods and whether there is more than one class of goods. Once those determinations have been made, the Tribunal must determine what constitutes the “domestic industry” (in this case, this also entails an analysis of whether a regional market exists).

## LIKE GOODS AND CLASSES OF GOODS

[28] For the Tribunal to determine whether the resumed or continued dumping of the subject goods is likely to cause material injury to the domestic producers of like goods, it must determine

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<sup>7</sup> Exhibit RR-2021-004-G-01 at para. 36; Exhibit RR-2021-004-F-01 at para. 12; see also *Transcript of Public Hearing* at 262.

<sup>8</sup> Exhibit RR-2021-004-A-01 at paras. 94–96; Exhibit RR-2021-004-A-02 (protected) at paras. 94–96; *Transcript of In Camera Hearing* at 9.

<sup>9</sup> Subsection 2(1) of SIMA defines “injury” as “material injury to the domestic industry” and “retardation” as “material retardation of the *establishment* of a domestic industry” [emphasis added]. Given that there is currently an established domestic industry, the issue of whether the expiry of the finding is likely to result in retardation does not arise in this expiry review.

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.<sup>10</sup>

[29] Subsection 2(1) of SIMA defines “like goods”, in relation to any other goods, as follows:

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

[30] 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.<sup>11</sup> These same factors are also considered in deciding whether there is more than one class of goods.<sup>12</sup>

[31] In the original inquiry, the Tribunal found that domestically produced gypsum board, defined in the same manner as the subject goods, were like goods in relation to the subject goods, and that there was a single class of goods.<sup>13</sup> The evidence in this expiry review reveals no changes in the physical and market characteristics of the goods over the past five years,<sup>14</sup> and the issue was uncontested by the opposing parties. As a result, the Tribunal finds that domestically produced gypsum board are like goods in relation to the subject goods and that there is a single class of goods.

## DOMESTIC INDUSTRY AND REGIONAL MARKET

[32] In this expiry review, the Tribunal must consider whether Western Canada continues to constitute a regional market for gypsum board. This assessment consequentially affects the definition of the domestic industry.

[33] Subsection 2(1) of SIMA defines “domestic industry” as follows:

*domestic industry* means, other than for the purposes of section 31 and *subject to subsection (1.1)*, 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.

[Emphasis added]

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<sup>10</sup> Should the Tribunal determine that there is more than one class of goods in this expiry review, it must conduct a separate injury analysis and make a decision for each class that it identifies. See *Noury Chemical Corporation and Minerals & Chemicals Ltd. v. Pennwalt of Canada Ltd. and Anti-dumping Tribunal*, [1982] 2 F.C. 283 (FC).

<sup>11</sup> See, for example, *Copper Pipe Fittings* (19 February 2007), NQ-2006-002 (CITT) at para. 48.

<sup>12</sup> In order to decide whether there is more than one class of goods, the Tribunal must determine whether goods potentially included in separate classes of goods constitute like goods in relation to each other. If they do, they will be regarded as comprising a single class of goods.

<sup>13</sup> *Gypsum Board* (4 January 2017), NQ-2016-002 (CITT) [*Gypsum Board NQ*] at para. 38.

<sup>14</sup> Exhibit RR-2021-004-A-03 at para. 7; Exhibit RR-2021-004-A-07 at para. 12.

[34] With respect to the establishment of a regional market, subsection 2(1.1) of SIMA provides as follows:

(1.1) In exceptional circumstances, the territory of Canada may, for the production of any goods, be divided into two or more regional markets and the domestic producers of like goods in any of those markets may be considered to be a separate domestic industry where

(a) the producers in the market sell all or almost all of their production of like goods in the market; and

(b) the demand in the market is not to any substantial degree supplied by producers of like goods located elsewhere in Canada.

[35] If a regional market is found to exist, subsection 42(5) of SIMA provides as follows:<sup>15</sup>

(5) Where subsection 2(1.1) applies in respect of the dumping or subsidizing of goods to which the preliminary determination applies, the Tribunal shall not find that the dumping or subsidizing of those goods has caused injury or retardation or is threatening to cause injury unless

(a) there is a concentration of those goods into the regional market; and

(b) the dumping or subsidizing of those goods has caused injury or retardation or is threatening to cause injury to the producers of all or almost all of the production of like goods in the regional market.

[36] The parties have made substantial submissions on the existence of the regional market and, in particular, whether the requirement of paragraph 2(1.1)(b) (the “inflows test”) is satisfied in this expiry review. The key issue in dispute between the parties is whether the existence of the regional market should be assessed on the basis of the POR data as it exists (as submitted by the parties opposed to the continuation of the finding) or whether the proper approach is to consider the market in the absence of the anti-dumping duties (as submitted by the supporting parties).

[37] The Tribunal notes that CGC raised similar arguments regarding the inflows test in the original inquiry, in a subsequent request for the Tribunal to initiate an interim review of its finding, and in a proceeding challenging the Tribunal’s decision not to conduct an interim review before a binational panel established under Chapter 10 of the Canada-United States-Mexico Agreement (CUSMA).<sup>16</sup> Specifically, in the original inquiry, CGC argued that the Tribunal should consider increased east-west flows after the imposition of provisional duties to be an indication that the inflows test was not satisfied. The Tribunal rejected this argument, finding that an increase in inflows into the Western Canadian market was an expected consequence of the imposition of the provisional duties, and that

to rely on this phenomenon to assess whether there is a regional market or not would undermine the very purpose of subsections 2(1) [*sic*] of SIMA and is therefore misguided. The proper test is to look at the behaviour of the market in the absence of duties.<sup>17</sup>

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<sup>15</sup> While subsection 42(5) of SIMA applies to the conduct of inquiries by the Tribunal, these additional requirements are applied in expiry reviews in accordance with Article 4.1 of the WTO Antidumping Agreement, which sets out these requirements without any differentiation between inquiries and reviews.

<sup>16</sup> 13 March 2020, S.C. 2020, c 1, online: <<https://international.gc.ca/trade-commerce/trade-agreements-accords-commerciaux/agr-acc/cusma-aceum/text-texte/toc-tdm.aspx?lang=eng>> (entered into force 1 July 2020).

<sup>17</sup> *Gypsum Board NQ* at para. 61.

[38] In the interim review proceedings, CGC argued that considerable volumes of gypsum board produced in Eastern Canada, i.e. outside of the regional market, were sold and supplied into Western Canada after the imposition of the duties, and that therefore the legal basis for the Tribunal's finding was no longer present. CGC argued that the use of the present tense in paragraph 2(1.1)(b) of SIMA requires an assessment of the existence of a regional market on a contemporaneous basis, i.e. that the Tribunal could not take into account the impact of the anti-dumping duties on the market dynamics when assessing whether the inflows test is met.

[39] The Tribunal rejected these arguments as well. In its decision, the Tribunal found that only where changes to regional supply are *sufficiently independent from the existence of the anti-dumping measure, and are demonstrated to result from normal changes to the market and economic conditions* that existed at the time of the initial examination, could the Tribunal conclude that the basis against which the injury was originally assessed has changed, that there may no longer be a regional market for the goods and, to a degree, that protection may no longer be justified.<sup>18</sup>

[Emphasis added]

[40] The Tribunal found that CGC had not provided any evidence that its increased east-west shipments were due to anything other than the existence of the anti-dumping duties, and noted that, to the contrary, CGC had stated that prior to the imposition of the duties, it was more cost-efficient for USG to supply the Western Canadian market from its plants in the Western U.S. than it was for CGC to ship from Eastern Canada (i.e. the change was not due to normal market dynamics but was due to the fact that the duties made it no longer cost-effective to supply the Western Canadian market from the U.S).<sup>19</sup>

[41] With respect to CGC's arguments regarding the interpretation of paragraph 2(1.1)(b) of SIMA, the Tribunal found that this provision should be interpreted in the context of the entire statutory scheme, which would allow the Tribunal to account for transient or temporary alterations in trade flows, such as those caused by the imposition of anti-dumping duties.<sup>20</sup>

[42] Accordingly, the Tribunal found that an interim review was not warranted. As noted above, CGC challenged this decision before a binational panel established under the dispute settlement mechanism set out in the CUSMA. Before that panel, CGC argued that the Tribunal's decision not to conduct an interim review was unreasonable on the grounds that the Tribunal had misinterpreted paragraph 2(1.1)(b) of SIMA and, in doing so, had departed from its own long-standing practice or established internal authority without justification, in particular, previous decisions such as *Concrete Panels*<sup>21</sup> and *Malt Beverages*.<sup>22</sup>

[43] The binational panel found that the Tribunal's decision not to conduct an interim review was reasonable. The panel found that there was nothing in the plain text of paragraph 2(1.1)(b) that required the inflows test to be conducted without considering the transient effect of anti-dumping duties, and that the Tribunal's finding that it would undermine the purpose of SIMA to rely on increased trade resulting from the impact of anti-dumping duties in conducting the inflows test was a

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<sup>18</sup> *Gypsum Board* (22 October 2020), RD-2020-001 [*Gypsum Board RD*] at para. 15.

<sup>19</sup> *Gypsum Board RD* at paras. 16–18.

<sup>20</sup> *Ibid.* at paras. 18–20.

<sup>21</sup> *Concrete Panels* (26 June 2002), RR-2001-004 (CITT) [*Concrete Panels*].

<sup>22</sup> *Malt Beverages* (2 December 1994), RR-94-001 (CITT) [*Malt Beverages*].

reasonable interpretation of that provision.<sup>23</sup> The panel further found that neither the *Malt Beverages* nor the *Concrete Panels* decisions directly addresses the issue of whether the inflows test is to be assessed in the absence of anti-dumping duties, and it was not satisfied that CGC had established that the decisions it cited were so inconsistent with the Tribunal's decision in the interim review that the Tribunal would need to explain a departure for its decision to be reasonable.<sup>24</sup>

[44] In this proceeding, the supporting parties submit that to be consistent with the Tribunal and binational panel decisions described above, the proper test in the expiry review context is to consider whether the regional market will *likely* exist—i.e., whether the outflows, inflows and concentration tests will likely be satisfied—if the finding is rescinded, that is, in the absence of anti-dumping duties. CertainTeed submits that this approach is consistent with the Tribunal's decision in the expiry review in *Fresh, Whole, Yellow Onions*, where the Tribunal found that its decision “must reflect the best judgment as to likely developments in [the regional] market if the finding were to be rescinded, including whether there is likely to be a concentration of dumped imports into that market”<sup>25</sup>.

[45] CGC argues that, in the expiry review context, paragraph 2(1.1)(b) of SIMA requires that the regional market analysis be conducted on the basis of the data collected over the Tribunal's POR, i.e. based on the market as it is and not the market as it might be in the absence of anti-dumping duties. CGC argues that it is improper to import a likelihood element, which applies only to the determination of injury as set out in subsection 76.03(10) of SIMA, into the regional market test.

[46] CGC further argues that the Tribunal made an error of law in interpreting paragraph 2(1.1)(b) of SIMA in its interim review decision and that, although this interpretation was found to be reasonable by the binational panel, this does not mean that the approach is a correct one. Instead, CGC argues that the Tribunal should follow the approach set out in *Concrete Panels* and *Malt Beverages*, which were decided in the expiry review context and therefore provide more appropriate guidance than the decisions in the original inquiry or interim review.

[47] In reply, the supporting parties submit that the binational panel decision definitively resolved this issue and that CGC is improperly attempting to relitigate it. They note the binational panel's finding that it is not clear that the issue of the proper market analysis in an expiry review was raised in *Concrete Panels* or *Malt Beverages* and argue that CGC is therefore placing too much reliance on those cases.

[48] The Tribunal finds no reason to depart from the principle it established in the original inquiry and interim review, which is that the existence of the regional market should be assessed in the absence of the anti-dumping duties. Changes to the market caused solely by the duties are, by definition, of a temporary and non-structural nature. Accordingly, the regional market test must not be based simply on the data presented in the investigation report, but must take into consideration the market characteristics, which are not being created by normal market forces, but rather are being influenced by the imposition of anti-dumping duties on imports of subject goods. The purpose of SIMA is to assess dumping effects, and when reviewing whether a regional market exists in the context of an expiry review, the Tribunal cannot ignore that the regional market is being directly impacted by anti-dumping measures.

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<sup>23</sup> Gypsum Board (June 14, 2022), CDA-USA-2020-10.12-01 (CUSMA Article 10.12 Binational Panel) at paras. 43–44.

<sup>24</sup> *Ibid.* at para. 55.

<sup>25</sup> *Fresh, Whole, Yellow Onions* (22 May 1992), RR-91-004 (CITT) at 9.

[49] Accordingly, relying solely on the data to establish that a regional market no longer exists without regard to the impact of the imposition of duties on the changes in regional supply during the POR would undermine the purpose of paragraph 2(1.1)(b) of SIMA. It is only to the extent that there is sufficient evidence indicating that the changes in regional supply (i.e. in the “inflows” from the rest of Canada) result from factors other than the existence of anti-dumping measures and that such changes are likely to persist in the absence of anti-dumping measures that it can be concluded that there may no longer be a regional market for the goods in the context of an expiry review. Otherwise, domestic producers could lose the benefit of the SIMA provisions allowing for the establishment of a regional market at the expiry review stage on the basis of temporary increased inflows due to the impact of the anti-dumping duties. In the Tribunal’s view, this would lead to an absurd result.

[50] With respect to CGC’s arguments regarding *Concrete Panels* and *Malt Beverages*, the Tribunal first notes that, although it strives to achieve consistency with its own past decisions, these decisions do not establish binding precedent and may be departed from where justified.<sup>26</sup> In *Concrete Panels*, the Tribunal found that the inflows test was not satisfied as “more than one fifth of the apparent regional market” was supplied by a producer outside the regional market during part of the period of review.<sup>27</sup> However, as noted by the supporting parties and the binational panel, the issue of whether the inflows were influenced by the existence of the anti-dumping duties is not mentioned in the reasons and there is no indication that it was even argued by the parties.

[51] In *Malt Beverages*, the Tribunal found that there was no longer a regional market, as there had been a “consistent pattern of a significant movement of packaged beer both into and out of” the regional market.<sup>28</sup> However, as noted by the parties and the binational panel, the Tribunal found that there was evidence of changes in the “economic and regulatory environment” that permitted increased interprovincial trade in beer and that these were not temporary phenomena.<sup>29</sup>

[52] Further, the Tribunal agrees that, to align with its forward-looking mandate in an expiry review, which is to assess conditions that are likely to exist if the finding were rescinded, the proper approach to the regional market test in an expiry review requires an assessment of whether the regional market will *likely* exist and whether the concentration of imports of subject goods into the region will *likely* resume if the finding is rescinded. The Tribunal considers that this approach would be consistent with interim review and binational panel findings that subsection 2(1.1) of SIMA should be interpreted consistently with the object and purpose of the Act, and that it is permissible to incorporate a forward-looking aspect into the test where the statutory context requires.<sup>30</sup>

[53] Accordingly, in order to determine whether to conduct a regional market analysis, the Tribunal will examine the following issues:

- i. Whether the producers in the Western Canadian market would likely sell all or almost all of their production of like goods in that market if the finding were rescinded (the outflows test);

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<sup>26</sup> *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, at paras. 129, 131.

<sup>27</sup> *Concrete Panels* at 6.

<sup>28</sup> *Malt Beverages* at 18.

<sup>29</sup> *Ibid.* at 17–18.

<sup>30</sup> Gypsum Board (June 14, 2022), CDA-USA-2020-10.12-01 (CUSMA Article 10.12 Binational Panel) at para. 42.

- ii. Whether demand in the Western Canadian market is not, to any substantial degree, likely to be supplied by like goods from Eastern Canada if the finding were rescinded (the inflows test); and
- iii. Whether there is likely to be a concentration of dumped goods in the Western Canadian market if the finding were rescinded.

[54] If these three questions are answered in the affirmative, the Tribunal will then have to determine, in the context of its analysis, whether there is a likelihood of injury to producers of all or almost all of the production of like goods in the regional market, as per paragraph 42(5)(b).

**Whether Western Canadian producers would likely sell all or almost all of their production in the Western Canadian market if the finding were rescinded**

[55] The Tribunal has previously interpreted “all or almost all” to mean at least 80 percent of sales of like goods.<sup>31</sup> CertainTeed, the sole domestic producer of gypsum board situated in Western Canada, sold all or almost all of its production of like goods in the Western Canadian market over the POR.<sup>32</sup> Furthermore, CertainTeed submits that there is no evidence on the record of this proceeding to suggest that these outflow rates would be any different in the absence of duties should the finding be rescinded. This submission was not contested by the opposing parties. In addition, the Tribunal notes that CertainTeed met this threshold in the original inquiry, i.e. in the absence of anti-dumping duties.<sup>33</sup>

[56] As a result, the Tribunal concludes that CertainTeed would likely sell all or almost all of its production in the Western Canadian market if the finding were rescinded.

**Whether demand in the Western Canadian market is not, to any substantial degree, likely to be supplied by like goods from Eastern Canada if the finding were rescinded**

[57] CGC argues that there is no longer a regional Western Canadian market because inflows into that region from Eastern Canada were above 20 percent of the total Western Canadian market throughout the POR and were therefore above the threshold established by the Tribunal as constituting a “substantial degree”.<sup>34</sup>

[58] The supporting parties submit that there is evidence that the east-west shipments are transitory in nature. First, they note that the shipments of like goods from Eastern Canada show a decreasing trend over the POR.<sup>35</sup> Second, they submit that CGC’s east-west shipments are not cost-effective, as demonstrated by its questionnaire response, and allege that the purpose of the shipments is to avoid the application of anti-dumping duties to USG. Along the same lines, they submit that CGC and USG have admitted that it would be more cost-effective for USG to supply the Western Canadian market in the absence of anti-dumping duties, and that CertainTeed has market intelligence that USG has incentives to resume shipments to Western Canada if the anti-dumping duties were removed.

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<sup>31</sup> *Certain Whole Potatoes* (10 September 2010), RR-2009-002 (CITT) at para. 92; *Gypsum Board* (4 January 2017), NQ-2016-002 at para. 46.

<sup>32</sup> Exhibit RR-2021-004-06.B (protected) at Table 10.

<sup>33</sup> *Gypsum Board NQ* at para. 53.

<sup>34</sup> *Concrete Panels* at 6.

<sup>35</sup> Exhibit RR-2021-004-06.B (protected), Table 10; CBSA data for total subject imports for interim 2021 and interim 2022 have been replaced by export sales to Western Canada from Table 63.



[59] In response to this argument, CGC submits that there is no evidence that the increased level of shipments into Western Canada should be viewed as a temporary phenomenon, as they were sustained over the POR, and that there is no evidence this change in supply patterns was strategic or instituted to defeat the duties. In reply, the supporting parties reiterate that CGC has submitted no evidence to establish that the increased inflows are anything other than a temporary phenomenon caused by the imposition of the anti-dumping duties.

[60] The Tribunal finds that inflows from Eastern Canada are the result of the duties imposed under the original finding and should not be taken into account in assessing the degree of inflows into the Western Canadian market. In this respect, the Tribunal finds that CGC has presented no evidence to counter the Tribunal's findings in the interim review that the increased sales into the Western Canadian market from CGC's Eastern Canadian plants were the direct result of the imposition of the anti-dumping duties, which made it no longer cost-effective for USG to supply the Western Canadian market from its plants in the Western U.S.

[61] The Tribunal accepts the arguments of the supporting parties on this issue. On balance, the Tribunal finds that the evidence indicates that it is unlikely that the shipments from Eastern Canada will continue in the absence of the finding. Based on its assessment of the evidence on the record, the Tribunal expects that CGC will behave as a rational economic actor and revert to its practice of treating the North American market as an integrated one, where Western Canada is supplied from the plants that incur the lowest freight costs, i.e. those in the Western U.S.<sup>36</sup> Since the vast majority of the east-west shipments were made by CGC,<sup>37</sup> if the finding were to expire, then inflows from Eastern Canada would likely almost entirely cease.

[62] As a result of the above, the Tribunal finds that demand in the Western Canadian market is not, to any substantial degree, likely to be supplied by like goods from Eastern Canada if the finding were rescinded.

#### **Whether there is likely to be a concentration of dumped goods in the Western Canadian market if the finding were rescinded**

[63] In assessing whether there is a concentration of dumped goods in a regional market, the Tribunal has traditionally analyzed three indicators, alone or in combination: the distribution indicator, which assesses the volume or value of the subject goods relative to the volume or value of imports from the rest of Canada; the density indicator, which assesses the percentage of subject goods relative to the domestic market; and the ratio indicator, which compares the import penetration in the regional market vis-à-vis the import penetration into the whole of Canada.

[64] CertainTeed prepared simulated concentration indicators for 2021 assuming there were no anti-dumping duties, by substituting import volumes from the first half of 2016 (before the finding) for the subject import volumes in the investigation report but keeping all other data the same.<sup>38</sup>

[65] The Tribunal finds the analysis prepared by CertainTeed to be a reasonable approach and notes that, using this approach, the concentration indicators would be consistent with those found in the original inquiry.<sup>39</sup> Accordingly, the Tribunal finds that there is likely to be a concentration of dumped goods in the Western Canadian market if the finding were rescinded.

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<sup>36</sup> *Gypsum Board NQ* at paras. 83–84.

<sup>37</sup> Exhibit RR-2021-004-06.B (protected), Table 10; Exhibit RR-2021-004-14.02.D (protected) at 7.

<sup>38</sup> Exhibit RR-2021-004-A-01 at paras. 36–46; Exhibit RR-2021-004-A-02 (protected) at Table 2, paras. 42, 44, 46.

<sup>39</sup> Exhibit RR-2021-004-A-02 (protected) at Table 2, paras. 42, 44, 46; *Gypsum Board NQ* at paras. 67–69.

## Conclusion

[66] In light of the above, the Tribunal finds that, if the finding were rescinded, producers in the Western Canadian market would likely satisfy all or almost all of the demand in the market, demand in Western Canada would not likely be supplied to any substantial degree by Eastern Canada, and there would likely be a concentration of dumped imports into Western Canada.

[67] As the conditions for finding a regional market have been met, the domestic industry in this case is the sole domestic producer, CertainTeed. Since CertainTeed accounts for 100 percent of production in the regional market, the requirement that the Tribunal assess whether injury will likely be caused to producers of all or almost all of the production of like goods in the regional market if the finding is rescinded will be met.

## LIKELIHOOD OF INJURY ANALYSIS

[68] An expiry review is forward-looking.<sup>40</sup> It follows that evidence from the period during which a finding was being enforced is relevant insofar as it bears upon the prospective analysis of whether the expiry of the finding is likely to result in injury.<sup>41</sup>

[69] There is no presumption of injury in an expiry review; findings must be based on positive evidence, in compliance with domestic law and consistent with the requirements of the applicable World Trade Organization agreements.<sup>42</sup> In the context of an expiry review, positive evidence can include evidence based on past facts that tend to support forward-looking conclusions.<sup>43</sup>

[70] In making its assessment of likelihood of injury, the Tribunal has consistently taken the view that the focus should be on circumstances that can reasonably be expected to exist in the near to medium term. In this case, the Tribunal finds it appropriate to focus its analysis on the next 18 to 24 months.

[71] Subsection 37.2(2) of the *Special Import Measures Regulations*<sup>44</sup> (Regulations) lists factors that the Tribunal may consider in addressing the likelihood of injury in cases where the CBSA has determined that there is a likelihood of continued or resumed dumping. The factors that the Tribunal considers relevant in this expiry review are discussed in detail below.

### Changes in market conditions

[72] To assess the likely volumes and prices of the subject goods, and their impact on the domestic industry if the finding is rescinded, the Tribunal will first consider changes in U.S. and domestic market conditions.<sup>45</sup> These changes provide some general context for the Tribunal's analysis.

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<sup>40</sup> *Certain Dishwashers and Dryers* (procedural order dated 25 April 2005), RR-2004-005 (CITT) at para. 16.

<sup>41</sup> *Copper Pipe Fittings* (17 February 2012), RR-2011-001 (CITT) at para. 56. In *Thermoelectric Containers* (9 December 2013), RR-2012-004 (CITT) [*Thermoelectric Containers*] at para. 14, the Tribunal stated that the analytical context pursuant to which an expiry review must be adjudged often includes the assessment of retrospective evidence supportive of prospective conclusions. See also *Aluminum Extrusions* (17 March 2014), RR-2013-003 (CITT) [*Aluminum Extrusions*] at para. 21.

<sup>42</sup> *Flat Hot-rolled Carbon and Alloy Steel Sheet and Strip* (16 August 2006), RR-2005-002 (CITT) at para. 59.

<sup>43</sup> *Thermoelectric Containers* at para. 14; *Aluminum Extrusions* at para. 21.

<sup>44</sup> S.O.R./84-927.

<sup>45</sup> See paragraph 37.2(2)(j) of the Regulations.

### U.S. market conditions

[73] Gypsum board is an important building material and, as a result, demand is driven by construction activity. According to Wayne Edgecombe of CertainTeed, gypsum board demand in North America is driven by both residential and commercial construction, as well as repair and remodelling activity. Residential construction is primarily measured through housing starts and completions (with gypsum board consumed closer to completion), whereas commercial construction is generally measured through construction spending. There is currently no direct metric to measure repair and remodelling activity.<sup>46</sup>

[74] From the time of the finding until 2019, U.S. demand for gypsum board, as reported by the Gypsum Association, remained relatively stable. Demand increased in 2020 as compared to 2019, and further in 2021 as compared to 2020. Mr. Briggs attributes this increase in demand for gypsum board to an increased demand for housing caused by the COVID-19 pandemic, which also left more disposable income for consumers to put toward do-it-yourself projects.<sup>47</sup> However, recent high inflation has caused the U.S. Federal Reserve to significantly increase interest rates, which translates into increased mortgage rates and, in turn, cooling of the housing market. This has already had a negative impact on U.S. housing starts and building permits.<sup>48</sup>

[75] In terms of forecasts, parties agreed that U.S. housing starts, by far the most important driver of demand for gypsum board in the U.S., would decline in 2023 and 2024, although there was some disagreement on the extent of the decline.<sup>49</sup> The Tribunal notes that in May 2022, ConstructConnect forecast that total U.S. residential construction spending would increase in the coming years, with the increase in apartment construction outpacing that of single-family homes. The report notes, however, that growth in construction in square footage terms is expected to be more modest due to the impact of higher prices,<sup>50</sup> which underlines the connection between inflation and high interest rates, and demand for gypsum board. In this regard, recent data from the U.S. Census Bureau showing a significant decrease in housing starts from April to July 2022<sup>51</sup> and the absence of evidence indicating that the Federal Reserve will cease its rate-hiking campaign in the near term suggest a likely important decline in housing starts in the next 24 months. This evidence provides further confirmation that it is unlikely that there will be a straight correlation between increased residential construction spending and shipments of gypsum board in square footage terms in the next 24 months.

[76] Turning to other indicators, some evidence indicates that repair and remodelling spending in the U.S. (the second most important driver of gypsum board demand) is expected to slightly increase during the same period. However, given the current high inflation, it is not clear that this projected increase will translate into increased demand for gypsum board. In other words, the Tribunal believes that it should tread carefully before relying on spending data which is not adjusted for inflation as a persuasive metric to forecast likely future demand for gypsum board in the current macroeconomic environment. Put simply, factoring in the impact of current and forecasted inflation rates, projected increased spending in repair and remodelling and the non-residential sector does not necessarily

<sup>46</sup> Exhibit RR-2021-004-A-07 at para. 11; see also Exhibit RR-2021-004-A-09 at para. 13.

<sup>47</sup> Exhibit RR-2021-004-A-09 at para. 15; Exhibit RR-2021-004-A-10 (protected) at attachment 1.

<sup>48</sup> Exhibit RR-2021-004-A-11 at 136-137, 139-142.

<sup>49</sup> Exhibit RR-2021-004-H-06 (protected) at para.5; Exhibit RR-2021-004-H-02 (protected) at para. 46 referencing Exhibit RR-2021-004-H-08 (protected) at 26; Exhibit RR-2021-004-A-10 (protected) at attachment 9; *Transcript of In Camera Hearing* at 65.

<sup>50</sup> Exhibit RR-2021-004-H-08 (protected) at 4, 5, 8.

<sup>51</sup> Exhibit RR-2021-004-38 at 5.

mean that there will be an increase in volumes of gypsum board shipments in the U.S. in the next 24 months. For example, the evidence indicates that, while there is an increase in non-residential spending (a distant third most important driver of gypsum board demand), this increase is likely explained by current inflation and does not necessarily translate to additional square footage, which would impact the gypsum market.<sup>52</sup>

[77] Additionally, information published by the Gypsum Association as well as the National Association of Home Builders Housing Market Index indicates that demand in the Western U.S., the region supplying Western Canada, is deteriorating faster than in other parts of the country.<sup>53</sup> On balance, while the Tribunal considered Mr. Cerqueira's view that demand for gypsum board is expected to continue to be robust in the U.S. in the foreseeable future,<sup>54</sup> it finds that the preponderant evidence indicates otherwise. The Tribunal's assessment is that recent changes in U.S. market conditions point toward a decline in demand for gypsum board in the near to medium term.

[78] In terms of supply, data from the Gypsum Association indicates that, during the POR, U.S. manufacturers of gypsum board had capacity exceeding their home market demand.<sup>55</sup> The U.S. market also saw an increase in imports from Mexico during the POR.<sup>56</sup> The arguments and evidence regarding U.S. producers' production and capacity will be discussed below, when considering the likely performance of the foreign industry.

#### Domestic market conditions

[79] The composition of the Western Canadian market has not changed significantly since the original inquiry in 2016. CertainTeed, as the only domestic producer, maintained significant market share. USG and GP were the dominant exporters to the market during the POR, and CGC's sales from its Eastern production are also significant in the Western Canadian market.<sup>57</sup>

[80] Western Canadian demand for gypsum board remained relatively stable during the POR, with a slight increase in 2021.<sup>58</sup> Western Canadian residential building permits declined slightly between 2019 and 2020 before seeing a marked increase in 2021.<sup>59</sup> Canada Mortgage and Housing Corporation (CMHC) data shows that housing starts in Western Canada decreased in 2020 as compared to 2019 but increased to above 2019 levels in 2021.<sup>60</sup> ConstructConnect indicates that residential building starts decreased in Canada by 13.7 percent in interim 2022.<sup>61</sup>

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<sup>52</sup> Exhibit RR-2021-004-H-08 (protected) at 26.

<sup>53</sup> Exhibit RR-2021-004-A-14 (protected) at para. 67; Exhibit RR-2021-004-A-18 (protected) at para. 7, attachment 6; Exhibit RR-2021-004-A-21 at attachment 3; *Transcript of Public Hearing* at 23, 24.

<sup>54</sup> Exhibit RR-2021-004-H-05 at para. 5.

<sup>55</sup> Exhibit RR-2021-004-A-10 at 17.

<sup>56</sup> Exhibit *Ibid.* (protected) at attachment 14.

<sup>57</sup> Exhibit RR-2021-004-20.04.B (protected) at 5; Exhibit RR-2021-004-20.03 (protected) at 4; Exhibit RR-2021-004-14.02.D (protected) at 7; Exhibit RR-2021-004-06.B (protected), Table 11.

<sup>58</sup> Exhibit RR-2021-004-06.B (protected), Table 11; Exhibit RR-2021-004-05.B, Table 12; CBSA data for subject imports in interim 2021 and 2022 replaced by exports to Western Canada from Table 63.

<sup>59</sup> Exhibit RR-2021-004-05.B, Table 64.

<sup>60</sup> *Ibid.*

<sup>61</sup> Exhibit RR-2021-004-H-08 (protected) at 7.

[81] The Bank of Canada has also recently increased interest rates in response to rapidly rising inflation.<sup>62</sup> ConstructConnect forecasts that a more hawkish Bank of Canada, spillover effects from the Russia-Ukraine war and a correction in housing prices are expected to slow growth in 2022 and 2023.<sup>63</sup> In this context, the increase in residential building permits and housing starts observed in 2021 is unlikely to constitute a trend that will continue in the foreseeable future. As is the case in the United States, the deteriorating market conditions rather suggest that demand for gypsum board driven by residential construction is likely to weaken in the coming months.

[82] Similarly, evidence submitted by GP indicates that housing starts in Canada are expected to be lower in 2023 and 2024 than they were during the POR given concerns related to a potential housing slow down.<sup>64</sup> Non-residential construction is expected to increase in 2023 and 2024. As for repair and remodelling, spending is expected to decline in 2023 and return to 2022 levels in 2024.<sup>65</sup> Wayne Edgecombe indicated that CertainTeed expects demand for gypsum board to peak this year, soften in 2023 and further soften in 2024.<sup>66</sup>

### Conclusion

[83] The Tribunal finds that demand for gypsum board in both the U.S. and Western Canadian markets will likely decline over the next 18 to 24 months.

### **Likely import volume of the dumped goods**

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

[85] The Tribunal's assessment of the likely volumes of dumped imports encompasses the likely performance of the foreign industry, the potential for the foreign producers to produce goods in facilities that are currently used to produce other goods, evidence of the imposition of anti-dumping and/or countervailing measures in other jurisdictions, and whether measures adopted by other jurisdictions are likely to cause a diversion of the subject goods to Canada.<sup>67</sup>

### Likely performance of the foreign industry

[86] CertainTeed submits that U.S. producers have a production imperative and will seek to maximize output. Further, CertainTeed submits that the U.S. gypsum board industry has significant and growing excess capacity. As noted above, it submitted evidence from the Gypsum Association showing that U.S. manufacturers of gypsum board have capacity exceeding their home market demand and that this excess capacity is many times larger than the Western Canadian market.<sup>68</sup>

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<sup>62</sup> Exhibit RR-2021-004-A-11 at 46-48.

<sup>63</sup> Exhibit RR-2021-004-H-08 (protected) at 7.

<sup>64</sup> *Ibid.* (protected) at 2.

<sup>65</sup> *Ibid.*

<sup>66</sup> Exhibit RR-2021-004-A-08 (protected) at para. 58.

<sup>67</sup> Paragraphs 37.2(2)(a), (d), (f), (h) and (i) of the Regulations.

<sup>68</sup> Exhibit RR-2021-004-A-10 (protected) at 17.

[87] In addition, CertainTeed submits that excess production capacity will increase significantly in the next 24 months due to rapidly increasing interest rates and inflation, which will drive down demand in the U.S. market. Additionally, it submits that a significant volume of new production capacity will be added in the medium term, which will increase supply.

[88] Further, CertainTeed notes that there has been an increase in gypsum board shipments from Mexico into the U.S. in 2022, and predicts that this will continue in 2023 and 2024, which will result in an increase in imports to Canada if the finding expires. CertainTeed argues that market conditions in Mexico will affect the U.S. market, where a combination of Mexican producer Panel Rey's 100 MMSF expansion in 2022, its low-price competitive advantage in the U.S. market, and weakness in the Mexican market (for example, a slowdown in housing starts) will cause a diversionary effect in the U.S. market, which will in turn drive subject goods toward Western Canada.<sup>69</sup>

[89] The CHBA argued that there is no evidence that U.S. producers are subject to a production imperative and that there is no incentive to sell excess capacity at any price. It submits that U.S. producers are not operating at full capacity, so it cannot be assumed that they produce excess supply that they are required to sell.

[90] GP submits that there are two significant constraints—labour shortages and the diminishing supply of synthetic gypsum—that have limited U.S. gypsum board production in the last year, and which will likely continue to constrain U.S. production capacity in the near future.

[91] GP argues that the Tribunal should focus on U.S. production facilities that could realistically export to Western Canada because a significant majority of U.S. gypsum board manufacturing is concentrated in the Eastern United States, which is farther from the Western Canadian market than Eastern Canada. It argues that freight costs make it uneconomical to ship gypsum board to Western Canada, and that there are further constraints on these shipments due to rising fuel costs.

[92] GP also submits that the net additional production capacity in the U.S. is small and will likely be absorbed by the regions surrounding the plants. It further argues that new capacity in the next 24 months will be met with the closing of existing facilities, noting that its planned facility in Sweetwater, Texas will occur in conjunction with the closure of its facility in Acme, Texas. CertainTeed countered that markets in proximity to the Sweetwater plant would no longer be served by plants in Washington and Wyoming, which would in turn look for export opportunities in Western Canada.

[93] With respect to imports into the U.S. from Mexico, GP argues that most Mexican products will serve the Mexican market and that imports into the U.S. will likely be absorbed into the southern U.S., as demand is increasing there. In support of this argument, it notes that the population of Texas is projected to grow faster than any state from 2020 to 2023.<sup>70</sup>

[94] In reply, CertainTeed submits that excess capacity levels are still significantly high even when considering only the U.S. plants that are capable of shipping to Western Canada. To support its position, CertainTeed calculated the excess capacity for these plants for 2021 and interim 2022 using the information provided by GP and USG in their RFI responses. The calculation demonstrates that there is a significant level of excess capacity compared to the Western Canadian market.<sup>71</sup>

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<sup>69</sup> Exhibit RR-2021-004-A-09 at paras. 28–33; Exhibit RR-2021-004-A-10 (protected) at 28–33.

<sup>70</sup> Exhibit RR-2021-004-H-07 at 64.

<sup>71</sup> Exhibit RR-2021-004-05.B, Table 63.

[95] Collectively, the foreign producers responding to the Tribunal's foreign producer questionnaire increased production in 2020 and 2021, with a slight decrease in interim 2022 compared to interim 2021.<sup>72</sup> The Tribunal finds that production is expected to continue at similar levels in order to service the U.S. market and to slightly decline in the near term due to the forecast decline in the U.S. housing market, as discussed above.

[96] Capacity utilization followed a similar trend to production, increasing over most of the POR, but decreasing in the interim 2022 period.<sup>73</sup> However, the evidence shows that there is currently excess capacity in the U.S. that could supply the entirety of the Canadian market.<sup>74</sup> Further, as noted by CertainTeed, there is sufficient U.S. capacity available, even when considering only plants that are in the northwestern U.S., to allow a shift in supply away from goods produced in Eastern Canada as well as additional export volume to Western Canada.<sup>75</sup> Mr. Edgcombe testified that CGC is CertainTeed's largest competitor in Western Canada and that CGC has told their customers that they have idle excess capacity at their Rainier plant that could supply the market.<sup>76</sup>

[97] The Tribunal also accepts that Mexican imports in the U.S. market will impact not only the southern U.S. market for gypsum board, but the U.S. market as a whole. Although these imports will not likely be shipped directly to Canada, they will cause a ripple effect by impacting overall domestic sales in the Northwest U.S., which will, in turn, likely increase exports to Western Canada.<sup>77</sup>

[98] The Tribunal considers that the evidence on U.S. producers' ability to produce product for the Canadian market provides a strong indication of a likely increase in import volumes if the finding is rescinded. The Tribunal is persuaded that sales to Western Canada would also still provide the benefit of contributing to the fixed costs of their U.S. factories.

[99] The Tribunal notes that Mr. Atkins testified that GP is currently operating on a managed order file system due to high demand in the U.S. and the desire to prevent overbooking production.<sup>78</sup> While the Tribunal accepts this evidence, it does not consider that the existence of this system is necessarily determinative to predict GP's, and more importantly, other U.S. producers' future ability to supply the Western Canadian market.

[100] Overall, the Tribunal finds that there is significant excess capacity in the U.S. market and, despite the forecast decrease in demand and new sources of supply emerging in the U.S. market, U.S. producers plan to further expand production capacity. As a result, there is ample capacity available to supply the Western Canadian market should the finding be rescinded. Further, U.S. producers will be incentivized to export to Canada, at least in the short term, because, as discussed in more detail below, Western Canadian prices are higher than U.S. prices.

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<sup>72</sup> *Ibid.*

<sup>73</sup> *Ibid.*; Exhibit RR-2021-004-RI-09.A (protected) at 2. Table 63 of the investigation report was reviewed in conjunction with the evidence provided by USG in its reply to the requests for information.

<sup>74</sup> Exhibit RR-2021-004-A-10 at 17.

<sup>75</sup> Exhibit RR-2021-004-RI-08.A (protected) at 6; Exhibit RR-2021-004-RI-09.A (protected) at 2; Exhibit RR-2021-004-06.B (protected), Table 10.

<sup>76</sup> *Transcript of Public Hearing* at 21.

<sup>77</sup> *Ibid.* at 24, 25.

<sup>78</sup> Exhibit RR-2021-004-H-04 (protected) at paras. 13–17; Exhibit RR-2021-004-H-03 at paras. 13–17; *Transcript of In Camera Hearing* at 89–91.

### Likely absolute volumes

[101] CertainTeed submits that subject imports have maintained a significant and growing presence in the Western Canadian market over the POR as compared to the period of investigation (POI) of the original inquiry. In addition, CertainTeed submits that U.S. producers would substantially increase the volume of subject goods shipped into the Western Canadian market if the finding is rescinded. It argues that the anticipated softening of the market conditions and increases in production capacity in the U.S. described above will result in an increase in the volume of dumped goods in the Western Canadian market. CertainTeed also submits that it is reasonable to conclude that CGC would prefer to replace volume from Eastern Canadian production with imports from the U.S. based on the evidence that it is more cost effective to do so. Finally, CertainTeed notes that prices in Western Canada are higher than U.S. prices, which will make Western Canada an attractive market for U.S. producers.

[102] Other parties also argue that the rescission of the finding would likely result in volumes exported from Eastern Canada to Western Canada during the POR being replaced by the subject goods. Local 213 and the IBB argue that sales from east to west are unnatural and inefficient, and would be replaced by products made in USG's U.S. plants if the finding is rescinded. Cabot similarly submits that subject imports could form a significant portion of the market and that the U.S.'s close geographic proximity makes the Western Canadian market easier to access.

[103] CertainTeed alleges that CGC and GP have sought to gain sales volume to offload gypsum board whenever available.<sup>79</sup> It provided various account-specific examples to demonstrate that CGC and GP used aggressive pricing strategies.<sup>80</sup>

[104] The investigation report shows that the subject goods' market share was relatively steady during the full years of the POR, although it was much lower than during the original inquiry.<sup>81</sup> Imports from non-subject countries were minimal during the POR.<sup>82</sup>

[105] Further, during the POR, CGC maintained a substantial share of the market with gypsum board from its Eastern Canada facilities as well as through imports from the U.S. from its related company, USG.<sup>83</sup> However, as previously discussed, prior to the imposition of duties, CGC primarily supplied the Western Canadian market with imports from the U.S. from its sister company's production facilities in the Pacific Northwest and Midwest U.S. Its supply strategy was based on the geographical location of production facilities because it would be more cost effective to deliver gypsum board from facilities closest to its customers.<sup>84</sup>

[106] The Tribunal finds that CGC's experience with largely servicing the Western Canadian market from Eastern Canada would give it reason to supply that market primarily using subject goods if the finding was rescinded.<sup>85</sup> It is reasonable to conclude that CGC/USG will want to maintain its market share and, behaving as a rational economic actor, will shift production from Eastern Canada to the United States to take advantage of lower shipping costs to Western Canada.

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<sup>79</sup> Exhibit RR-2021-004-A-07 at para. 68.

<sup>80</sup> Exhibit RR-2021-004-A-08 (protected) at paras. 69, 72, 75.

<sup>81</sup> Exhibit RR-2021-004-09 (protected), Table 22; Exhibit RR-2021-06.B (protected), Table 13.

<sup>82</sup> Exhibit RR-2021-004-06.B (protected), Tables 11-13.

<sup>83</sup> Exhibit RR-2021-004-14.02.D (protected) at 7; Exhibit RR-2021-004-17.04.B (protected) at 8; Exhibit RR-2021-004-06.B (protected), Table 11.

<sup>84</sup> *Gypsum Board RD* at para. 16, citing Exhibit RD-2020-003-01 at 15.

<sup>85</sup> Exhibit RR-2021-004-14.02.D (protected) at 17.



[107] The Tribunal considers the market intelligence of Wayne Edgcombe, indicating that CGC would increase supply of the subject goods to Western Canada if the finding is rescinded, to be reliable.<sup>86</sup> In addition, CGC's replies to the Tribunal's producer and importer questionnaires, including shipping costs, lead the Tribunal to believe that it would also pursue sales in the Western Canadian market aggressively.<sup>87</sup> In the original inquiry, the Tribunal found that "... some of the largest Canadian purchasers of gypsum board obtained dumped U.S. prices from USG's production. These prices were so low that their levels were the subject of some candid and eye-opening protected evidence by the USG/CGC witness."<sup>88</sup> In the current review, CGC did not file nor provide compelling evidence to dispute the statements made by the domestic industry nor provide a rationale why CGC/USG would not simply revert to servicing the Western Canadian market from its facilities located geographically closer to the market.

[108] In addition, the Tribunal notes that Western Canadian prices are currently higher than U.S. prices,<sup>89</sup> which will make Western Canada an attractive market for U.S. producers, at least in the short term.

[109] Further, based on the evidence of the aggressive strategies used with duties in place, the Tribunal finds that USG and GP would likely pursue the market aggressively to obtain sales volume if the duties were removed. Despite GP's claims to the contrary, the Tribunal considers that GP has been aggressive in the Western Canadian market over the POR.<sup>90</sup> While some allegations were successfully refuted by GP,<sup>91</sup> others were not, and CertainTeed lost substantial sales volume to GP's imports of subject goods during the POR.

[110] In summary, the Tribunal expects that key market players GP and CGC will behave like rational economic actors and that, if the finding expires, CGC's sales from Eastern Canada will likely be replaced by sales of subject goods, just as sales of subject goods were largely displaced by sales of goods from Eastern Canada after the Tribunal issued its finding in 2017.<sup>92</sup> Without the market discipline of anti-dumping duties, CGC will no longer have an incentive to ship less cost-effective goods from Eastern Canada in large volumes, leading to an increase in imports of subject goods. Further, the relatively higher prices in the Western Canadian market will attract U.S. producers. The Tribunal notes that, although CGC was a party to the expiry review, it did not provide any persuasive evidence to refute the claims of CertainTeed, instead focusing its arguments on the issue of the regional market.

#### Likely relative volumes

[111] The ratios of imports of subject goods relative to both domestic production and domestic sales from domestic production followed similar trends during the POR. Both ratios peaked in 2020, increasing slightly as compared to 2019. In 2021, both ratios decreased slightly by 1 percentage point. Both ratios continued to decrease between the interim periods, by 2 percentage points and 3 percentage points, respectively.<sup>93</sup>

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<sup>86</sup> Exhibit -RR-2021-004-A-08 (protected) at attachments 7, 12 and 14.

<sup>87</sup> Exhibit RR-2021-004-14.02.D (protected) at 7, 17; Exhibit RR-2021-004-17.04.B (protected) at 3.

<sup>88</sup> *Gypsum Board NQ* at para. 97.

<sup>89</sup> Exhibit RR-2021-004-A-05 at para. 30; Exhibit RR-2021-004-A-06 (protected) at para. 30 (Table 4); *Transcript of Public Hearing* at 192–193.

<sup>90</sup> Exhibit RR-2021-004-A-08 (protected) at para. 74; *Transcript of In Camera Hearing* at 94–98.

<sup>91</sup> Exhibit RR-2021-004-H-04 (protected) at paras. 11–12.

<sup>92</sup> Exhibit RR-2021-004-09 (protected), Tables 20, 22; Exhibit RR-2021-004-06.B (protected), Tables 11, 13.

<sup>93</sup> Exhibit RR-2021-004-06.B (protected) at Tables 5, 9, 11, 63; Exhibit RR-2021-004-05.B, Table 9. CBSA data for subject imports in interim 2021 and 2022 replaced by exports to Western Canada from Table 63.

[112] Western Canadian demand for gypsum board reached a peak over the POR and weakening demand in the future means a smaller pie to share. While overall Canadian residential construction starts were forecasted to increase over the next few years, these forecasts were made earlier in 2022 based on assumptions of controlled inflation and modest interest rate increases by the Bank of Canada. In view of the deteriorating economic conditions, particularly the recent significant increase in interest rates and the Bank of Canada's commitment to pursue a more restrictive monetary policy to fight inflation in the near future, the Tribunal is not persuaded that the evidence relating to this projected increase remains reliable. On balance, despite the CMHC or ConstructConnect forecasts on the record,<sup>94</sup> the Tribunal is unable to find that significant growth in housing starts is likely to occur in Western Canada.

[113] In the Tribunal's opinion, USG/CGC will have the ability to compete on price to maintain and increase its market share in these market conditions. In the absence of compelling evidence indicating otherwise, the Tribunal finds that CGC's behaviour over the POI, as described in CertainTeed's market intelligence, indicates that such behaviour is likely to recur in the next 18 to 24 months.<sup>95</sup> While, on its own, the likely volume of dumped imports from USG/CGC is likely to be significant based on this evidence, the Tribunal considers that GP would have no choice but to follow the lead of CGC to maintain its market share.<sup>96</sup>

[114] The Tribunal therefore finds that, as U.S. producers increase absolute volumes of imports to replace supply from Eastern Canada and seek to obtain additional sales in a stable or declining Western Canadian market, imports of subject goods will also increase relative to domestic production and sales of domestic production.

#### Conclusion on likely volumes

[115] In sum, the Tribunal finds that producers of the subject goods have considerable available production capacity and have demonstrated an interest in maintaining a presence in the Western Canadian market while the finding has been in place. The Tribunal also expects that, if the finding is rescinded, USG/CGC would resume supplying the Western Canadian market with U.S. production, instead of shipping goods from Eastern Canada, as it is more cost effective to do so. This alone, even without considering the likely behaviour of other U.S. producers in the absence of the finding, is likely to result in a significant increase in the volume of dumped imports.

[116] In light of the foregoing, the Tribunal finds that the rescission of the finding would likely result in a significant increase in the volume of imports of the subject goods, in absolute and relative terms, in the next 24 months.

#### **Likely price effects of the dumped goods**

[117] The Tribunal must consider whether, if the finding is rescinded, the dumping of the subject goods is likely to significantly undercut the prices of like goods, depress them, or suppress them by preventing increases that would likely have otherwise occurred.<sup>97</sup> In this regard, the Tribunal distinguishes the price effects of the dumped goods from any price effects that would likely result from other factors affecting prices.

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<sup>94</sup> Exhibit RR-2021-004-A-11 at attachment 10; Exhibit RR-2021-004-H-08 (protected) at 18.

<sup>95</sup> Exhibit RR-2021-004-A-08 (protected) at para. 75.

<sup>96</sup> *Transcript of In Camera Hearing* at 150–152.

<sup>97</sup> Paragraph 37.2(2)(b) of the Regulations.

[118] CertainTeed submits that gypsum board is price sensitive, and foreign producers like CGC and GP are aggressively pursuing the Canadian market to maintain and enhance their market share. CertainTeed adds that, should the finding be allowed to expire, the subject imports would likely undercut CertainTeed's unit values of sales from domestic production, depressing them to levels last seen in 2015.

[119] According to CertainTeed, prices in Western Canada are higher than in the U.S., and this price differential not only makes Canada an attractive market to U.S. producers, but also shows the extent to which subject goods producers could reduce prices to undercut Canadian producers in order to obtain market share.

[120] CertainTeed also argues that U.S. exporters sold gypsum board to importers in Western Canada over the POR at almost exactly the price needed to avoid anti-dumping duties. It submits that this behaviour underlines just how price sensitive the Western Canadian market is, and how desperate GP and USG/CGC have been to hold on to market share over the life of the finding.

[121] Cabot argues that, due to the importance of price to purchasers of gypsum board, injurious conditions, as found by the Tribunal in the original inquiry, would return if the finding is rescinded.

[122] The CHBA argues that imports priced above the reference values (i.e., the floor) established by the remission order could not be injurious, and that volumes sold below those values were insignificant. It further submitted that, rather than establishing that U.S. exporters are bad actors who dumped during the POR and would likely continue to dump if the finding is rescinded, the CBSA's enforcement data establishes that U.S. exporters are good actors that sold gypsum board into the Canadian market at non-injurious prices. It submits that this is evidence that supports the conclusion that U.S. exporters would likely sell at non-injurious price levels if the finding is rescinded.

[123] GP submits that prices of subject goods are likely to remain high and similar to current levels if the finding is rescinded, due to a number of factors, including high demand and tight supply that will continue to dictate prices in Western Canada and across the U.S. for the next 12 to 24 months; prices of subject goods sold in Western Canada that are already far above the minimum prices required by normal values, meaning market conditions, and not the finding, are keeping prices at elevated levels; and cross-border consolidation of major distributors of gypsum board that now operate on both sides of the Canada-U.S. border, which reduces the ability of U.S. exporters to price discriminate between Western Canada and the U.S. GP submits that, if the finding is rescinded, prices would be in line with CGC's average price of sales of imports in Eastern Canada or sales of Eastern Canadian production to Western Canada in interim 2022.

[124] As outlined below, the Tribunal finds that there is likely to be a negative impact on prices of like goods if the finding is rescinded.

[125] In the original inquiry, the Tribunal found that gypsum board is a commodity product, as price was the determining factor in purchasing decisions.<sup>98</sup> CertainTeed submitted that this remains the case, and the Tribunal received no opposing views. Consequently, the Tribunal accepts that purchasers of gypsum board will buy the lowest-priced gypsum board.

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<sup>98</sup> *Gypsum Board NQ* at para. 96.

[126] In response to the parties' arguments regarding the impact of subject goods sold above reference values established by the remission order, the Tribunal observes that goods sold above those values can still cause injury to the domestic industry. The reference values are intended to strike a balance between protection afforded under SIMA for the domestic industry from the injurious effects of dumped imports and ensuring that duties do not impose an unnecessary burden for downstream businesses that use gypsum board.<sup>99</sup> In other words, prices above reference values still cause injury to the domestic industry, but this is deemed acceptable given the burden that it imposes on downstream users.

#### Price undercutting and depression

[127] The Tribunal is of the view that, if the finding is rescinded, the subject goods will undercut and depress prices of like goods.

[128] Evidence before the Tribunal indicates that, historically, Canadian prices for gypsum board have trended very closely to U.S. prices. However, current Western Canadian prices are higher than U.S. prices,<sup>100</sup> as the imposition of the finding has disrupted this trend.

[129] If, after the finding is rescinded, USG/CGC production for the Western Canadian market shifts back to Northwestern U.S. production facilities, it is likely that average prices of gypsum board will decrease in Western Canada due to their demonstrated desire to maintain and gain market share, their demonstrated aggressive pricing behaviour and due to the fact that they would be advantaged by much lower freight costs for goods sold to the Western Canadian market. Based on the evidence, the Tribunal finds that if the finding is rescinded, USG/CGC would be the main driver of injurious price effects, as the circumstances that caused it to sell gypsum board at very low prices at the time of the original investigation still exist.

[130] CertainTeed submitted a confidential price analysis for CGC and GP selling in Western Canada from their respective gypsum board plants located in the U.S. if the finding were rescinded.<sup>101</sup> Based on this price analysis, CertainTeed concluded that CGC and GP would likely undercut the selling prices of like goods in Western Canada. Furthermore, CertainTeed argues that this underselling will inevitably lead to price depression and price suppression, as it will be forced to respond to the lower pricing or lose market share, as occurred during the POI of the original investigation.<sup>102</sup> The Tribunal is convinced of the credibility of the methodology applied by CertainTeed, and considers that its assumptions are conservative.

[131] The Tribunal, as noted in the likely volume section, finds that CGC and USG will aggressively pursue the Western Canadian market. The evidence suggests that CGC will be the price leader in the market and that GP will follow suit.<sup>103</sup>

[132] There is evidence that gypsum board from Eastern Canada undercut in some instances the like goods during the POR, even factoring in high freight costs. In the opinion of the Tribunal, this is

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<sup>99</sup> *Gypsum Board Products Anti-dumping Duty Remission Order, 2017*, Regulatory Impact Analysis Statement, *Canada Gazette* Part II, Vol. 151, No. 5 (8 March 2017).

<sup>100</sup> Exhibit RR-2021-004-A-05 at para. 30; Exhibit RR-2021-004-A-06 (protected) at para. 30 (table 4); *Transcript of Public Hearing* at 192–193.

<sup>101</sup> Exhibit RR-2021-004-A-13 at paras. 96–100; Exhibit RR-2021-004-A-14 (protected) at paras. 96–100.

<sup>102</sup> Exhibit RR-2021-004-A-13 at para. 100.

<sup>103</sup> *Transcript of In Camera Hearing* at 113,114.

an indication that in the absence of the finding, subject goods are also likely to undercut the like goods<sup>104</sup> given the relative freight cost advantage they could benefit from if the finding were rescinded.

[133] GP argues that it has increased its prices many times during the POR,<sup>105</sup> and that this will continue if the finding is rescinded. Furthermore, GP adds that exporters of the subject goods are interested in maximizing their profits by selling at the highest possible prices as opposed to selling at lower prices to maximize volumes. The Tribunal is unable to accept this argument and is rather of the view that GP will have no choice but to compete on price with others in the market, following CGC, which it finds will be the price leader in Western Canada. The Tribunal does not find it plausible that all U.S. producers will purposefully sell at higher prices without the pricing discipline imposed by the finding to maintain inflated margins, and not be tempted to reduce pricing to gain additional sales volumes from competitors. The Tribunal finds that the latter scenario is more probable. This expected behaviour will likely result in the subject goods undercutting the prices of like goods, which, in turn, will likely result in price depression and, as discussed further below, price suppression and lost sales.

[134] Finally, the Tribunal notes that it heard testimony that common customers located in Canada and the U.S. will demand price parity or at least closer pricing.<sup>106</sup> With the known lower transportation costs from the Western U.S. compared to Eastern Canada, the Tribunal finds that such customers in Western Canada would demand lower pricing from U.S. producers than was in place during the POR. While GP indicated that there would be no incentive to decrease pricing in Canada and that it would not be in its interest to do so, the Tribunal finds that it is unlikely that GP would be able to maintain the current high prices in Western Canada due to customer demand and competitive pricing from USG/CGC. This decrease in pricing will lead to likely price undercutting and depression in the near-to-medium term.

[135] Based on the above, the Tribunal finds that, should the finding be rescinded, the prices of the subject goods will likely significantly undercut and significantly depress the prices of like goods as prices drop closer to those in the U.S. market.

#### Price suppression

[136] The Tribunal is of the view that, if the finding is rescinded, the dumping of the subject goods is also likely to significantly suppress the prices of like goods by preventing increases in those prices that would likely have otherwise occurred.

[137] Over the POR, CertainTeed's costs of producing and selling gypsum board have increased. Its selling prices, however, also increased allowing it to maintain its gross margins. Between 2019 and 2021, as well as between the interim periods, prices of like goods, subject goods and gypsum board purchased from Eastern Canada have either stayed the same or increased.<sup>107</sup> Furthermore, inflation is a current concern in both the U.S. and Canada. It is expected that costs will continue to

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<sup>104</sup> Exhibit RR-2021-004-06.B (protected), Tables 36, 44.

<sup>105</sup> Exhibit RR-2021-004-H-03.A at para. 18; Exhibit RR-2021-004-H-04.A (protected) at para. 18; *Transcript of Public Hearing* at 170.

<sup>106</sup> Exhibit RR-2021-004-H-03.A at para. 30.

<sup>107</sup> Exhibit RR-2021-004-05.B, Table 37; Exhibit 06.B (protected), Tables 36, 50, 56.

rise over the near term, as raw material costs have been steadily increasing over the course of the POR<sup>108</sup>, and there are no indications that there will be a reversal in this trend.

[138] As discussed above, the Tribunal finds that prices will likely decrease if the finding expires, thereby creating a cost-price squeeze for the domestic industry. The domestic industry's inability to increase its selling prices under these circumstances will therefore result in price suppression.

[139] The Tribunal finds that should the finding be rescinded, the prices of the subject goods will likely significantly suppress the prices of like goods.

#### Conclusion on likely price effects

[140] The evidence indicates that the resumed or continued dumping of the subject goods is likely to cause significant adverse price effects, namely price undercutting, price depression and price suppression, over the next 24 months if the finding is rescinded.

#### **Likely impact of the dumped goods on the domestic industry**

[141] The Tribunal will now assess the likely impact of the above volumes and prices on the domestic industry if the finding were rescinded,<sup>109</sup> taking into consideration the recent performance of the domestic industry. In this analysis, the Tribunal distinguishes the likely impact of the dumped goods from the likely impact of any other factors affecting or likely to affect the domestic industry.<sup>110</sup>

[142] The Tribunal notes that, since there is only one domestic producer comprising the domestic industry, much of the information on the record is specific to this producer and hence confidential. Recognizing this constraint, the Tribunal can only refer to data in a limited way in support of its public reasons.

#### Recent performance of the domestic industry

[143] The volume of goods produced by CertainTeed for sale in the Western Canadian market has increased slightly every year during the POR, except for interim 2022, where it decreased as compared to interim 2021.<sup>111</sup> The trend in production is mirrored by the trend in the total volume of domestic sales and of the Western Canadian market as a whole, although the market contraction in interim 2022 was more pronounced.<sup>112</sup>

[144] Although the domestic industry's cost of goods sold increased throughout the POR, its net sales values also increased, allowing CertainTeed to maintain its financial performance.<sup>113</sup>

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<sup>108</sup> Exhibit RR-2021-004-A-06 (protected) at para. 28; Exhibit RR-2021-004-06.B (protected), Table 56.

<sup>109</sup> Paragraphs 37.2(2)(e) and (g) of the Regulations.

<sup>110</sup> See paragraph 37.2(2)(k) of the Regulations.

<sup>111</sup> Exhibit RR-2021-004-06.B (protected), Table 59; Exhibit RR-2021-004-05.B, Table 60.

<sup>112</sup> Exhibit RR-2021-004-05.B, Tables 12, 51. CBSA data for subject imports in interim 2021 and 2022 replaced by exports to Western Canada from Table 63.

<sup>113</sup> Exhibit RR-2021-004-06.B (protected), Table 51.

[145] The domestic industry's capacity utilization has slightly increased over the POR, even though there was also a slight increase in practical plant capacity. However, the domestic industry still has excess capacity.<sup>114</sup>

[146] Although there was a decrease in employment levels in 2020, employment increased in 2021 and 2022 to reach pre-pandemic levels. Wages have increased over the POR.<sup>115</sup> CertainTeed's investments in Western Canada have also increased year over year throughout the POR.<sup>116</sup>

[147] The Tribunal recognizes that the domestic industry has stabilized and improved its profitability since the time the finding was put in place, even when faced with competition from Eastern Canadian imports, as well as U.S. imports benefitting from the remission order. As it stands, if volumes and prices remained the same and the market remained steady, the domestic industry's financial performance could remain healthy at this level of competition.

#### Likely impact of the dumped goods on the domestic industry

[148] The Tribunal must ultimately assess whether the likely volumes and prices of the dumped goods will likely, *in and of themselves*, result in material injury to the domestic industry, taking into account the impact of any other factors unrelated to the dumping.

[149] CertainTeed argues that the finding allowed its performance to drastically improve, but that the rescission of the finding would lead to the return of subject imports in significant volumes and at low prices, which would virtually guarantee the recurrence of material injury to its Western Canadian operations similar to the situation that prevailed prior to the original finding, in the form of reduced sales, production, utilization rates, revenue, profitability, cash flows, employment, and the ability to invest and raise capital.

[150] The opposing parties generally submit that CertainTeed's current healthy financial position makes it unlikely that the resumption or continuation of imports of dumped subject goods would cause it any significant injury.

### **Production and capacity**

[151] As set out above, the Tribunal anticipates that, if the finding were rescinded, importers of subject goods would not only maintain their existing customers but leverage aggressive pricing to secure more sales volumes. With weakening demand creating a smaller market, the Tribunal finds that there would likely be a reduction in production. This will in turn likely reduce CertainTeed's capacity utilization to levels that would not allow it to maintain profitable margins.

### **Sales and market share**

[152] As noted above, U.S. producers maintained a significant market share during the POR, and the Tribunal anticipates that U.S. producers will seek to expand market share at the expense of the domestic industry, resulting in a loss of sales volume by the domestic industry. Although the anticipated contraction in market demand due to inflation and the slowing housing market will have

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<sup>114</sup> Exhibit RR-2021-004-06.B (protected), Table 59; Exhibit RR-2021-004-05.B, Table 60.

<sup>115</sup> Exhibit RR-2021-004-06.B (protected), Table 59.

<sup>116</sup> *Ibid.* (protected), Table 58.

some impact on the domestic industry's sales, the Tribunal considers that the anticipated increase in subject goods volumes will nevertheless be, in and of itself, a cause of lost sales and market share to the domestic industry.

### **Employment and wages**

[153] The Tribunal anticipates that the likely decrease in production as the result of the rescission of the finding will be severe enough to cause a reduction in employment levels and wages, as employees will either be laid off or have reduced hours. Currently, the CertainTeed plant operates with four shifts. However, with a reduction in production, this would be reduced to three shifts, which will impact hours worked and annual wages.<sup>117</sup>

[154] The Tribunal also heard testimony regarding the impact that the rescission of the finding would have on workers. Specifically, switching from a four-shift to a three-shift schedule makes scheduling more unpredictable, which can have significant impacts on employees' lifestyle, mental health and family life.<sup>118</sup> In addition, CertainTeed's plant employees have enjoyed job stability since the finding has been in place; however, if the finding is rescinded, the anticipated layoffs will have a more severe impact on newer employees that have little seniority.<sup>119</sup>

[155] SIMA has recently been amended to ensure that the Tribunal takes the impact on workers into account during an injury inquiry. However, as per the transitional provisions in the implementing legislation, these changes are not applicable to the current expiry review. Nevertheless, the Tribunal wishes to acknowledge the evidence of impact on workers provided by the witnesses from the unions.

### **Reduced profitability**

[156] Mr. Mazzaferro prepared a "but-for" analysis of the impact of the rescission of the finding on CertainTeed's projected financial performance in 2023. Mr. Mazzaferro first set out projections for CertainTeed's financial performance should the finding be continued. Notably, CertainTeed expects to increase prices in 2023 to accommodate increases in raw material costs, as discussed above, and had projected an increase in sales volumes for that year. CertainTeed also factored in anticipated increases in transportation costs, raw materials costs and other financial expenses.<sup>120</sup>

[157] Mr. Mazzaferro then set out two possible scenarios if the finding were rescinded: one with a decrease in prices only and one where CertainTeed could experience both volume loss and decreased prices. The projected decrease in price was based on the increase in prices CertainTeed experienced in the quarter after the imposition of final duties, as compared to the quarter prior to the imposition of the provisional duties. Similarly, the projected loss of sales volumes was based on the 5 percent increase in market share CertainTeed estimated that it obtained after the imposition of the duties.<sup>121</sup>

[158] Based on these projections, Mr. Mazzaferro indicated that, should CertainTeed experience its estimated decrease in prices, this would translate to a serious impact on revenue, gross margin and

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<sup>117</sup> *Transcript of Public Hearing* at 124–125.

<sup>118</sup> *Ibid.* at 76–78, 80.

<sup>119</sup> *Ibid.* at 86–87, 107–108, 111, 113.

<sup>120</sup> Exhibit RR-2021-004-A-05 at para. 35.

<sup>121</sup> *Ibid.* at paras. 36–37.



net income, and put CertainTeed below its target return on sales (ROS). If CertainTeed were to experience both decreased prices and lost volumes, this would render the impact even more severe. Mr. Mazzaferro further noted that the injury would continue and worsen in 2024 as U.S. market conditions are expected to continue to deteriorate, incentivizing U.S. exporters to ship larger volumes at more aggressive prices to Western Canada.<sup>122</sup>

[159] GP submits that CertainTeed's estimates of price declines are unreasonable as prices in the Western Canadian market are currently high, that any decrease in prices in the Western Canadian market would be small and would not cause material injury to CertainTeed, and that it is unreasonable to assume that CertainTeed would experience both price and volume losses.

[160] At the hearing, CertainTeed presented an updated "but-for" analysis and argued that, even using GP's projections of the decline in the Western Canadian market,<sup>123</sup> its financial performance would still deteriorate if the finding were rescinded.

[161] The Tribunal accepts CertainTeed's revised "but for" projections, as it considers that the assumptions adopted by CertainTeed are both reasonable and conservative. As discussed above, the Tribunal considers that prices in the Western Canadian market will decline significantly if the finding is rescinded, as U.S. producers would price aggressively into the Canadian market to increase market share. In accordance with CertainTeed's estimates, this will result in a significant decline in sales volume and net sales value, which will amount to a material decline in gross margin and net income, resulting in a negative impact on its ROS.

## **Investments**

[162] CertainTeed made significant investments over the POR and provided details regarding future planned investments in its plants.<sup>124</sup> The Tribunal heard evidence that CertainTeed must achieve a certain ROS to compete with other members of the Saint-Gobain group for investment dollars.<sup>125</sup>

[163] In light of this evidence, the Tribunal considers that CertainTeed's return on existing investments and ability to raise additional capital will both likely be negatively impacted if the finding is rescinded.

### Conclusion on likely impact

[164] For the above reasons, having accounted for the impact of all relevant factors, the Tribunal finds that, if the finding is rescinded, the domestic industry will likely experience injury in terms of reduced production, capacity utilization, sales, market share, employment, profitability, return on investment and ability to raise capital, and that such injury will be material.

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<sup>122</sup> Exhibit RR-2021-004-A-05 at paras. 40–42.

<sup>123</sup> Exhibit RR-2021-004-H-06 (protected) at para. 13 and *Transcript of In Camera Hearing* at 105.

<sup>124</sup> Exhibit RR-2021-004-A-03 at paras. 26, 28; Exhibit RR-2021-004-A-04 (protected) at 27–28.

<sup>125</sup> *Transcript of In Camera Hearing* at 9.

## EXCLUSIONS

[165] The Tribunal received one request to exclude products from the finding should it be continued.

[166] SIMA implicitly authorizes the Tribunal to grant exclusions from the scope of an order or finding.<sup>126</sup> Exclusions are an extraordinary remedy that may be granted at the Tribunal's discretion, i.e. when the Tribunal is of the view that such exclusions will not cause injury to the domestic industry.<sup>127</sup> In the context of an expiry review, the rationale is that, despite the general conclusion that all goods covered by an order are likely to cause injury to the domestic industry, there may be case-specific evidence that imports of particular products captured by the definition of the goods are not likely to cause injury.

[167] In determining whether an exclusion is likely to cause injury to the domestic industry, the Tribunal considers such factors as whether the domestic industry produces, actively supplies or is capable of producing like goods in relation to the subject goods for which the exclusion is requested.<sup>128</sup>

[168] The onus is upon the requester to demonstrate that imports of the specific goods for which the exclusion is requested are not likely to be injurious to the domestic industry.<sup>129</sup>

[169] CGC has requested an exclusion for Sheetrock® Brand UltraLight Panels Firecode® X - 5/8" Type X Gypsum Board (ULIX).

[170] CGC claims that the domestic industry does not produce *lightweight 5/8"* Type X gypsum board, only standard weight products, and that lightweight and standard weight gypsum board are fundamentally different products, with different consumer preferences, price premiums and uses. CGC claims that there are significant benefits associated with the use of lightweight board since it reduces strain on workers and reduces transportation costs. CGC submits that standard weight gypsum board is not substitutable for lightweight gypsum board because the latter is a high-end innovative product for which it can charge a price premium. Further, CGC submits that the domestic industry is not capable of producing an equivalent product since the process for creating ULIX is subject to patent protection.

[171] CGC acknowledges that an exclusion request for ULIX (as it existed in 2016) was rejected by the Tribunal in the original inquiry, but submits that the domestic industry has made no effort to begin producing an equivalent product.

[172] CertainTeed submits that this request is identical to the one made in the original inquiry and should therefore be rejected on the same basis, which was that standard weight products were interchangeable with lightweight products. CertainTeed further submits that patent protection is not a basis for granting a product exclusion. In addition, CertainTeed notes that CGC has not submitted any witness evidence in support of its request.

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<sup>126</sup> *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.

<sup>127</sup> See, for example, *Aluminum Extrusions* (17 March 2009), NQ-2008-003 (CITT) at para. 339.

<sup>128</sup> *Certain Fasteners* (6 January 2010), RR-2009-001 (CITT) [*Fasteners*] at para. 245.

<sup>129</sup> *Fasteners* at para. 243.

[173] The Tribunal rejects CGC's product exclusion request. In the original inquiry, the Tribunal did not find the benefits associated with using lightweight board, or the price premium applicable to the lightweight product, to be sufficient to differentiate standard from lightweight board. In this review, CGC has offered no evidence to support its renewed claims that there are significant differences between lightweight and standard weight board in terms of customer preferences, that lightweight and standard weight board have different end uses, or that it is able to charge a price premium for lightweight board.

[174] In contrast, Mr. Edgecombe and Mr. Cai's joint witness statement indicates that lightweight and standard weight board meet the same specifications, that CertainTeed's standard weight gypsum board is sold in direct competition with CGC's lightweight board, and that customers consider the products fully substitutable and will choose the overall lowest-priced option. Accordingly, Mr. Edgecombe states that unfairly priced lightweight board would impact CertainTeed's ability to secure sales at profitable prices.<sup>130</sup>

[175] In light of the above, the Tribunal considers that granting the requested product exclusion is likely to cause injury to the domestic industry.

## CONCLUSION

[176] Pursuant to paragraph 76.03(12)(b) of SIMA, the Tribunal continues its finding in respect of certain gypsum board originating in or exported from the U.S.

Cheryl Beckett  
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Cheryl Beckett  
Presiding Member

Georges Bujold  
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Georges Bujold  
Member

Serge Fréchette  
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Serge Fréchette  
Member

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<sup>130</sup> Exhibit RR-2021-004-32.01.A at paras. 12, 18, 22, 29.