



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Dumping and Subsidizing

FINDING AND REASONS

Inquiry No. NQ-2008-002

Thermoelectric Containers

*Finding issued
Thursday, December 11, 2008*

*Reasons issued
Monday, December 29, 2008*

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

**THE DUMPING AND SUBSIDIZING OF THERMOELECTRIC CONTAINERS
ORIGINATING IN OR EXPORTED FROM THE PEOPLE'S REPUBLIC OF
CHINA**

FINDING

The Canadian International Trade Tribunal, under the provisions of section 42 of the *Special Import Measures Act*, has conducted an inquiry to determine whether the dumping and subsidizing of thermoelectric containers that provide cooling and/or warming with the use of a passive heat sink and a thermoelectric module, excluding liquid dispensers, originating in or exported from the People's Republic of China have caused injury or retardation or are threatening to cause injury to the domestic industry.

This inquiry is pursuant to the issuance by the President of the Canada Border Services Agency of preliminary determinations dated August 13, 2008, and of final determinations dated November 10, 2008, that thermoelectric containers originating in or exported from the People's Republic of China have been dumped and subsidized.

Pursuant to subsection 43(1) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby finds that the dumping and subsidizing of thermoelectric containers originating in or exported from the People's Republic of China have caused injury to the domestic industry.

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Ellen Fry
Presiding Member

Diane Vincent
Diane Vincent
Member

Pasquale Michael Saroli
Pasquale Michael Saroli
Member

Hélène Nadeau
Hélène Nadeau
Secretary

The statement of reasons will be issued within 15 days.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	November 10 and 12 to 14, 2008
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STATEMENT OF REASONS

1. The Canadian International Trade Tribunal (the Tribunal), pursuant to section 42 of the *Special Import Measures Act*,¹ has conducted an inquiry to determine whether the dumping and subsidizing of thermoelectric containers that provide cooling and/or warming with the use of a passive heat sink and a thermoelectric module, excluding liquid dispensers (thermoelectric containers), originating in or exported from the People's Republic of China (China) (the subject goods) have caused injury or retardation or are threatening to cause injury to the domestic industry.
2. On May 15, 2008, the President of the Canada Border Services Agency (CBSA), following a complaint filed by Koolatron Corporation (Koolatron), initiated investigations into whether the subject goods had been dumped and subsidized.
3. On May 16, 2008, pursuant to subsection 34(2) of *SIMA*, the Tribunal issued a notice advising interested parties that it had initiated a preliminary injury inquiry to determine whether the evidence disclosed a reasonable indication that the dumping and subsidizing of the subject goods had caused injury or retardation or were threatening to cause injury. On July 14, 2008, the Tribunal made a preliminary determination that there was a reasonable indication that the dumping and subsidizing of the subject goods had caused injury.
4. On July 29, 2008, in the statement of reasons for its preliminary determination of injury, the Tribunal stated its conclusion that thermoelectric containers produced in Canada were "like goods" in relation to the subject goods. For the purposes of determining whether there was a reasonable indication of injury, the Tribunal also considered that thermoelectric containers constituted a single class of goods. However, the Tribunal also stated it was of the view that there was evidence which indicated that there could be more than one class of goods in this inquiry. The Tribunal considered that the issue of whether there could exist more than one class of goods needed to be fully addressed during an inquiry under section 42 of *SIMA*, if the CBSA made a positive preliminary determination of dumping and subsidizing of the subject goods. Therefore, the Tribunal requested that the CBSA provide, in addition to the single class of subject goods as defined at initiation, separate information on the dumping and subsidizing of the following goods: (1) thermoelectric containers used for travel, whether sold to consumers or to commercial users; (2) thermoelectric containers exclusively for home use, i.e. excluding those that can also be used for travel; (3) thermoelectric containers used for retail display; and (4) thermoelectric containers used as wine display/wine coolers.
5. On August 13, 2008, the CBSA issued preliminary determinations of dumping and subsidizing. It was satisfied, as a result of its preliminary investigations, that the subject goods had been dumped and subsidized, that the margin of dumping and the amount of subsidy were not insignificant and that the volumes of dumped and subsidized goods were not negligible.
6. On August 14, 2008, the Tribunal issued a notice of commencement of inquiry² under subsection 42(1) of *SIMA*. The Tribunal's period of inquiry (POI) covered three full years, from January 1, 2005, to December 31, 2007, and an interim period from January 1 to June 30, 2008. As part of its inquiry, the Tribunal sent questionnaires to domestic producers, importers and foreign producers of thermoelectric containers. The Tribunal also sent a questionnaire on market characteristics to purchasers. From the replies to the questionnaires and other information on the record, the Tribunal's staff prepared public and protected pre-hearing staff reports.

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

2. C. Gaz. 2008.I.2471.

7. In its notice of commencement of inquiry, the Tribunal invited interested parties to file submissions and reply submissions on whether the four classes of goods listed above constituted separate classes of goods. The Tribunal received four submissions and two reply submissions.

8. On September 11, 2008, the Tribunal informed the parties that it had determined that thermoelectric containers constituted a single class of goods and that, therefore, it would conduct its injury analysis on that basis.

9. On September 12, 2008, the Tribunal issued a notice that the date of the commencement of the hearing was changed from November 12, 2008, as indicated in the notice of commencement of inquiry, to November 10, 2008.

10. On November 10, 2008, the CBSA issued final determinations of dumping and subsidizing.

11. A hearing, with public and *in camera* testimony, was held in Ottawa, Ontario, on November 10 and 12 to 14, 2008. Koolatron filed a submission, provided evidence and made arguments in support of a finding of injury. It was represented by counsel and presented witnesses at the hearing. Canadian Tire Corporation, Limited (Canadian Tire), and Mobicool International Ltd. and Mobicool Electronic (Shenzhen) Co. Ltd. (collectively Mobicool) were represented by counsel, filed submissions, provided evidence and made arguments in opposition to a finding of injury and, in the alternative, for certain exclusions. Canadian Tire presented witnesses at the hearing. Hus-Tek International Co. Ltd. (Hus-Tek) opposed a finding of injury, made requests for product exclusions and was represented by counsel at the hearing. Product Specialties Inc. (Product Specialties) presented evidence and argument with regard to its request for product exclusion.

12. SWG Canada (Division of Salton Appliances [1985] Corp.) (SWG), Costco Wholesale Canada Ltd. (Costco) and Wal-Mart Canada Corporation (Wal-Mart) appeared as Tribunal witnesses during the hearing.

13. The record of this inquiry consists of all Tribunal exhibits, including the record of the preliminary injury inquiry (PI-2008-001), replies to questionnaires, requests for information and replies thereto in accordance with the Tribunal's directions, all documents with respect to the product exclusion process, witness statements, all other exhibits filed by parties and the Tribunal throughout the inquiry and the transcript of the hearing. All public exhibits were made available to the parties. Protected exhibits were made available only to counsel who had filed a declaration and confidentiality undertaking with the Tribunal in respect of confidential information.

14. The Tribunal issued its finding on December 11, 2008.

RESULTS OF THE CBSA'S INVESTIGATIONS

15. On November 10, 2008, the CBSA determined that the overall weighted average margin of dumping, expressed as a percentage of the export price, was 30.8 percent, with Mobicool and all other exporters having weighted average margins of dumping of 16.7 percent and 37.0 percent respectively. The CBSA also determined that the weighted average amount of subsidy, expressed as a percentage of the export price, was 9.9 percent, with Mobicool and all other exporters having weighted average amounts of subsidy of 0.8 percent and 14.1 percent respectively. The CBSA concluded that the overall margin of dumping and the amount of subsidy were not insignificant. The CBSA found that 100 percent of the subject goods released into Canada from January 1, 2007, to March 31, 2008, were dumped and that 100 percent of the subject goods released into Canada during the same period were subsidized.³

3. Tribunal Exhibit NQ-2008-002-04A, Administrative Record, Vol. 1 at 211.27, 211.32, 211.36.

PRODUCT

Product Description

16. Thermoelectric containers rely on a principle called “the Peltier effect” to pump heat electronically, without the use of compressors, coils and gases. The Peltier effect dictates that, if a direct current (DC) passes through an electrical junction formed of dissimilar metals, heat will flow towards or away from the junction, depending on the direction of the DC flow in the junction. To achieve a practical level of heat pumping capability, multiple junctions are bonded together to form thermoelectric modules.

17. Thermoelectric containers can therefore be used to either cool or warm their interior air volume, relative to the temperature of the surrounding (ambient) air.

18. Thermoelectric containers operate using a DC power cord, a battery or a 120-volt alternating current (AC) power adapter.

19. Thermoelectric containers are made of a variety of materials including plastic, metal and fabric. They can be hard or soft-sided.

20. The nature of thermoelectric technology generally limits the maximum size of thermoelectric containers to approximately 100 litres.

Production Process

21. Thermoelectric containers consist of an insulated box, with a door or lid, and a heat pump, including the thermoelectric module.

22. The production process begins with insulating foam being inserted between the inner and outer shells of the box and doors or lids. It continues with the addition of the heat pump. The heat pump consists of a heat sink, a thermoelectric module and an extender block. The thermoelectric module is a small device made up of a number of pairs of bismuth telluride crystals sandwiched between ceramic plates, which are located between the heat sink and the extender block. The heat pump is placed on the outside of the box and, on the inside, a cold plate is attached to the extender block.

23. Next, a fan motor is added and wired, and fan blades are attached on the inside and outside. The fan motor (or motors) blows the air on the cold plate and the heat sink. Finally, a cold plate shroud is fitted, and the lids and latches are installed.

DOMESTIC PRODUCERS

24. The Tribunal sent questionnaires to two potential domestic producers of thermoelectric containers. It received a complete reply from Koolatron and limited information from MTL Technologies Inc. (MTL Technologies).

Koolatron

25. Koolatron has its headquarters in Brantford, Ontario, where it manufactures thermoelectric containers and conducts related research and development. It manufactures thermoelectric containers for travel, home, retail display, and wine display/wine cooler use. Koolatron also manufactures and distributes other products outside the scope of this inquiry.

26. Koolatron has wholly owned subsidiaries in Barbados and the United Kingdom that provide services to Koolatron in respect of its sales outside Canada. An associated company provides warehousing and sales services in the United States.

MTL Technologies

27. MTL Technologies of Chambly, Quebec, manufactures thermoelectric containers for retail display.

IMPORTERS, PURCHASERS AND FOREIGN PRODUCERS

28. The Tribunal sent 28 questionnaires to importers and received 12 replies. Eight of the 12 replies were from wholesaler/distributors, and 4 were from retailers. An additional 7 companies indicated that they did not import thermoelectric containers during the POI or that their import volumes were minimal.

29. The Tribunal sent questionnaires on market characteristics to 16 purchasers. The Tribunal received 11 replies, of which 8 were from retailers and 3 from wholesalers/distributors.

30. The Tribunal sent questionnaires to 43 potential foreign producers/exporters and received 1 complete reply from a company located in China and 2 incomplete replies from companies located in the United States, which do not manufacture thermoelectric containers.

DISTRIBUTION

31. The distribution channels for domestic and imported thermoelectric containers are generally the same and include mass merchandisers⁴ and other types of retailers, as well as operators of loyalty reward programs, such as Air Miles®. Thermoelectric containers are also sold by Koolatron and other companies directly to consumers via the Internet and to other end users, such as Canadian Blood Services.

ANALYSIS

32. In the present case, pursuant to subsection 42(1) of *SIMA*, the Tribunal is required to inquire as to whether the dumping or subsidizing of the subject goods has caused injury or retardation or is threatening to cause injury. “Injury” is defined in subsection 2(1) as “...material injury to a domestic industry”. “Domestic industry”, in turn, is defined as “... the domestic producers as a whole of the like goods or those domestic producers whose collective production of the like goods constitutes a major proportion of the total domestic production of the like goods 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.”

33. The Tribunal must therefore first determine what constitutes “like goods”. It will then determine what constitutes the “domestic industry” for the purposes of its injury analysis. The Tribunal must also determine whether it will make an assessment of the cumulative effect of the dumping and subsidizing of the subject goods.

4. The Tribunal considers “mass merchandisers” as retailers that are primarily engaged in selling a wide range of product categories, e.g. Canadian Tire, Wal-Mart and Costco.

34. The Tribunal will then determine whether the dumping or subsidizing of the subject goods has caused injury to the domestic industry. Should the Tribunal arrive at a finding of no injury, it will then determine whether there exists a threat of injury.⁵ If necessary, the Tribunal will also consider the question of retardation.⁶

35. In conducting its injury analysis, the Tribunal will also examine other factors alleged to have had an impact on the domestic industry to ensure that any injury caused by such factors is not attributed to the effects of the dumping or subsidizing of the subject goods.

Like Goods and Classes of Goods

36. Given that the Tribunal must determine whether the dumping or subsidizing of the subject goods has caused, or is threatening to cause, injury to the domestic producers of like goods, the Tribunal must determine which domestically produced goods, if any, constitute like goods in relation to the subject goods.

37. Subsection 2(1) of *SIMA* defines “like goods”, in relation to any other goods, as follows:

...

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

(b) in the absence of any goods described in paragraph (a), goods the uses and other characteristics of which closely resemble those of the other goods.

38. When goods are not identical in all respects to other goods, the Tribunal typically considers a number of factors to determine “likeness”, including the physical characteristics of the goods (such as composition and appearance), their market characteristics (such as substitutability, pricing, distribution channels and end uses) and whether the goods fulfill the same customer needs.⁷

39. In its preliminary injury inquiry, based on the evidence and argument submitted in that proceeding, the Tribunal found that the thermoelectric containers produced in Canada were like goods in relation to the subject goods. During this inquiry, the parties did not adduce any evidence or file submissions that disputed the Tribunal’s preliminary determination on this issue.

40. On the basis of the evidence before it, the Tribunal sees no reason to depart from its preliminary determination. The Tribunal is of the opinion that thermoelectric containers produced in Canada closely resemble the subject goods in terms of physical and market characteristics, can generally be substituted for them and compete directly with them in the Canadian market. Accordingly, for the purposes of this injury inquiry, the Tribunal finds that domestically produced thermoelectric containers constitute like goods in relation to the subject goods.

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

6. Subsection 2(1) of *SIMA* defines “retardation” as “... material retardation of the establishment of a domestic industry.” Therefore, should the Tribunal determine that a domestic industry is already established, it will not need to consider the question of retardation.

7. See, for example, *Copper Pipe Fittings* (19 February 2007), NQ-2006-002 (CITT) at 8 [*Copper Pipe Fittings*]; *Oil and Gas Well Casing* (10 March 2008), NQ-2007-001 (CITT) at 7 [*Oil and Gas Well Casing*]; *Carbon Steel Welded Pipe* (20 August 2008), NQ-2008-001 (CITT) at 6.

41. With respect to the argument by Canadian Tire that the Tribunal should assess whether ice-cooled insulated containers and containers powered by other technologies also constitute like goods in relation to the subject goods, the Tribunal is of the view that the specific technology employed in thermoelectric containers (as described above) and the fact that it provides these containers with the capability to both cool and warm are key factors that render them fundamentally different from ice-cooled insulated containers on the one hand and those powered by other technologies (e.g. compressor-based units) on the other. While the Tribunal considers that these products and thermoelectric containers may be substitutable goods for certain cooling applications, this is not sufficient to conclude that they are like goods in relation to each other, in view of the distinctive technology and uses of thermoelectric containers.

42. Concerning the issue of classes of goods, for the purposes of its preliminary injury inquiry, the Tribunal considered that thermoelectric containers that provide cooling and warming with the use of a passive heat sink and a thermoelectric module constituted a single class of goods. However, as noted above, the Tribunal indicated that this issue would need to be fully addressed during an inquiry under section 42 of *SIMA*.

43. Accordingly, as noted above, the Tribunal, in the notice of commencement of inquiry, invited interested parties to file submissions on whether there was more than one class of goods in this inquiry. Specifically, the Tribunal requested that interested parties present facts and arguments on whether the following categories of thermoelectric containers constitute separate classes of goods: (1) thermoelectric containers used for travel, whether sold to consumers or to commercial users; (2) thermoelectric containers exclusively for home use, i.e. excluding those that can also be used for travel; (3) thermoelectric containers used for retail display; and (4) thermoelectric containers used as wine display/wine coolers.

44. Koolatron submitted that there is a single class of goods in this inquiry because of the similarities in appearance, composition, technology, functionality, methods of manufacture, marketing, channels of distribution, selling practices and end uses between the subject goods and the like goods.

45. Looking first at the physical characteristics of the goods, Koolatron argued that all thermoelectric containers, regardless of size or specific end use, have a similar physical appearance, similar technical process/functionality, similar production processes and components, and similar packaging. In particular, it stated that thermoelectric containers across all four of the potential classes identified by the Tribunal use the same materials. In Koolatron's view, this similar physical appearance is due to the use of identical, i.e. the Peltier effect-based, technology, which, it submitted, allows all containers to be used for either cooling or warming. Koolatron added that all thermoelectric containers are manufactured using the same method of construction. In this regard, it stated that it sometimes manufactures products in more than one of the potential classes at the same time on its production line, using the same employees.

46. In terms of market characteristics, Koolatron submitted that thermoelectric containers have similar or identical channels of distribution, as well as similar marketing methods and points of sale. It also submitted that prices in the proposed classes influence one another and that substitutability exists across the proposed classes. According to Koolatron, the marketing methods for all thermoelectric containers are directed at capturing mass-market, price-sensitive consumers and, as a result, price is not a distinguishing factor between the products contained in the proposed categories. On the issue of prices, Koolatron added that, in its view, the price of thermoelectric containers included in one of the proposed categories will have an impact on the price of thermoelectric containers included in other proposed categories.

47. With respect to customer needs and end uses, Koolatron submitted that the thermoelectric containers sold in the domestic market have similar or identical end uses across the proposed categories. Koolatron also argued that the thermoelectric containers marketed for sale as travel coolers and wine coolers and for home use and commercial use have essentially the same end use, i.e. to cool and/or warm temperature-sensitive liquids and solids prior to their consumption or other use. In this connection, it noted that, regardless of the market segment that is targeted, thermoelectric containers can generally be substituted and used for many applications, since all products have the same mechanical and functional properties.

48. The Tribunal also received submissions on this issue from parties opposed to a finding of injury. In particular, SWG and Product Specialties, two importers, filed submissions supporting multiple classes of goods. Mobicool, an exporter of thermoelectric containers in China, submitted that there was no injury to any class or subclass of the subject goods, but did not present arguments on whether the four proposed potential categories of thermoelectric containers constitute separate classes of goods.

49. SWG submitted that thermoelectric containers for travel and home use and wine coolers are separate classes of goods. Product Specialties submitted that the Tribunal should find that the four categories of goods proposed by the Tribunal constitute separate classes of goods.

50. Both SWG and Product Specialties submitted that thermoelectric containers used for travel are different in appearance, construction and end use compared to containers exclusively for home use, as the former are intended for both warming and cooling, are built with an AC/DC supply system and are mostly intended to be used as portable containers. They added that the thermoelectric containers which they import and sell are exclusively for home use, are not portable, are built with only an AC power supply system and can be used only for cooling. With respect to market characteristics, SWG stated that retailers sometimes sell all four categories of thermoelectric containers. However, thermoelectric containers for travel use are sold in a completely different department from that of the products for home use and target different consumers. In SWG's view, differences in shape, size and design allow each product class to fill its unique intended use, and substitution is almost impossible.

51. Finally, both SWG and Product Specialties submitted that thermoelectric containers used for travel fulfil an entirely different consumer need from thermoelectric containers for home use or used as wine display/wine coolers.

52. On September 11, 2008, after having considered the evidence and argument on the record, the Tribunal informed parties that it had determined that thermoelectric containers constituted a single class of goods. Accordingly, the Tribunal informed parties that it would conduct its injury analysis on the basis of a single class of goods. The following are the Tribunal's reasons for this determination.

53. In addressing the issue of classes of goods, the Tribunal typically examines whether goods allegedly included in separate classes of goods constitute like goods in relation to each other. If those goods are like goods in relation to each other, they will be regarded as comprising a single class of goods.⁸ In past inquiries, the Tribunal found that goods made of substantially the same materials and components, manufactured using similar methods of construction, that have essentially the same end use should be considered a single class of goods.⁹

8. See, for example, *Certain Fasteners* (7 January 2005), NQ-2004-005 (CITT) at 11; *Thermal Insulation Board* (11 April 1997), NQ-96-003 (CITT) at 10.

9. See, for example, *Leather Footwear* (27 December 2001), NQ-2001-003 (CITT) at 10.

54. Following this approach, the Tribunal considered whether there are sufficient differences between thermoelectric containers included in different proposed product categories, based on an analysis of the above-noted factors for determining “likeness”, to justify separating those goods into different classes.

55. The Tribunal is satisfied that, overall, while not identical in all respects to each other, thermoelectric containers used for travel, thermoelectric containers exclusively for home use, thermoelectric containers used for retail display and thermoelectric containers used as wine display/wine coolers have similar physical and market characteristics and similar end uses and closely resemble one another. Therefore, they are like goods in relation to one another.

56. With respect to physical characteristics, the evidence is clear that all thermoelectric containers are made of similar basic materials and components and are manufactured using similar methods of construction. Moreover, upon visual inspection of the physical exhibits on the record and a review of pictures and specifications of other models of thermoelectric containers filed in evidence, the Tribunal is of the view that, with the exception of thermoelectric containers that have soft sides, thermoelectric containers included in all four proposed classes have the same general physical appearance. All models have a sealed interior volume, a door or a lid and a thermoelectric module paired with a passive heat sink. Contrary to the submissions of SWG and Product Specialties, the preponderance of the evidence is that many containers can be used for either cooling or warming. With respect to thermoelectric containers that have soft sides, the Tribunal notes that they use different materials for their cover than containers with hard sides (fabric rather than plastic) which gives them a different appearance. However, the Tribunal is of the view that this difference in appearance is not sufficient to conclude that thermoelectric containers that have soft sides constitute a separate class of goods, given that they employ essentially the same technology and have uses that fulfill essentially the same customer needs as thermoelectric containers with hard sides.

57. In terms of market characteristics, the evidence adduced by Koolatron indicates that substitutions are sometimes possible between thermoelectric containers, irrespective of whether they are primarily marketed or intended for travel, home use or use as wine coolers. In particular, the product literature on the record demonstrates that the same product can be marketed for both home use and travel use and can be used for multiple purposes. For example, a product primarily intended or sold for use as a wine cooler can also be used to chill various other beverages and perishable food products. Koolatron submitted that the “thermoelectric box” that it uses in the manufacture of a four-bottle wine cooler can be fitted with either solid or clear doors and can be configured to be portable or for use in the home.¹⁰ In this regard, the Tribunal also notes that many models marketed as wine coolers or as containers for home or travel use, especially those that are configured with a clear lid or door, could undoubtedly be used by commercial buyers to display their products. The Tribunal also accepts Koolatron’s argument that most thermoelectric containers are sold through the same channels of distribution, in large part to mass merchandisers, and are marketed using methods geared at capturing mass-market customers. However, it warrants noting that thermoelectric containers used for retail display appear to be sold through different channels of distribution to specific commercial buyers having different customer needs.

58. Regarding the pricing of thermoelectric containers in each of the proposed categories, the Tribunal notes that SWG and Product Specialties have not argued that there are significant differences in prices among the categories.

10. Tribunal Exhibit NQ-2008-002-21.03, Administrative Record, Vol. 1 at 235-36, 273.

59. With respect to end uses and customer needs, the Tribunal is of the view that all thermoelectric containers have essentially the same end use, namely, the cooling or warming of temperature-sensitive liquids or solids. In this way, they all fulfil the same fundamental customer need.

60. In sum, thermoelectric containers are all similar in their basic physical characteristics and end uses, despite certain differences between some models in terms of features, such as size, shape, configuration of storage areas, or type and placement of doors.¹¹ Moreover, thermoelectric containers are, in a number of instances, substitutable across the proposed classes of goods. Thermoelectric containers are generally sold through the same channels of distribution, except for containers used for retail display. Similarly, on balance, the Tribunal is not convinced that price is a defining difference between thermoelectric containers in the four proposed categories. Accordingly, in the Tribunal's view, there is only one class of goods in this injury inquiry.

Domestic Industry

61. Subsection 2(1) of *SIMA* defines "domestic industry" as follows:

... the domestic producers as a whole of the like goods or those domestic producers whose collective production of the like goods constitutes a major proportion of the total domestic production of the like goods except that, where a domestic producer is related to an exporter or importer of dumped or subsidized goods, or is an importer of such goods, "domestic industry" may be interpreted as meaning the rest of those domestic producers.

62. The Tribunal must therefore determine whether there has been injury, or whether there is a threat of injury, against the domestic producers as a whole or those domestic producers whose production represents a major proportion of the total production of like goods.

63. As previously noted, there are only two domestic producers of thermoelectric containers: Koolatron and MTL Technologies. However, the Tribunal notes that Koolatron was also an importer of subject goods during the POI.¹²

64. As indicated in the definition of "domestic industry" in subsection 2(1) of *SIMA*, where a domestic producer is related to an exporter or importer of dumped or subsidized goods, or is an importer of such goods, that producer may be excluded from the "domestic industry". The Tribunal considers that the fundamental question is whether the domestic producer is essentially a producer of like goods in Canada or, instead, essentially an importer of dumped or subsidized goods and whether this results directly from its own importing activities or indirectly from being related to an importer or exporter of dumped or subsidized goods.¹³

65. According to Koolatron, its imports of the subject goods were a purely defensive measure undertaken to enable it to maintain production in Canada. Parties opposed characterized Koolatron's imports of the subject goods as self-serving, rejecting Koolatron's claim that it was pursuing a defensive import strategy intended to allow it to average down its production costs so as to mitigate the injury caused by the influx of the subject goods

11. In *Waterproof Footwear and Bottoms* (8 December 2000), NQ-2000-004 (CITT) at 8, the Tribunal stated that the described goods belonged to one class of goods, even if they came in numerous styles and varieties.

12. *Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-06A, Administrative Record, Vol. 1.1 at 127.

13. *Cross-Linked Polyethylene Tubing* (13 October 2006), NQ-2006-001 (CITT) at para. 56.

66. According to the evidence adduced by Koolatron, its importation of subject goods was done purely as a defensive measure in an attempt to maintain shelf space and supplier relationships with its customers.¹⁴ The evidence also indicates that the bulk of Koolatron's imports in 2006 and 2007 were imports of niche products. The witnesses for Koolatron explained that the importation of these products was an attempt to build market acceptance in Canada and that Koolatron wanted to manufacture eventually these products in Canada, which, in some cases, it did.¹⁵ As is discussed in greater detail below, the Tribunal further notes that Koolatron's imports of subject goods demonstrated a different trend from that seen for imports of subject goods by non-producers during the POI, having substantially decreased in the first half of 2008 compared to the first half of 2007, contrary to the overall spike in subject imports during the same period.

67. Moreover, the evidence on the prices at which subject goods were sold in the Canadian market and Koolatron's cost to manufacture like goods demonstrates that Koolatron's imports were not an aggressive measure designed to use imports to increase its market share at the expense of its domestic production. Rather, the evidence confirms that Koolatron's motive in importing the subject goods was defensive in nature, and that this decision resulted from the low prices of the subject goods compared to Koolatron's domestic manufacturing costs for the goods.¹⁶ In view of this evidence, the Tribunal accepts Koolatron's argument that it devised an import strategy to essentially average down the cost of its domestic production and average up its margins on its sales by mixing specific niche models of subject goods with its core domestic product line.

68. Therefore, on the basis of the foregoing, the Tribunal finds that Koolatron and MTL, which together account for the domestic production as a whole of the like goods, constitute the domestic industry for the purposes of the Tribunal's injury analysis. Since Koolatron accounted for the major proportion of the total domestic production during the POI, the Tribunal considers it appropriate to focus its analysis of injury on the performance indicators for Koolatron.¹⁷

Cross-cumulation

69. As noted above, the Tribunal must also determine whether it will make an assessment of the combined effect of the dumping and subsidizing of the subject goods, i.e. whether it will cross-cumulate. While subsection 42(3) of *SIMA* addresses cumulation, which is the assessment of the effect of the dumping of goods from more than one country, taken together, or of the subsidizing of goods from more than one country, taken together, there are no legislative provisions that directly address the issue of cross-cumulation.

70. However, as noted in previous cases, subsections 37.1(1) and (2) of the *Special Import Measures Regulations*¹⁸ prescribe certain factors for the Tribunal to consider in making its finding. These factors have, as their focus, the effect that dumped or subsidized goods have had or may have on a number of economic indices. In this regard, the effect of dumping and subsidizing of the same goods from a particular country (in

14. Manufacturer's Exhibit A-03 at para. 121, Administrative Record, Vol. 11.

15. Manufacturer's Exhibit A-03 at paras. 118-21, Administrative Record, Vol. 11; Manufacturer's Exhibit A-05 at paras. 10-13, Administrative Record, Vol. 11; Manufacturer's Exhibit A-04 (protected) at paras. 118-21, Administrative Record, Vol. 12; Manufacturer's Exhibit A-06 (protected) at paras. 10-13, Administrative Record, Vol. 12; *Transcript of Public Hearing*, Vol. 1, 10 November 2008, at 75, 190-93, 201-202; *Transcript of Public Hearing*, Vol. 2, 12 November 2008, at 281; *Transcript of In Camera Hearing*, Vol. 1, 10 November 2008, at 41-43.

16. *Protected Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-07A (protected), Administrative Record, Vol. 2.1 at 171, 192.

17. *Ibid.* at 152.

18. S.O.R./84-927 [*Regulations*].

this case China) is manifested in a single set of effects caused by pricing. It is therefore the Tribunal's view that, in the conduct of an injury analysis, it is not possible to isolate the effects caused by the dumping from the effects caused by the subsidizing. In reality, they are so closely intertwined as to render it impossible to allocate discrete portions to the dumping and the subsidizing respectively.¹⁹

71. Therefore, consistent with its longstanding view on the matter, the Tribunal will cross-cumulate the effects of the dumping and subsidizing of the subject goods in the present case.

INJURY

72. Subsection 37.1(1) of the *Regulations* prescribes that, in determining whether the dumping or subsidizing has caused injury to the domestic industry, the Tribunal consider the volume of the dumped or subsidized goods, their effect on the price of like goods and their resulting impact on the state of the domestic industry. Subsection 37.1(3) also directs the Tribunal to consider factors other than the dumping and subsidizing to ensure that any injury or threat of injury caused by those other factors is not attributed to the effect of the dumped or subsidized imports.

Volume of Imports of Dumped and Subsidized Goods

73. Pursuant to paragraph 37.1(1)(a) of the *Regulations*, the Tribunal will consider the volume of the dumped and subsidized goods and, in particular, whether there has been a significant increase in the volume of imports of the dumped and subsidized goods, either in absolute terms or relative to the production or consumption of the like goods.

74. Koolatron submitted that there had been an unprecedented increase in the volume of subject goods, particularly in 2007 and the first half of 2008.

75. The evidence on the record indicates that imports of the subject goods represented the vast majority of the total volume of imports from all sources of thermoelectric containers in every period of the POI. They attained, by far, their highest share of total imports of thermoelectric containers in the first six months of 2008.

76. Overall, the volume of imports of the subject goods decreased by 11 percent between 2005 and 2007. However, the volume of imports fluctuated within this period. Following a decrease of 28 percent from 2005 to 2006, imports of the subject goods increased by 23 percent from 2006 to 2007, and increased again by 82 percent in the first half of 2008 compared to the same period in 2007. The Tribunal notes that the volume of imports of the subject goods in the first six months of 2008 represented nearly 90 percent of the volume for all of 2007.

77. When the subject goods imported by Koolatron are excluded, the remaining imports followed the same trends as discussed above. However, the increases, decreases and year-over-year fluctuations in the volume of imports of the subject goods by non-producers were of a greater magnitude than those seen for total imports of the subject goods over the POI. In particular, the volume of imports of the subject goods by non-producers more than doubled in the first six months of 2008 compared to the same period in 2007.

19. See, for example, *Oil and Gas Well Casing* at 12; *Copper Rod* (28 March 2007), NQ-2006-003 (CITT) at 8; *Copper Pipe Fittings* at 12-13; *Grain Corn* (7 March 2001), NQ-2000-005 (CITT) at 14.

78. Koolatron's imports demonstrated a trend opposite to that seen for total imports of the subject goods. The volume of imports of the subject goods by Koolatron first increased between 2005 and 2006, then decreased between 2006 and 2007 for a net increase between 2005 and 2007. Its imports of the subject goods were considerably lower in the first half of 2008 than in the first half of 2007 whereas, as noted above, the volume of imports of the subject goods by non-producers more than doubled during the same period.

79. The United States is the only other source of imported thermoelectric containers in the Canadian market. Imports from the United States increased modestly between 2005 and 2007. However, they fell substantially in the first six months of 2008 compared to the first six months of 2007, to a level that amounted to less than 40 percent of the total volume of imports in 2007.²⁰

80. The volume of dumped and subsidized imports was substantially larger than the volume of domestic production of the like goods in every period of the POI. Further, the ratio of imports of the subject goods to domestic production increased by nearly 15 percent between 2005 and 2007. In the first six months of 2008, the very large increase in the volume of imports of the subject goods noted above, coupled with a decline in domestic production, led to a major increase in the ratio of imports of the subject goods to domestic production compared to the same period in 2007.

81. When Koolatron's imports are excluded, the data indicate that the remaining imports of the subject goods were still substantially larger than domestic production in all periods, except 2006. The ratio of imports of the subject goods by non-producers to the volume of domestic production decreased moderately between 2005 and 2007, as the former declined to a greater extent than the latter. In the first half of 2008, the ratio increased significantly, as the volume of non-producer imports of the subject goods increased while domestic production decreased.²¹

82. The *Regulations* also require the Tribunal to consider whether the volume of dumped and subsidized good increased relative to the consumption of the like goods, i.e. the volume of domestic sales of like goods.

83. The Tribunal notes that the volume of imports of the subject goods was larger than the volume of domestic sales of like goods in every period of the POI and that, further, the subject goods accounted for a larger share of the market in every period of the POI.

84. Between 2005 and 2007, the ratio of imports of the subject goods to domestic sales of like goods more than doubled. In the first half of 2008, the ratio reached a peak, increasing by more than 16 times compared to the same period in 2007. This result is due to the very large increase in the volume of imports of the subject goods, coupled with an even larger decrease in the volume of domestic sales of like goods.

20. *Protected Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-07A (protected), Administrative Record, Vol. 2.1 at 153-54; *Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-06A, Administrative Record, Vol. 1.1 at 151, 154.

21. *Protected Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-07A (protected), Administrative Record, Vol. 2.1 at 152-53; *Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-06A, Administrative Record, Vol. 1.1 at 151.

85. Excluding Koolatron's imports from the above analysis yields similar results. The volume of imports of the subject goods by non-producers still exceeded the volume of domestic sales of like goods in every period of the POI. The ratio of their imports of the subject goods to domestic sales of like goods in the first half of 2008 was more than 23 times larger than in the first half of 2007.²²

86. Basing its conclusion on the foregoing, the Tribunal is of the view that there was a significant increase in the absolute volume of imports of the subject goods, as well as a significant increase relative to the production and consumption of like goods during the POI.

87. The Tribunal notes that excluding Koolatron's imports of the subject goods does not change its assessment. The volume of imports of the subject goods by non-producers increased significantly from 2006 onward, both in absolute terms and relative to the production and consumption of the like goods.

Effects of Dumped and Subsidized Imports on Prices

88. Pursuant to paragraph 37.1(1)(b) of the *Regulations*, the Tribunal must consider the effects of the dumped and subsidized goods on the price of like goods and, in particular, whether the dumped and subsidized goods have significantly undercut or depressed the price of the like goods, or suppressed the price of the like goods by preventing increases for those like goods that would otherwise likely have occurred.

89. Koolatron submitted that thermoelectric containers are price-sensitive products and that, all other things being equal, purchasers at all trade levels favour the lowest price in their buying decision. It also submitted that because of the dominant position of mass merchandisers in the market, the prices they pay for thermoelectric containers have a significant impact on the prices that all purchasers are willing to pay. Further, since mass merchandisers closely monitor pricing, the price paid by one company affects the prices that its competitors are willing to pay.

90. Mobicool submitted that thermoelectric containers are not commodity goods and that purchasers consider a range of factors when making their decision. It submitted that respondents to the Tribunal's purchasers' questionnaire on market characteristics rated "product quality", "product meets technical specifications" and "reliability of supply" as the most important factors, with "lowest price" being a less important factor. Canadian Tire also characterized thermoelectric containers as non-commodity products.

91. The Tribunal agrees that price is not the only factor considered by purchasers when purchasing the subject and like goods. However, the evidence on the record clearly indicates that price is an important factor in the purchase decision. In this regard, the Tribunal notes that "product quality", "product meets technical specifications", "reliability of supply" and "lowest price" were each rated as a "very important" or "somewhat important" factor in the buying decisions of all 11 respondents to the Tribunal's purchasers' questionnaire on market characteristics. The Tribunal also notes that only one purchaser, responding to a question on how often the lowest-priced product wins a bid or sale, indicated that it "never" did so, with the remaining purchasers indicating that the lowest-priced product "always", "usually" or "sometimes" wins.²³

22. *Protected Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-07A (protected), Administrative Record, Vol. 2.1 at 153, 162, 165; *Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-06A, Administrative Record, Vol. 1.1 at 151, 162.

23. *Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-06A, Administrative Record, Vol. 1.1 at 136, 141.

92. Several witnesses from mass merchandisers at the hearing referred to the importance of price in their purchase decision for thermoelectric containers. The witness for Costco stated that, when sourcing product, its buyers will try to find the best item, then the best price for that item.²⁴ A witness for Canadian Tire testified that price is always a factor in its choice of supplier because it influences the retail prices at which goods can be offered and, consequently, the financial returns to Canadian Tire.²⁵

93. The Tribunal also heard that price is also an important consideration in consumers' purchase decisions for thermoelectric containers. According to a witness for Canadian Tire, one way to create demand for thermoelectric containers is to offer them at retail prices that consumers find attractive compared to the prices of ice-cooled insulated containers at the entry price point.²⁶ Further, the Tribunal heard that some retailers are just beginning to enter the wine cooler market and that the retail price is a very important consideration in making this product appealing to consumers.²⁷

94. The evidence shows that mass merchandisers purchase the majority of the subject and like goods.²⁸ In the Tribunal's view, while different mass merchandisers have different strategies with regard to how they position their prices in the marketplace, mass merchandisers and the importers who sell to them generally track their competitors' prices for identical or similar goods, which can influence their respective price targets.²⁹ Retail price targets, along with the margin that a retailer expects to achieve on the sale of the goods to its customers, determine the prices that it is willing to pay for the subject or like goods.

95. Canadian Tire is the dominant seller of thermoelectric containers for travel use. It submitted that its strategy for selling thermoelectric containers is to provide consumers with "exciting, new and exclusive" products in order to differentiate itself from its competitors, particularly those mass merchandisers that try to attract consumers on the basis of offering the lowest price. Canadian Tire explained that it spends time, money and effort to build awareness of products that bring customers to shop at Canadian Tire specifically. According to Canadian Tire, this means that it does not have to compete on price on similar items.³⁰

96. In the Tribunal's view, the fact that Canadian Tire is the dominant seller of thermoelectric containers in the Canadian market³¹ means that retail prices at Canadian Tire greatly influence retail prices at other retailers. In instances where other retailers are offering lower retail prices than Canadian Tire, Canadian Tire's desire to sell products at attractive price points³² pulls down retail prices generally and, consequently, affects the price at which retailers and importers seek to purchase thermoelectric containers.

24. *Transcript of Public Hearing*, Vol. 2, 12 November 2008, at 353.

25. *Ibid.* at 245-46.

26. *Ibid.* at 237-38, 295-97.

27. *Transcript of Public Hearing*, Vol. 3, 13 November 2008, at 400.

28. Manufacturer's Exhibit A-03 at para. 35, Administrative Record, Vol. 11; Tribunal Exhibit NQ-2008-002-RI-01 (protected) at 5-1, Administrative Record, Vol. 10; Tribunal Exhibit NQ-2008-002-RI-01A (protected) at 1-4, Administrative Record, Vol. 10; importers' questionnaire replies found under collective Tribunal Exhibit NQ-2008-002-13 (protected), Administrative Record, Vol. 6; Tribunal Exhibit NQ-2008-002-10.01A (protected), Administrative Record, Vol. 4 at 109-112.

29. *Transcript of Public Hearing*, Vol. 2, 12 November 2008, at 353; *Transcript of Public Hearing*, Vol. 3, 13 November 2008, at 383, 418.

30. Importer's Exhibit B-03 at paras. 9-23, Administrative Record, Vol. 13; *Transcript of Public Hearing*, Vol. 2, 12 November 2008, at 221.

31. *Transcript of Public Hearing*, Vol. 2, 12 November 2008, at 225.

32. *Ibid.* at 238, 245-46.

97. Finally, the Tribunal notes that, generally, the smaller the capacity of a thermoelectric container, the lower the purchase price paid by mass merchandisers.³³ In the Tribunal's view, it is reasonable to assume that the price of each product along a producer's thermoelectric container product line bears a logical relationship to each other product along its thermoelectric container continuum, having regard to relative capacity and other specific features. That being the case, it stands to reason that changes in the price that mass merchandisers pay for a particular size of thermoelectric container could influence the prices they are willing to pay for other sizes of containers. Accordingly, the prices of the subject goods could have an impact not only on like goods in sizes comparable to the subject goods, but also on the prices of other like goods, of different sizes.

Price Undercutting

98. Koolatron submitted that the prices of the subject goods imported by non-producers consistently undercut the prices of its like goods. According to Koolatron, this undercutting forced it to lower its prices in 2006 and 2007. However, despite this action, the prices of the subject goods continued to undercut the prices of its like goods.

99. The Tribunal notes that neither Canadian Tire nor Mobicool explicitly denied that the prices of the subject goods undercut the prices of the like goods.

100. The pricing data on the record clearly show that the average unit selling prices of the subject goods imported by non-producers significantly undercut the average unit selling prices of Koolatron's like goods throughout the POI.³⁴

101. An examination of the benchmark product data, which covers the vast majority of domestic sales of thermoelectric containers, confirms that price undercutting occurred not only in terms of average prices in the market as a whole, but also for specific products that are comparable. In fact, for the benchmark products, in every period where there were sales of both subject goods and like goods, the unit selling prices of the subject goods imported by non-producers undercut the unit selling prices of Koolatron's like goods. Further, individual non-producer data show that substantial price undercutting by the subject goods was a general occurrence.³⁵

102. As noted above, witnesses for Koolatron testified that it undertook a defensive import strategy to maintain shelf space at retailers because it was experiencing price undercutting by the subject goods. For example, Koolatron submitted that the unit selling prices of Mobicool's products to Canadian Tire undercut its unit selling prices of like goods. Witnesses for Koolatron indicated that the products that it chose to import to "fill holes in [its] product line" were those that it could not produce economically in Canada.³⁶

33. *Protected Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-07A (protected), Administrative Record, Vol. 2.1 at 181, 184; *Protected Pre-hearing Staff Report*, revised 10 November 2008, Tribunal Exhibit NQ-2008-002-07B (protected), Administrative Record, Vol. 2.1 at 230-34.

34. *Protected Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-07A (protected), Administrative Record, Vol. 2.1 at 171.

35. *Ibid.* at 184; *Protected Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-07B (protected), Administrative Record, Vol. 2.1 at 230-34.

36. *Transcript of Public Hearing*, Vol. 1, 10 November 2008, at 190-91.

103. The Tribunal notes that the unit selling prices of the subject goods imported by non-producers undercut Koolatron's "blended" price (i.e. its overall weighted average price for sales of both like goods and subject goods) in 2005, 2006 and the first half of 2007 and were only marginally higher in 2007 and the first half of 2008.³⁷ Accordingly, the Tribunal does not consider that Koolatron's import strategy negated the effects of price undercutting by the subject goods imported by non-producers.

104. The Tribunal heard testimony that the subject goods sometimes include additional features ("add-ons"), such as light-emitting diode temperature displays and/or power adapters, for the same price as like goods without these features.³⁸ In the Tribunal's view, in these situations, the price undercutting attributable to the subject goods is manifesting itself as greater value for the same money, rather than as a pure price advantage. Furthermore, it is reasonable to consider that the prices of the subject goods without these features (i.e. with features fully comparable to the domestic goods) would be even lower.

105. The Tribunal observes that only a narrow majority of replies to the Tribunal's purchasers' questionnaire on market characteristics give imports of the subject goods the price advantage over like goods.³⁹ (In comparison, the Tribunal notes that a large majority of respondents rated the like goods as comparable or as having the advantage for each of the non-price factors, including "product quality", "product meets technical specifications" and "reliability of supply".) However, the testimony of Tribunal witnesses confirms the market perception that price undercutting did indeed take place. The Tribunal also notes that one of the respondents to the purchasers' questionnaire that indicated Chinese goods have a price advantage was Canadian Tire, the dominant purchaser of travel coolers in the market.⁴⁰

106. Finally, the Tribunal notes the occurrence of price undercutting at Canadian Tire, which was a very large account for Koolatron until 2007, when Canadian Tire decided to make a transition from Koolatron to Mobicool as its major supplier. In 2008, all of Canadian Tire's purchases of thermoelectric containers were from Mobicool.⁴¹ As noted above, Canadian Tire was a dominant buyer of thermoelectric containers in the Canadian market throughout the POI.⁴²

107. Canadian Tire submitted that, prior to making its decision to change suppliers, its sales of thermoelectric containers predominantly supplied by Koolatron were stagnant and were not generating the same margins as ice-cooled insulated containers. However, it viewed thermoelectric containers as a product line with potential for growth in its camping business.⁴³ Canadian Tire believed that it could grow the market for thermoelectric containers by selling entry-level thermoelectric containers at a price point that was close enough to that of ice-cooled insulated containers to persuade consumers to move up to thermoelectric containers. This prompted Canadian Tire to spend a great amount of time and energy reviewing a product line that comprised only a very small portion of its business. In Canadian Tire's view, lower retail prices for thermoelectric containers would reduce the purchase barrier for consumers and would create an opportunity

37. *Protected Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-07A (protected), Administrative Record, Vol. 2.1 at 171.

38. *Transcript of Public Hearing*, Vol. 1, 10 November 2008, at 173; *Transcript of Public Hearing*, Vol. 2, 12 November 2008, at 250-51, 269-70.

39. *Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-06A, Administrative Record, Vol. 1.1 at 138.

40. Tribunal Exhibit NQ-2008-002-18.09, Administrative Record, Vol. 5.2 at 174; *Transcript of Public Hearing*, Vol. 2, 12 November 2008, at 225.

41. *Transcript of Public Hearing*, Vol. 1, 10 November 2008, at 82-84; *Transcript of Public Hearing*, Vol. 2, 12 November 2008, at 241-43; Importer's Exhibit B-03 at paras. 31-35, Administrative Record, Vol. 13.

42. *Transcript of Public Hearing*, Vol. 2, 12 November 2008, at 225.

43. *Ibid.* at 228, 236-40, 246; *Transcript of In Camera Hearing*, Vol. 2, 12 November 2008, at 135.

to educate customers on the benefits of thermoelectric containers. At the same time, the Tribunal heard that Canadian Tire wanted to increase its margin on sales of thermoelectric containers to enable it to “reinvest” in the product and justify allocating space to the product in its advertising flyers.⁴⁴

108. The evidence indicates that Canadian Tire acted on its views by purchasing the subject goods at prices that were substantially lower than the prices of Koolatron’s like goods, which, in the Tribunal’s view, probably enabled it to further grow the business and, presumably, to meet its desired retail price points for entry-level thermoelectric containers.⁴⁵ The Tribunal heard *in camera* testimony that the transfer from Koolatron to Mobicool positively affected Canadian Tire’s margins to a significant extent.⁴⁶

109. The Tribunal notes an e-mail exchange between Koolatron and Canadian Tire in which Canadian Tire states that a “big reason” why it transferred its purchases to Mobicool was that Koolatron was no longer “cost-competitive”.⁴⁷

110. The evidence also indicates that Canadian Tire had concerns about other aspects of its relationship with Koolatron. First, Canadian Tire was disappointed to learn that Koolatron was selling similar products to Costco, which was counter to its expectation that Koolatron would provide it with exclusive products in respect of which Canadian Tire invested a great deal of marketing effort. Canadian Tire was concerned about the fact that it was competing head-to-head with the same product in the market, which was not consistent with its marketing philosophy of “exciting, new and exclusive” products.⁴⁸ Canadian Tire also expressed concern about certain issues of inventory management with Koolatron.⁴⁹ Further, Canadian Tire indicated a preference for certain features of Mobicool’s products, believing that they offered a better value for consumers.⁵⁰ Finally, Canadian Tire alleged that Koolatron was not committed to product innovation or to forming a strategic business partnership with it based on the provision of “exciting, new and exclusive” products.⁵¹

111. With respect to these issues, the Tribunal notes that, in its reply to the Tribunal’s purchasers’ questionnaire on market characteristics, Canadian Tire indicated that the subject goods had a price advantage over like goods, but that the two were comparable in terms of quality. Further, it confirmed in testimony that there were no quality issues with Koolatron’s like goods that would have caused Canadian Tire to stop purchasing them.⁵²

44. *Transcript of Public Hearing*, Vol. 2, 12 November 2008, at 233-40, 246, 295-96.

45. *Ibid.* at 245, 270-72, 287; Tribunal Exhibit NQ-2008-002-10.01A (protected), Administrative Record, Vol. 4 at 109-112; Tribunal Exhibit NQ-2008-002-13.10 (protected), Administrative Record, Vol. 6 at 195-97; Tribunal Exhibit NQ-2008-002-RI-01 (protected), at 5-1, Administrative Record, Vol. 10.

46. *Transcript of In Camera Hearing*, Vol. 2, 12 November 2008, at 119-20.

47. Manufacturer’s Exhibit A-06 (protected), tab 3, Administrative Record, Vol. 12; Manufacturer’s Exhibit A-07 at 11, Administrative Record, Vol. 11.

48. *Transcript of Public Hearing*, Vol. 1, 10 November 2008, at 52; *Transcript of In Camera Hearing*, Vol. 2, 12 November 2008, at 104, 105, 115, 124; Importer’s Exhibit B-03 at 10, Administrative Record, Vol. 13.

49. *Transcript of In Camera Hearing*, Vol. 2, 12 November 2008, at 106; Importer’s Exhibit B-03 at para. 58, Administrative Record, Vol. 13.

50. *Transcript of Public Hearing*, Vol. 2, 12 November 2008, at 249-51.

51. Importer’s Exhibit B-03 at 4-8, Administrative Record, Vol. 13.

52. *Transcript of Public Hearing*, Vol. 2, 12 November 2008, at 250; Tribunal Exhibit NQ-2008-002-18.09, Administrative Record, Vol. 5.2 at 174.

112. When questioned as to what way Koolatron did not meet the strategic objectives desired by Canadian Tire, a witness stated that the issue came down to price and Koolatron's inability to offer a product that would allow Canadian Tire to reposition its retail prices.⁵³

113. Further, although product or brand exclusivity was important to Canadian Tire, and it was concerned about exclusivity in relation to sales to Costco in particular, as discussed above, the Tribunal notes that there was never any written agreement between Canadian Tire and Koolatron on the issue of exclusivity,⁵⁴ nor does there appear to have been a formal written agreement between Canadian Tire and Mobicool that would have been the decisive factor in Canadian Tire's decision to move sales away from Koolatron.⁵⁵

114. In summary, the Tribunal is of the view that, while significant irritants existed in the business relationship between Canadian Tire and Koolatron that may have influenced Canadian Tire's decision to move its thermoelectric container account from Koolatron to Mobicool, the evidence demonstrates that price and its impact on margins were, ultimately, the main consideration that prompted Canadian Tire to transfer its thermoelectric account to Mobicool.

115. On the basis of the foregoing analysis, the Tribunal is convinced that the evidence on the record indicates that, the prices of the dumped and subsidized goods significantly undercut the prices of the like goods in the Canadian market over the POI.

Price Depression

116. Koolatron argued that its decision to lower its prices for like goods in 2006 and 2007 was solely attributable to imports of the subject goods, as imports from the United States, the only other source of thermoelectric containers, were priced higher than like goods in all periods of the POI, except in 2008.

117. The Tribunal notes that parties opposed did not explicitly contradict Koolatron's submissions that it had to lower its prices during the POI.

118. The evidence indicates that Koolatron's average unit selling prices for the like goods declined considerably between 2005 and 2007, then recovered in small measure in the first half of 2008, but only to a level that was still lower than at the beginning of the POI. The price depression is also evident in the data for the benchmark products, which show price declines for each of the three products for which Koolatron reported sales of like goods over the seven quarters examined. Further, Koolatron's average unit selling prices to most of its largest accounts also declined over the POI.⁵⁶

119. In the Tribunal's view, given the importance of price in thermoelectric container purchasing decisions and the fact that the price depression occurred at a time when there was extensive price undercutting by the subject goods in the market, it is reasonable to conclude that the prices of the subject

53. *Transcript of Public Hearing*, Vol. 2, 12 November 2008, at 287-89.

54. *Transcript of Public Hearing*, Vol. 1, 10 November 2008, at 77-78; *Transcript of In Camera Hearing*, Vol. 2, 12 November 2008, at 124, 125.

55. *Transcript of Public Hearing*, Vol. 2, 12 November 2008, at 264-65, 268, 290-93.

56. *Protected Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-07A (protected), Administrative Record, Vol. 2.1 at 171, 185-87; *Protected Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-07B (protected), Vol. 2.1 at 230-32; Tribunal Exhibit NQ-2008-002-RI-01 (protected) at 5-1, Administrative Record, Vol. 10; Tribunal Exhibit NQ-2008-002-10.01A (protected), Administrative Record, Vol. 4 at 109-112.

goods were the cause of Koolatron reducing its own selling prices, as it needed to compete with the subject imports. The Tribunal concludes, therefore, that the dumped and subsidized goods significantly depressed the prices of like goods.

Price Suppression

120. Koolatron submitted that it faced significant increases in its costs of materials over the POI and that the presence of the subject goods in the market prevented it from passing along these cost increases to its customers. Contrary to Koolatron's submissions, the cost of goods manufactured statement that it provided indicates only modest increases in the unit cost of direct materials.

121. In the Tribunal's view, however, price suppression relates to whether a producer is able to recover increases in its total manufacturing costs, not just its material costs. In this regard, the evidence indicates that Koolatron's overall unit cost of goods manufactured, i.e. the cost of direct materials, direct labour and overhead, increased considerably over the POI, but that Koolatron was not able to increase its prices to cover this cost increase.⁵⁷

122. The Tribunal also heard from Koolatron with respect to one product in particular, its new four-bottle wine cooler, that it was unable to set the price at a profitable level due to the prices of the subject goods.⁵⁸

123. In view of the foregoing, the Tribunal is of the view that the dumped and subsidized goods have suppressed the price of like goods by preventing price increases that would have otherwise occurred.

Conclusion

124. In summary, the Tribunal concludes that the dumped and subsidized goods have significantly undercut, depressed and suppressed the prices of like goods in the Canadian market.

Impact of Dumped and Subsidized Imports on the Domestic Industry

125. Paragraph 37.1(1)(c) of the *Regulations* requires the Tribunal to consider the impact of the dumped and subsidized goods on the domestic industry.

126. Koolatron argued that the subject goods imported by non-producers have resulted in declines in output, sales, market share, profits, capacity utilization and employment.

127. Canadian Tire and Mobicool argued that any injury experienced by Koolatron was not caused by the subject goods.

Production, Capacity and Capacity Utilization

128. Koolatron's production increased from 2005 to 2006, before decreasing significantly in 2007 to a level that was below the 2005 level. The decline in production deepened in the first half of 2008 compared to the first half of 2007.⁵⁹

57. *Protected Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-07A (protected), Administrative Record, Vol. 2.1 at 192.

58. Manufacturer's Exhibit A-03 at paras. 90-95, Administrative Record, Vol. 11.

59. *Protected Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-07A (protected), Administrative Record, Vol. 2.1 at 152.

129. Koolatron's practical plant capacity remained stable throughout the POI. Its capacity utilization rate increased moderately in 2006, before decreasing significantly in 2007, for a net decrease of one third between 2005 and 2007. Koolatron's capacity utilization rate fell even further in the first six months of 2008 compared to the first six months of 2007, declining by 60 percent during that period. The Tribunal notes that Koolatron's capacity utilization rate remained low throughout the POI, especially in 2007 and during the first six months of 2008.⁶⁰

Sales From Domestic Production and Market Share

130. Between 2005 and 2007, the size of the Canadian market experienced a net decline of 22 percent, the result of a decrease of 31 percent in 2006 followed by an increase of 13 percent in 2007.

131. In contrast, Koolatron's sales of like goods increased slightly in 2006. In the Tribunal's view, this result is due to the fact that, as discussed above, Koolatron lowered its prices in order to compete with the prices of the subject goods. In terms of market share, the portion represented by Koolatron's sales of like goods increased moderately in 2006. At the same time, the market share held by non-producers' imports of the subject goods declined by more than 20 percentage points.⁶¹

132. However, in 2007, the situation deteriorated substantially for Koolatron, as its sales of like goods fell dramatically in an expanding market. Koolatron saw its market share decrease by approximately two thirds, while the market share held by non-producers' imports of the subject goods recovered the more than 20 percentage points lost in 2006. The Tribunal notes that virtually all of Koolatron's sales of like goods in 2007 occurred in the first six months of the year.⁶² A major part of its substantial decrease in sales volume in 2007, as discussed above, was the loss of a large volume of sales to Canadian Tire, a very large account of Koolatron's, because of price undercutting by the subject goods.

133. The situation continued to worsen for Koolatron in the first six months of 2008. Although the Canadian market increased by 37 percent in this period compared to the same period in 2007, Koolatron's sales of like goods virtually collapsed while its market share fell precipitously to an almost insignificant level. In contrast, during the first six months of 2008, the market share held by non-producers' imports of the subject goods almost doubled, achieving an unprecedented level of dominance in the Canadian market.⁶³

60. *Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-06A, Administrative Record, Vol. 1.1 at 151; *Protected Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-07A (protected), Administrative Record, Vol. 2.1 at 196.

61. *Protected Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-07A (protected), Administrative Record, Vol. 2.1 at 165, 167; *Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-06A, Administrative Record, Vol. 1.1 at 151, 162; Manufacturer's Exhibit A-03 at para. 53, Administrative Record, Vol. 11.

62. *Protected Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-07A (protected), Administrative Record, Vol. 2.1 at 165-67; *Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-06A, Administrative Record, Vol. 1.1 at 151.

63. *Protected Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-07A (protected), Administrative Record, Vol. 2.1 at 165-67; *Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-06A, Administrative Record, Vol. 1.1 at 151; Manufacturer's Exhibit A-03 at para. 53, Administrative Record, Vol. 11.

Financial Results

134. Koolatron submitted that its financial performance for sales of like goods in the Canadian market deteriorated steadily throughout the POI, with significant losses in the last two years.

135. The evidence on the record supports Koolatron's claim that it began suffering net losses in 2006, which grew significantly in 2007. The Tribunal notes that the net loss experienced by Koolatron in the first six months of 2008 was almost as large as its entire net loss in 2007. On a per-unit basis, Koolatron's results follow a similar trend, except that its per-unit loss in the first six months of 2008 was significantly greater than for all of 2007 because of the near total elimination of domestic sales of the like goods in the first six months of 2008.⁶⁴

Employment and Productivity

136. Koolatron submitted that, in July 2007, it had to lay off most of its full-time production workers due to lower sales of like goods and, consequently, lower production.

137. The evidence on the record shows that direct employment at Koolatron followed a declining trend throughout the POI, decreasing by 10 percent in 2006, then by 40 percent in 2007, for a net decrease of 46 percent between 2005 and 2007. Direct employment fell by 61 percent in the first six months of 2008 compared with the same period in 2007. Wages generally followed a similar trend.⁶⁵

138. Regarding productivity, the data show that, over the POI, there was an increase in the number of units produced per employee and per hour.⁶⁶

Other Indicators

139. The Tribunal notes that paragraph 37.1(1)(c) of the *Regulations* prescribes that the Tribunal consider certain other factors, in addition to those discussed above, in its assessment of the impact of the dumped and subsidized goods on the domestic industry.

140. With regard to one of these factors, inventories, the evidence on the record shows that Koolatron's level of inventories increased significantly from 2005 to 2007, even though its production levels decreased considerably.⁶⁷

141. Paragraph 37.1(1)(c) also prescribes that the Tribunal consider in its assessment "... the magnitude of the margin of dumping or amount of subsidy in respect of the dumped or subsidized goods ...". As noted above, the CBSA determined that the weighted average margin of dumping, expressed as a percentage of the export price, was 30.8 percent and that the weighted average amount of subsidy, expressed as a percentage of the export price, was 9.9 percent. The Tribunal is of the view that margins of dumping and subsidy amounts of these magnitudes are potentially significant for a price-sensitive product such as thermoelectric containers.⁶⁸

64. *Protected Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-07A (protected), Administrative Record, Vol. 2.1 at 188.

65. *Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-06A, Administrative Record, Vol. 1.1 at 151, 194; *Protected Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-07A (protected), Administrative Record, Vol. 2.1 at 194.

66. *Protected Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-07A (protected), Administrative Record, Vol. 2.1 at 195.

67. *Ibid.* at 152, 198.

68. Tribunal Exhibit NQ-2008-002-01, Administrative Record, Vol. 1 at 16; Tribunal Exhibit NQ-2008-002-04A, Administrative Record, Vol. 1 at 211.36

142. Finally, with regard to the remaining prescribed factors, namely, return on investment, cash flow, growth and ability to raise capital, other than Koolatron's submissions, there is little or no evidence with respect to the impact of the subject goods on these other factors. It is reasonable, however, in view of the effects of the subject goods on Koolatron's financial performance, to expect that it would have also experienced negative effects in these related areas as well.

Conclusion

143. As discussed above, there was a significant increase in the volume of imports of the subject goods during the POI, at prices that significantly undercut the prices of like goods, which forced Koolatron to lower its prices in an effort to compete and prevented it from passing on increases in costs to its customers. Ultimately, Koolatron lost significant market share to the subject goods, which led to a substantial deterioration in production, capacity utilization, sales of like goods, employment and financial results. The Tribunal does not consider that the modestly positive results with respect to productivity negate the significant decreases observed in the other performance indicators and concludes, therefore, that the domestic industry experienced injurious effects from the dumped and subsidized goods.

144. The Tribunal also concludes that this analysis demonstrates that the injurious effects were material and, accordingly, constitute injury, as defined in subsection 2(1) of *SIMA*.

Other Factors

145. Parties opposed made submissions with respect to several factors other than the dumping and subsidizing that they argued were responsible for any injury experienced by Koolatron. The Tribunal carefully considered these factors, as well as the other factors prescribed by paragraph 37.1(3)(b) of the *Regulations*, to ensure that any injury caused by those other factors is not attributed to the effects of the subject goods. Following is the Tribunal's assessment of the relevant factors.

Imports of the Subject Goods by Koolatron

146. Parties opposed alleged that Koolatron's own imports of the subject goods exacerbated its situation by taking away sales from its like goods.

147. The Tribunal does not accept the argument that Koolatron's imports of the subject goods contributed significantly to its loss of sales of like goods. In 2006, although Koolatron increased its sales of the subject goods, its sales of like goods remained steady. In 2007 and the first half of 2008, when Koolatron's sales of like goods fell, its sales of subject goods also fell, but sales of the subject goods by non-producers more than doubled. Further, sales of the subject goods by non-producers were larger in every period of the POI than Koolatron's sales of the subject goods.⁶⁹ The Tribunal considers, therefore, that it was the sales of subject goods by non-producers that resulted in a reduction in Koolatron's sales of like goods and not Koolatron's sales from imports.

148. Koolatron testified that its imports of the subject goods were niche products that it was unable to produce profitably in Canada because of the presence of the subject goods in the domestic market.⁷⁰ It is also clear, as discussed above, that, regardless of the pricing of Koolatron's imports, the injury caused by the

69. *Protected Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-07A (protected), Administrative Record, Vol. 2.1 at 165-67.

70. *Transcript of Public Hearing*, Vol. 1, 10 November 2008, at 190-92.

dumped prices of the non-producer imports was material. The Tribunal does not consider, therefore, that any effect of Koolatron's imports of the subject goods on its performance during the POI negates the injury caused by imports of the subject goods by non-producers.

Koolatron's Relationship With Canadian Tire

149. As discussed above, Canadian Tire and Mobicool submitted that the main cause of any injury suffered by Koolatron with respect to its sales to Canadian Tire was the deterioration of its relationship with Canadian Tire.

150. For the reasons indicated above, the Tribunal is of the view that it was the price of the subject goods and not other aspects of the relationship between Canadian Tire and Koolatron that was the main factor that resulted in the Canadian Tire decision to transfer its purchases from Koolatron to Mobicool.

Competition From Substitute Products

151. According to Canadian Tire, competition from substitute products, such as ice-cooled insulated containers and containers that use compressor technology, was another factor responsible for the injury experienced by Koolatron.

152. The Tribunal heard from several witnesses that thermoelectric containers face competition from both less expensive ice-cooled insulated containers and more expensive compressor-based products. These witnesses indicated the importance of the price differential between thermoelectric containers and substitute products in terms of increasing demand for thermoelectric containers. They also indicated the challenge in building consumer awareness of the product and the capabilities of its technology in order to grow sales relative to substitute products.⁷¹

153. The Tribunal observes that the size of the Canadian market for thermoelectric containers has grown steadily since 2006 and that the decline in that year appears to have been chiefly due to the one-time actions of a large player.⁷² Furthermore, the Tribunal notes that thermoelectric coolers compete with substitute products only in particular parts of the product range (e.g. larger home/travel thermoelectric coolers compete with compressor-based "dorm fridges"). The Tribunal does not accept, therefore, the proposition that substitute products took market share away from thermoelectric containers. Furthermore, regardless of any impact of the price of substitute products on thermoelectric coolers in the pertinent areas of competition, it is clear, as discussed above, that the pricing of non-producer imports caused very significant injury.

Koolatron's Production Strategy and Productivity

154. Canadian Tire argued that Koolatron failed to take advantages of economies of scale and should look to see where its efficiencies lie instead of trying to "do it all". According to Canadian Tire, Koolatron has a comparative advantage in large containers because of the higher cost of transporting large

71. *Ibid.* at 53, 85, 96, 134, 164, 181; *Transcript of Public Hearing*, Vol. 2, 12 November 2008, at 233-34, 236-38, 296-99; *Transcript of Public Hearing*, Vol. 3, 13 November 2008, at 391-92, 416-17, 425-27; *Transcript of In Camera Hearing*, Vol. 3, 13 November 2008, at 167.

72. *Protected Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-07A (protected), Administrative Record, Vol. 2.1 at 165; *Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-06A, Administrative Record, Vol. 1.1 at 151; Tribunal Exhibit NQ-2008-002-10.01C (protected), Administrative Record, Vol. 4 at 120.5, 120.6; importers' questionnaire replies found under collective Tribunal Exhibit NQ-2008-002-13 (protected), Administrative Record, Vol. 6.

thermoelectric containers from China. Canadian Tire further argued that domestic firms must move from a mindset of offering finished goods for sale domestically and must seek to organize themselves and their activities within global value chains. Finally, Canadian Tire suggested that the Tribunal assess Koolatron's productivity relative to that of Mobicool's.

155. The Tribunal does not accept the contention that the injury sustained by Koolatron was due to low productivity, which was exacerbated, according to Canadian Tire, by its insistence on producing a full range of thermoelectric containers, rather than focusing on those larger units in respect of which it was competitively better-positioned. In fact, as noted above, Koolatron improved its productivity in terms of the number of units produced per employee and per hour over the POI.

156. The Tribunal is also of the view that Koolatron will have the opportunity to further enhance productivity through the realization of new economies of scale from the increase in demand for like goods expected to result from the elimination of the negative effects of dumping and subsidizing from the domestic market.

157. Further, the Tribunal notes that there were significant volumes of large-sized containers imported⁷³ during the POI, which undercut the price of like goods and, in the Tribunal's view, contributed to the injury experienced by Koolatron.

158. Canadian Tire is essentially arguing that Koolatron should be mitigating the injury being caused to it by the subject goods by importing certain of these same goods. In the Tribunal's view, *SIMA* does not require the domestic industry to try to mitigate injury being caused to it in this manner.

Inability to Compete With Low-Cost Goods

159. Mobicool submitted that the evidence indicated that it had not obtained the Canadian Tire account because of dumping and that, even at non-dumped prices, it would retain that business. To support its argument, Mobicool compared its non-dumped landed prices (i.e. normal values, adjusted for freight, brokerage and profit) to Koolatron's selling prices for allegedly similar models of thermoelectric containers. It was suggested that these subject goods could not be considered to have caused Koolatron's injury if, even in the absence of dumping and subsidizing, the landed price of those goods would have been less than the price of the comparable like goods.

160. In assessing Mobicool's argument, the Tribunal first notes that Mobicool disregards the fact, as discussed above, that, while price is a key consideration in the purchasing decisions of mass merchandisers, it is not the only consideration. In this regard, it is the Tribunal's view that a narrowing of the price differential between the subject and like goods resulting from the elimination of dumping and subsidizing would allow other non-price factors, in respect of which Koolatron was rated comparable or superior to its subject goods counterparts, to acquire greater prominence in retailer purchasing decisions. Indeed, the evidence shows that, since the application of duties, Koolatron's sales have improved.⁷⁴

73. *Protected Pre-hearing Staff Report*, revised 20 October 2008, Tribunal Exhibit NQ-2008-002-07B (protected), Administrative Record, Vol. 2.1 at 231, 237, 239.

74. *Transcript of Public Hearing*, Vol. 1, 10 November 2008, at 35-36, 168, 201-202; Tribunal Exhibit NQ-2008-002-34.01, Administrative Record, Vol. 1.3 at 50-51; Manufacturer's Exhibit A-04 (protected) at paras. 99-102, Administrative Record, Vol. 12; Manufacturer's Exhibit A-06 (protected) at paras. 27-29, 38, 47-51, Appendices 9, 10, Administrative Record, Vol. 12; Manufacturer's Exhibit A-03 at paras. 99-102, Administrative Record, Vol. 11; Manufacturer's Exhibit A-05 at paras. 27-29, 38, 47-51, Administrative Record, Vol. 11.

161. The Tribunal also notes that Mobicool's costs and pricing for these products, in the particular time frame used by the CBSA to determine normal values, are not necessarily representative of the costs and pricing of the subject goods from all Chinese producers. Further, neither Mobicool's nor Koolatron's costs and pricing as shown for this time period were necessarily consistent throughout the POI. As well, the Tribunal notes the evidence that certain mass merchandisers are willing to pay a premium for domestic goods because of the benefits of having a local supplier, e.g. better inventory management.⁷⁵ This would also affect the perceived gap between Mobicool's prices and Koolatron's prices. Furthermore, even if the Tribunal were to conclude that the comparison were valid for any of the goods selected, despite the foregoing uncertainties, the Tribunal is of the view that the dumping and subsidizing would still have been a cause of injury.

162. Accordingly, the Tribunal is not convinced that any injury resulting from competition from Mobicool's low-priced goods is sufficient to sever the causal link that it determined exists between the dumping and subsidizing of the subject goods and the injury experienced by Koolatron.

Conclusion

163. The Tribunal is of the view that any injurious effect that may be attributable to the above factors does not negate its conclusion that the dumping and subsidizing of the subject goods have caused injury as defined in subsection 2(1) of *SIMA*.

EXCLUSIONS

Product Exclusions

164. The Tribunal received requests for product exclusions from four participants, namely, Canadian Tire, Hus-Tek, Fusion Products Ltd. (Fusion) and Product Specialties. Koolatron either opposed or did not consent to all these requests. The Tribunal will address each request separately.

165. At the outset, the Tribunal notes that it has indicated in past decisions that product exclusions are granted only in exceptional circumstances.⁷⁶ In *Stainless Steel Wire*,⁷⁷ the Tribunal summarized its views on the matter of product exclusions as follows:

It is well established that the Tribunal has the discretion to grant product exclusions under subsection 43(1) of *SIMA*. *The fundamental principle is that the Tribunal will grant product exclusions only when it is of the view that such exclusions will not cause injury to the domestic industry.* The Tribunal has granted product exclusions for particular products in circumstances when, for instance, the domestic industry does not produce those particular products. The Tribunal also considers factors such as whether there is any domestic production of substitutable or competing goods, whether the domestic industry is an "active supplier" of the product or whether it normally produces the product or whether the domestic industry has the capability of producing the product.

[Emphasis added, footnotes omitted]

75. *Transcript of Public Hearing*, Vol. 1, 10 November 2008, at 149; *Transcript of Public Hearing*, Vol. 2, 12 November 2008, at 362; *Transcript of Public Hearing*, Vol. 3, 13 November 2008, at 414; *Transcript of In Camera Hearing*, Vol. 3, 13 November 2008, at 184, 193.

76. *Laminate Flooring* (16 June 2005), NQ-2004-006 (CITT) at 30; *Cold-rolled Steel Sheet* (13 September 1999), NQ-99-001 (CITT) at 33.

77. (30 July 2004), NQ-2004-001 (CITT) at 22.

166. Thus, product exclusions are an extraordinary remedy. As it recently stated in *Carbon Steel Welded Pipe*,⁷⁸ when the Tribunal is requested to grant an exclusion, i.e. to exclude from its finding certain goods that would normally be covered by the finding, the onus is upon the requester to demonstrate that imports of the goods for which the exclusion is requested will not be injurious to the domestic industry.

Canadian Tire

167. Canadian Tire requested product exclusions for two types of thermoelectric containers, namely, thermoelectric containers with hard sides having a capacity of less than 18 litres and thermoelectric containers with soft (fabric) sides whether or not made with a rigid interior. As a basis for these requests, Canadian Tire submitted that such products are not manufactured in Canada and are imported by Koolatron. However, these arguments are factually inaccurate. In view of the abundant evidence of actual or imminent domestic production of substitutable goods by Koolatron, the Tribunal denies Canadian Tire's requests.

168. With respect to thermoelectric containers with hard sides and a capacity of less than 18 litres, the Tribunal notes that Koolatron provided as physical exhibits containers having such characteristics and produced in Canada.⁷⁹ The evidence also indicates that Koolatron currently manufactures a thermoelectric container with a capacity of 17 litres and manufactured this container throughout the POI.⁸⁰ In addition, Koolatron provided evidence that it sold this model to Canadian Tire in 2005 and 2006 and that this model accounted for all of Koolatron's sales of domestically produced travel containers with a capacity between 15 and 25 litres in the Canadian market during the seven quarters for which benchmark product information was collected (i.e. Q4 2006 to Q2 2008).⁸¹ Koolatron also currently produces two other models of like goods which are covered by the definition of goods for which this exclusion is requested.⁸² While it is true that Koolatron discontinued the production of one such model (i.e. a 7-litre model) sometime in 2005 or 2006,⁸³ this model is now back in production since the issuance of the CBSA's preliminary determination.⁸⁴ This suggests that this model was not produced by Koolatron during certain periods because it could not do it profitably due to the presence of dumped and subsidized imports.

169. With respect to thermoelectric containers with soft sides, Koolatron started to manufacture such a container at its facility in Brantford in September 2008. This model was filed as a physical exhibit.⁸⁵ Koolatron has produced 1,200 units of this model to date.⁸⁶ Koolatron is also currently selling this model to one of its customers.⁸⁷ In addition, the evidence indicates that Koolatron is committed to produce other models of soft-sided thermoelectric containers of various sizes in 2009. In particular, the evidence indicates that Koolatron has made plans for the production of soft-sided thermoelectric containers of 7, 10, 13 and 32 litres.⁸⁸

78. *Carbon Steel Welded Pipe* (20 August 2008), NQ-2008-001 (CITT) at 20.

79. Physical Exhibits A-10, A-16 and A-17.

80. Tribunal Exhibit NQ-2008-002-9.01, Administrative Record, Vol. 3 at 11-13; Tribunal Exhibit NQ-2008-002-34.01, Administrative Record, Vol. 1.3 at 106-120; Tribunal Exhibit NQ-2008-002-35.01 (protected), Administrative Record, Vol. 2.3 at 163-191.

81. *Transcript of Public Hearing*, Vol. 2, 12 November 2008, at 278-79; Tribunal Exhibit NQ-2008-002-34.01, Vol. 1.3 at 112; *Transcript of Public Hearing*, Vol. 1, 10 November 2008, at 115-17.

82. Tribunal Exhibit NQ-2008-002-34.01, Administrative Record, Vol. 1.3, tabs 4, 5; Tribunal Exhibit NQ-2008-002-35.01 (protected), Administrative Record, Vol. 2.3, tabs 4, 5.

83. *Transcript of Public Hearing*, Vol. 1, 10 November 2008, at 33, 167-68.

84. Tribunal Exhibit NQ-2008-002-34.01, Administrative Record, Vol. 1.3 at 116-117; *Transcript of Public Hearing*, Vol. 1, 10 November 2008, at 33, 167-68.

85. Physical Exhibit A-09.

86. *Transcript of Public Hearing*, Vol. 1, 10 November 2008 at 35-36, 168, 201-202.

87. *Transcript of In Camera Hearing*, Vol. 1, 10 November 2008, at 41-43; *Transcript of Public Hearing*, Vol. 3, 13 November 2008, at 408.

88. Tribunal Exhibit NQ-2008-002-34.01, Administrative Record, Vol. 1.3 at 122-36; Tribunal Exhibit NQ-2008-002-35.01 (protected), Administrative Record, Vol. 2.3 at 193-212.

170. Thus, the evidence is clear that Koolatron produces or is capable of producing products that are substitutable for the products for which Canadian Tire seeks exclusions. In this regard, the Tribunal notes that Canadian Tire has not argued that Koolatron's products do not directly compete with or are not substitutable for the products for which Canadian Tire requested exclusions. Accordingly, the Tribunal is of the view that, if Canadian Tire's requests were granted, imports of these dumped and subsidized goods from China would likely be injurious to the domestic industry.

Hus-Tek

171. Hus-Tek requested product exclusions for the same two types of products identified by Canadian Tire. Hus-Tek's requests are also solely based on arguments that such products are not manufactured by domestic producers and are imported by Koolatron. The Tribunal denies these requests for the aforementioned reasons.

Fusion

172. Fusion requested product exclusions for a 10-litre DC cooler/warmer and a 24-litre AC/DC cooler/warmer. As a basis for these requests, Fusion submitted that these products are not manufactured in Canada. However, the evidence indicates that Koolatron manufactures and sells very similar products that are substitutable for those for which Fusion requests an exclusion. For example, Koolatron is currently offering for sale domestically produced thermoelectric containers with capacities of 7, 13, 17 and 27.5 litres. The evidence also demonstrates that Koolatron has the ability to produce thermoelectric containers with identical capacities and characteristics to those for which Fusion seeks exclusions. Indeed, Koolatron has made plans for the production of a hard-sided model with a capacity of 24 litres.⁸⁹ The Tribunal is therefore of the view that if Fusion's requests were granted, imports of these dumped and subsidized goods from China would likely be injurious to the domestic industry. Therefore, the Tribunal denies these requests.

Product Specialties

173. Product Specialties has requested product exclusions for any wine cooler, bar or cellar not attached to a kitchen cupboard or mounted in a similar fashion, or any wine cooler manufactured by Product Specialties or a designated sub-contractor, and any wine cooler, bar or cellar with a condensation control system. As a basis for its request, Product Specialties submitted that it is a Canadian product development company that designs, engineers and develops unique wine bars, coolers and cellars as new products in Canada. It provided evidence that it cannot manufacture in Canada and that it must sub-contract its production in China in order to be competitive on the worldwide market.⁹⁰ Koolatron submitted Product Specialties' requests are overly broad and provided evidence that it manufactures and has the capability to manufacture the entire range of products for which Product Specialties seeks an exclusion.⁹¹

89. Tribunal Exhibit NQ-2008-002-34.01, Administrative Record, Vol. 1.3 at 45-73; Tribunal Exhibit NQ-2008-002-35.01 (protected), Administrative Record, Vol. 2.3 at 44-110.

90. *Transcript of Public Hearing*, Vol. 2, 12 November 2008, at 313-15.

91. Tribunal Exhibit NQ-2008-002-34.01, Administrative Record, Vol. 1.3, tab 7; Tribunal Exhibit NQ-2008-002-35.01 (protected), Administrative Record, Vol. 2.3, tab 7; Tribunal Exhibit NQ-2008-002-9.01, Administrative Record, Vol. 3, at 11-13.

174. The Tribunal notes that the evidence does not indicate that the wine coolers for which Product Specialties seeks an exclusion have unique characteristics that prevent the goods produced by Koolatron from being substituted for them. To the contrary, the witness for Product Specialties acknowledged that the average consumer could not tell the difference between the four-bottle wine cooler imported by Product Specialties and sold in Canada and Koolatron's similar product.⁹² In addition, the Tribunal witnesses who purchased wine coolers indicated that they did not take into account in their purchasing decisions certain features that the witness from Product Specialties indicated were unique to its product, such as its condensation control system and wireless temperature technology.⁹³ Thus, the Tribunal is of the view that the domestic industry produces goods that are substitutable for those for which Product Specialties seeks an exclusion.

175. The Tribunal is therefore of the view that if Product Specialties' requests were granted, imports of these dumped and subsidized goods from China would likely be injurious to the domestic industry. For these reasons, the Tribunal denies Product Specialties' requests.

Producer Exclusion

176. Canadian Tire requested an exclusion for all exports of subject goods bearing the Mobicool brand to be sold exclusively at Canadian Tire on the grounds that, in its view, these sales would have been achieved with or without the dumping or subsidizing of the subject goods. At the hearing, Mobicool supported Canadian Tire's request. In response, Koolatron submitted that Mobicool was a large exporter of dumped and subsidized products that has caused the injury suffered by Koolatron. In view of the fact that imports from Mobicool have been dumped and subsidized at an overall weighted margin of 17.5 percent, Koolatron submitted that the removal of the duties would permit renewed sales of dumped and subsidized goods by Mobicool, which would in turn exert downward price pressure in the Canadian market as Canadian Tire's competitors would seek to match its price points.

177. The fundamental principle for producer exclusions, as for product exclusions, is that the Tribunal will grant producer exclusions only when it is of the view that such exclusions are not injurious to the domestic industry. As was stated by the Tribunal in *Horizontal Venetian Blinds*, "[t]he circumstances in which the Tribunal would exclude one or more exporters from a finding of material injury must be adequately demonstrated and would be exceptional."⁹⁴

178. On the basis of the evidence before it, the Tribunal denies Canadian Tire's producer exclusion request. The Tribunal considers that Canadian Tire and Mobicool have not presented evidence in support of the existence of exceptional circumstances that could justify granting a producer exclusion. The Tribunal is convinced that thermoelectric containers produced and exported by Mobicool compete on the basis of price with the subject goods from other Chinese producers and with the like goods produced by the domestic industry, thus contributing to the injury suffered by the domestic industry. As discussed above, it is also not clear to what extent, if any, the price comparisons by Mobicool are made on a valid basis or support the conclusions of Mobicool about the relative pricing of Mobicool's and Koolatron's products. Consequently, the Tribunal is of the view that, if Canadian Tire's request were granted, imports of goods manufactured by Mobicool in China at dumped and subsidized prices would likely be injurious to the domestic industry.

92. *Transcript of Public Hearing*, Vol. 2, 12 November 2008 at 319-20.

93. *Transcript of Public Hearing*, Vol. 3, 13 November 2008, at 375-78, 413-14.

94. (7 February 1992), NQ-91-004 (CITT) at 12.

CONCLUSION

179. Pursuant to subsection 43(1) of *SIMA*, the Tribunal hereby finds that the dumping and subsidizing of thermoelectric containers originating in or exported from China have caused injury to the domestic industry.

Ellen Fry

Ellen Fry

Presiding Member

Diane Vincent

Diane Vincent

Member

Pasquale Michaele Saroli

Pasquale Michaele Saroli

Member