



Canadian International  
Trade Tribunal

Tribunal canadien du  
commerce extérieur

CANADIAN  
INTERNATIONAL  
TRADE TRIBUNAL

# Dumping and Subsidizing

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## FINDING AND REASONS

Inquiry No. NQ-2006-001

Cross-linked Polyethylene Tubing

*Finding issued  
Friday, September 29, 2006*

*Reasons Issued  
Friday, October 13, 2006*

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

**CROSS-LINKED POLYETHYLENE TUBING ORIGINATING IN OR  
EXPORTED FROM THE UNITED STATES OF AMERICA**

**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 of single or multilayer cross-linked polyethylene tubing in nominal tubing sizes up to and including 1 inch or the metric equivalent, excluding cross-linked polyethylene tubing with an oxygen barrier layer, originating in or exported from the United States of America has caused injury or retardation or is threatening to cause injury.

This inquiry is pursuant to the issuance by the President of the Canada Border Services Agency of a preliminary determination dated June 1, 2006, and of a final determination dated August 30, 2006, that the aforementioned goods have been dumped.

Pursuant to subsection 43(1) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby finds that the dumping of the aforementioned goods has not caused injury or retardation and is not threatening to cause injury.

Ellen Fry  
Ellen Fry  
Presiding Member

James A. Ogilvy  
James A. Ogilvy  
Member

Serge Fréchette  
Serge Fréchette  
Member

Hélène Nadeau  
Hélène Nadeau  
Secretary

The statement of reasons will be issued within 15 days.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	August 29 to 31, 2006
Tribunal Members:	Ellen Fry, Presiding Member James A. Ogilvy, Member Serge Fréchette, Member
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## STATEMENT OF REASONS

### BACKGROUND

1. The Canadian International Trade Tribunal (the Tribunal), under the provisions of section 42 of the *Special Import Measures Act*,<sup>1</sup> has conducted an inquiry to determine whether the dumping of single or multilayer cross-linked polyethylene tubing in nominal tubing sizes up to and including 1 inch or the metric equivalent, excluding cross-linked polyethylene tubing with an oxygen barrier layer, originating in or exported from the United States of America (the subject goods), has caused injury or retardation or is threatening to cause injury.

2. On March 3, 2006, the President of the Canada Border Services Agency (CBSA), following a complaint filed by Vanguard Piping Systems (Canada) Inc. (Vanguard), initiated an investigation into whether the subject goods had been dumped.

3. On March 6, 2006, 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 of the subject goods had caused injury or retardation or was threatening to cause injury. On May 2, 2006, the Tribunal made a preliminary determination that there was evidence that disclosed a reasonable indication that the dumping of the subject goods had caused injury or retardation or was threatening to cause injury.

4. On June 1, 2006, the CBSA issued a preliminary determination of dumping. It was satisfied, as a result of its preliminary investigation, that the subject goods had been dumped, that the margins of dumping were not insignificant and that the volumes of dumped goods were not negligible.

5. On June 2, 2006, the Tribunal issued a notice of commencement of inquiry.<sup>2</sup> As part of the inquiry, it sent questionnaires to 6 Canadian producers, 12 importers and 7 foreign producers. From the replies to the questionnaires and other sources, the Tribunal's research staff prepared public and protected pre-hearing staff reports.

6. On August 30, 2006, the CBSA issued a final determination of dumping, which confirmed that the margins of dumping were not insignificant.

7. A hearing, with public and in camera testimony, was held in Ottawa, Ontario, from August 29 to 31, 2006. Vanguard and another domestic producer, Bow Plumbing Group Inc. (Bow), filed submissions in support of a finding of injury or threat of injury and were represented at the hearing. Zurn Industries Limited (Zurn) and Zurn Pex, Inc. (Zurn Pex) opposed a finding of injury or threat of injury and were represented at the hearing. The Tribunal also heard testimony from Tribunal witnesses from EMCO Corporation (EMCO), Groupe Deschênes Inc. and Boone Plumbing and Heating Supply Inc.

8. Requests for product exclusions were received from Uponor Ltd. (Uponor) and Central Boiler Inc. (Central Boiler).

9. The record of this inquiry consists of all Tribunal exhibits, including the public and protected record of the preliminary injury inquiry (PI-2005-002), public and protected replies to questionnaires, requests for information and replies thereto, witness statements and all exhibits filed by the parties and the Tribunal throughout the inquiry, as well as the transcript of the hearing. All public exhibits were made available to the

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

2. C. Gaz. 2006.I.1441.

parties. Protected exhibits were made available only to counsel who had filed confidentiality undertakings with the Tribunal in respect of confidential information.

10. The Tribunal issued its finding on September 29, 2006.

## **RESULTS OF THE CBSA'S INVESTIGATION**

11. The CBSA determined that the weighted average margin of dumping, expressed as a percentage of the export price, was 59.76 percent and that 99.60 percent of the subject goods released into Canada from January 1 to December 31, 2005, were dumped.

## **PRODUCT**

### **Product Description**

12. Cross-linked polyethylene tubing is commonly referred to as "PEX tubing". Cross-linking involves the formation of links between individual polyethylene macromolecules to create a single large molecule of polyethylene. The resulting large molecule is resistant to temperature extremes, chemical attack and creep deformation.<sup>3</sup> As a result of these properties, PEX tubing is used in hot and cold potable water distribution systems; potable water is defined as water that meets applicable water quality standards and that is safe to be consumed.

13. PEX tubing is designed and marketed to replace traditional copper tubing. PEX tubing is sold in the same nominal dimensions as copper tubing, either in straight lengths or in coils. PEX tubing is manufactured in white and other colours. These include red and blue, which are used for easy differentiation between hot and cold lines. The two most common sizes of PEX tubing are 1/2 in. diameter and 3/4 in. diameter.

14. PEX tubing is sold as complying with the applicable standards of the American Society for Testing and Materials and the Canadian Standards Association (CSA), as well as having been certified by the National Sanitation Foundation International (NSF).<sup>4</sup> The National Plumbing Code (NPC)<sup>5</sup> and related provincial codes permit the use of PEX tubing that is certified CAN/CSA B137.5 in potable water systems. Depending on the type of application, PEX tubing must also meet certain requirements of the National Building Code (NBC).<sup>6</sup>

15. Single-layer PEX tubing degrades quickly if exposed to ultraviolet (UV) light. Therefore, it cannot be exposed to sunlight unless it is wrapped in protective material. Through the addition of multiple layers, multilayer PEX tubing meets the relevant standards for chlorinated, potable water systems under conditions of extended UV exposure.

16. Excluded from the subject goods is PEX tubing with an oxygen barrier layer (PEX oxygen tubing), which is generally made of ethylene vinyl alcohol. Such tubing is bright red or orange and has distinct markings. PEX oxygen tubing is typically used in hydronic radiant heating piping systems.

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3. Creep deformation, in this context, refers to a change of shape under stress or load.

4. The NSF is a non-profit organization that provides standards for food, water and consumer goods.

5. The NPC is in the form of a model code to permit adoption by the appropriate authorities. Most provinces and territories, namely, New Brunswick, Newfoundland and Labrador, Nova Scotia, Manitoba, Saskatchewan, Prince Edward Island, the Northwest Territories, Nunavut and Yukon, adopt or adapt the NPC and enforce its requirements. Alberta, British Columbia, Ontario and Quebec publish their own codes based on the NPC.

6. The NBC is also a model code.

## **Production Process**

17. The production of PEX tubing begins with high-density polyethylene (HDPE) resin or medium-density polyethylene resin that is placed in a hopper, mixed with other materials and then fed into an extruder. There are three methods of PEX tubing production: the peroxide method, the silane method and the irradiation method.

18. The peroxide method, also called the Engel method, involves “hot” cross-linking. Peroxide is added to the base resin, and an extruder with a plunger action is used. Through a combination of pressure and high temperature, the cross-linking takes place as the tubing is produced.

19. The silane method, also called the moisture-cure method, involves grafting a reactive silane molecule to the backbone of the polyethylene. The PEX tubing is produced by blending this grafted compound with a catalyst. While some of the cross-linking occurs in the extruder, the majority actually takes place in a water bath or in a sauna at elevated temperatures after the tubing passes through the extruder.

20. The third method is the irradiation method. The tubing is extruded like normal HDPE tubing and then taken to an electron beam facility where it is dosed with a specific amount of radiation to initiate molecular cross-linking.

21. PEX tubing produced by the peroxide, silane and irradiation methods is generally referred to as PEX-A tubing, PEX-B tubing and PEX-C tubing respectively.

22. Information, such as the trade name, size, date of manufacture and certifications, is printed on the PEX tubing. Cutters are used to cut the PEX tubing into straight lengths (20-ft. lengths are common in the industry), or a coiler is used to create coils that range in length from 100 ft. to 1,000 ft. Bundles of lengths are subsequently bagged on a bundle table; coils are taped or strapped in place.

23. Multilayer PEX tubing is manufactured similarly to single-layer PEX tubing; however, a co-extrusion process is used in which the middle layer of tubing is coloured black to provide ultraviolet protection, and the top layer is thinly co-extruded to provide the desired colour.

## **DOMESTIC PRODUCERS**

24. There are currently six Canadian producers of PEX tubing: Vanguard, Bow, HeatLink Group Inc. (HeatLink), IPEX Inc. (IPEX), Uponor and Watts Industries (Canada) Inc. (Watts).

### **Vanguard**

25. Vanguard was incorporated in 1997 as a joint venture between Vanguard Industries Inc., a U.S. producer of PEX tubing and other products, and another Canadian corporation. That same year, Vanguard began test production of PEX-B tubing at its plant in Burnaby, British Columbia. Vanguard produces PEX-B tubing in diameters of 1/4 in., 3/8 in., 1/2 in., 3/4 in. and 1 in. In the third quarter of 2005, Vanguard started to produce multilayer PEX tubing in addition to single-layer PEX tubing. Vanguard also produces PEX oxygen tubing and accessories for PEX tubing. Vanguard is associated with C-B Supplies Limited, which is a master distributor of PEX tubing and other plumbing products.



**Bow**

26. Bow was incorporated in 1949 and produces a range of plastic plumbing products. In 1997, it began producing PEX-B tubing at its plant in Granby, Quebec. Bow produces PEX-B tubing in diameters of 1/4 in., 3/8 in., 1/2 in., 3/4 in. and 1 in. Since late 2002, except for 1/4 in. and 3/8 in. PEX tubing, all of Bow's PEX tubing has been of the multilayer type. It also produces PEX oxygen tubing for the radiant heating market.

**HeatLink**

27. HeatLink, located in Calgary, Alberta, was incorporated in 1991. Its PEX-A tubing is produced in diameters of 1/2 in. to 1 in. In addition, HeatLink produces accessories for PEX-A tubing and fitting systems.

**IPEX**

28. IPEX, which was incorporated in 1992, manufactures a variety of plastic pipe and fitting systems. It started producing PEX-B tubing in mid-2005 at its plant in L'Assomption, Quebec.

**Uponor**

29. Uponor was incorporated in 1992. The company is wholly owned by a U.S. manufacturer, Hot Water Systems North America, Inc. Uponor began producing PEX-A tubing in 1/2 in. and 3/4 in. diameters at its plant in Saint John, New Brunswick. It also produces PEX oxygen tubing at this plant. From 2000 to March 2005, Uponor produced PEX-B tubing in diameters of 1/4 in., 3/8 in., 1/2 in., 3/4 in. and 1 in. at its plant in Langley, British Columbia.

**Watts**

30. Watts was incorporated in October 1955 and, in November 2005, began producing PEX-B tubing in diameters of 1/4 in. to 1 1/4 in. at its plant in Langley, British Columbia. It also produces PEX oxygen tubing and an extensive line of flow control products. Watts is owned by Watts Water Technologies, Inc. (Watts Water), a U.S. corporation that has over 50 subsidiaries worldwide, including Watts Radiant, Inc., which produces PEX tubing at a plant in Springfield, Missouri.

**IMPORTERS AND EXPORTERS**

31. The Tribunal sent questionnaires to 12 importers in Canada and 7 U.S. exporters of PEX tubing.

32. The Tribunal received a substantive reply from only one importer, Zurn, which is a subsidiary of Zurn Pex, a U.S. producer of PEX tubing. One importer, Rehau Industries Inc., provided information in common with its affiliated U.S. exporter of PEX tubing. Of the remaining 10 importers, 6 indicated that they imported little or no subject goods, and 4 did not reply to the questionnaire.

33. The Tribunal received some information from five U.S. exporters of PEX tubing: Zurn Pex, Consolidated Plumbing Industries, Watts Water, Rehau Incorporated and Roth Industries, Inc. Two exporters, Central Boiler and Mercury Plastics, Inc., indicated that they did not export significant volumes of PEX tubing to Canada.

## PRODUCT DISTRIBUTION

34. Sales of PEX tubing in Canada can be divided into two distinct markets: wholesale and retail.

35. In the wholesale market, PEX tubing is sold to plumbing supply distributors, which, in turn, sell to plumbing contractors or plumbers. EMCO and Wolseley Canada Inc. are among the largest independent distributors. Certain distributors have formed buying groups to increase their bargaining power when dealing with producers, e.g. Canaplus Limited Partnership and Octo Purchasing Group Ltd. Some U.S. producers of PEX tubing (i.e. Zurn Pex and Rehau Incorporated) have related companies in Canada that import PEX tubing and then sell it to distributors.

36. Producers of PEX tubing also sell directly to retailers, which then sell to consumers and to smaller contractors.

37. PEX tubing sales are seasonal. They tend to be higher during the spring and summer months than during the rest of the year.

## Pricing

38. PEX tubing is sold using a list price system. Prices are usually expressed in dollars per linear foot.

39. When a producer of PEX tubing sells to a distributor, a discount is applied to the list price, with the amount of the discount varying according to the size and buying power of the distributor or buying group. The discount tends to be negotiated on a regional basis and may be applied to specific products.

40. Producers of PEX tubing may also provide rebates that effectively become an additional discount to the list price. Rebates can be based on the total volume or value of purchases of PEX tubing or other criteria, such as total purchases of all products, including both subject and non-subject goods, from the manufacturer. Rebates are often scaled by tiers, with greater rebates for purchases above certain limits. Rebates can be negotiated to provide payment to the distributor on a monthly, quarterly or annual basis. In addition, producers of PEX tubing may offer additional incentives to buyers, such as marketing assistance, free subject or non-subject goods, prepaid freight and a discount for early payment.

## ANALYSIS

41. Pursuant to subsection 42(1) of *SIMA*, the Tribunal is required to inquire as to whether the dumping and subsidizing of the subject goods have caused injury or retardation or are threatening to cause injury. "Injury" is defined in subsection 2(1) as "material injury to a domestic industry". The producers to be included in the domestic industry are discussed below. Injury and threat of injury are distinct findings, and the Tribunal does not need to make a finding relating to threat of injury under subsection 43(1) unless it first makes a finding of no injury. Finally, if it finds injury or threat of injury, the Tribunal must decide whether to grant exclusions from its finding.

42. Because the CBSA found only dumping, and not subsidizing, of the subject goods, the Tribunal will confine its analysis to the question of whether the dumping of the subject goods caused or threatens to

cause injury. Further, because, as discussed below, a domestic industry is already established, the Tribunal will not consider the question of retardation.<sup>7</sup>

43. Before conducting its injury analysis, the Tribunal will determine what are the like goods to the subject goods and what domestic producers constitute the domestic industry.

### Like Goods

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

45. In considering the issue of like goods, the Tribunal typically looks at a number of factors, such as the physical characteristics of the goods, their market characteristics, such as substitutability, pricing and distribution, and whether the domestic goods fulfill the same customer needs as the subject goods.

46. The evidence indicates that PEX tubing produced in Canada and the subject goods are very similar in appearance. They meet the same general standards and fulfill the same end uses. Further, PEX tubing produced in Canada and the subject goods are sold through the same channels of distribution, in a pricing regime characterized by list prices with rebates, discounts and incentives, and compete directly with each other in the market.<sup>8</sup> The Tribunal therefore concludes that PEX tubing produced in Canada constitutes like goods to the subject goods.

47. In considering whether there is more than one class of like goods, the Tribunal typically looks at the same factors as in considering like goods, including those listed above, and applies them to the like goods. It agrees with the parties that there is one class of like goods. The Tribunal notes that PEX-A and PEX-B tubing account for almost all of the domestic market and that PEX-C tubing appears to be present in only minor volumes.<sup>9</sup> Although the different methods of manufacture may impart physical differences to the resultant PEX tubing, the evidence is clear that purchasers do not distinguish PEX tubing on the basis of its method of manufacture or any resultant product distinctions.<sup>10</sup> In addition, PEX-A, PEX-B and PEX-C tubing have common channels of distribution and similar pricing systems.

48. The end use of all the PEX tubing in question is similar or identical, as it is used in potable water distribution systems in applications where copper tubing would typically have been used previously. PEX tubing is used in low-rise building construction across Canada and in high-rise<sup>11</sup> construction in most regions. The Tribunal notes that, throughout the period of inquiry, Uponor’s PEX-A tubing was the only PEX tubing available in the Canadian market that was certified to meet the requirements of

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7. Subsection 2(1) of *SIMA* defines “retardation” as “material retardation of the establishment of a domestic industry”.

8. *Pre-hearing Staff Report*, revised 4 August 2006, Tribunal Exhibit NQ-2006-001-06A, Administrative Record, Vol. 1.1 at 181-82; Manufacturer’s Exhibit A-03 at 14-15, Administrative Record, Vol. 11; Manufacturer’s Exhibit B-03 at 2-4, Administrative Record, Vol. 11; Tribunal Exhibit NQ-2006-001-14.05 at 33, Administrative Record, Vol. 5.

9. *Protected Pre-hearing Staff Report*, revised 18 August 2006, Tribunal Exhibit NQ-2006-001-7C (protected), Administrative Record, Vol. 2.1 at 366.

10. *Transcript of Public Hearing*, Vol. 1, 29 August 2006, at 75, 84, 126-27; *Transcript of In Camera Hearing*, Vol. 1, 29 August 2006, at 284.

11. Witnesses at the hearing generally considered high-rise construction to cover buildings above four storeys. See *Transcript of Public Hearing*, Vol. 1, 29 August 2006, at 102; *Transcript of Public Hearing*, Vol. 2, 30 August 2006, at 205-206, 255-56.

CAN/ULC-S101—“Standard Methods of Fire Endurance Tests of Building Construction and Materials” (S101).<sup>12</sup> According to the evidence, the City of Vancouver, and possibly other municipalities in British Columbia, requires that PEX tubing installed in high-rise buildings have the S101 certification.<sup>13</sup>

49. The Tribunal is of the view that, although S101 certification may have been a significant differentiating factor for PEX-A tubing in Vancouver, and possibly in other B.C. municipalities, it does not seem to have affected end use in the high-rise market in the rest of the country. Other jurisdictions appear willing to permit the use, in such buildings, of PEX tubing that does not meet S101, provided it has been certified as equivalent by an appropriate individual, e.g. a code consultant.<sup>14</sup> In addition, four other domestic producers expect to receive S101 certification for PEX-B tubing in the fall of 2006 and, as a result, gain access to the Vancouver high-rise market.<sup>15</sup>

50. Accordingly, the Tribunal considers PEX-A, PEX-B and PEX-C tubing to comprise a single class of goods.

### Domestic Industry

51. 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.

52. Vanguard argued that Uponor should be excluded from the Tribunal’s interpretation of “domestic industry” and that the Tribunal should consequently assess injury only against the other domestic producers of the like goods. Vanguard argued that Uponor should be excluded on the grounds that it was related to an exporter of dumped goods, was an importer of such goods and did not support a finding of injury. According to Vanguard, in these circumstances, the discretionary language of subsection 2(1) of *SIMA* should be read as mandatory, based on Tribunal jurisprudence. Bow supported Vanguard’s position, and Zurn agreed that Uponor should be excluded. Although Vanguard itself is also an importer of dumped goods, none of the parties argued for its exclusion from the “domestic industry”.

53. The definition of “domestic industry” uses the word “may”, thereby indicating that it is within the Tribunal’s discretion to decide whether to exclude domestic producers that are importers or are related to exporters or importers.

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12. In its product exclusion request, Uponor states that the NBC requires that floor assemblies in “commercial or multi-family” buildings that are fire separations to have a demonstrated fire-resistance rating as tested in accordance with S101. Since PEX tubing is a component part of the floor assembly, the floor assembly including the PEX tubing needs to have a demonstrated fire-resistance rating in accordance with S101. See Tribunal Exhibit NQ-2006-001-29.01, Administrative Record, Vol. 1.3 at 5.

13. Tribunal Exhibit NQ-2006-001-29.01, Administrative Record, Vol. 1.3 at 233. *Transcript of Public Hearing*, Vol. 1, 29 August 2006, at 110-12, Vol. 2, 30 August 2006, at 255.

14. *Transcript of Public Hearing*, Vol. 1, 29 August 2006, at 110-13.

15. Vanguard, Bow, HeatLink and IPEX. In addition, an exporter, Rehau Incorporated, is part of the group seeking S101 certification. *Transcript of Public Hearing*, Vol. 1, 29 August 2006, at 20.

54. The Tribunal will exercise this discretion in a manner that, in its view, promotes the policy and objects of *SIMA*.<sup>16</sup> In the Tribunal's view, the remedies imposed under *SIMA* are intended to provide protection, in appropriate circumstances, for companies that produce goods in Canada.

55. In the Tribunal's view, Parliament provided it with discretion under subsection 2(1) of *SIMA* in order to enable the Tribunal, in appropriate circumstances, to exclude from the definition of domestic industry, for the purposes of its injury determination, those domestic producers that are themselves associated with the potentially injurious dumping or subsidizing, either directly, or indirectly through related companies that are themselves involved in such activity.

56. The fundamental question before the Tribunal is whether a domestic producer is essentially a producer of like goods in Canada or, instead, essentially an importer of dumped or subsidized goods, whether the latter role results directly from its own importing activities or indirectly from being related to an importer or exporter of dumped or subsidized goods. Where a domestic producer's role in the market is essentially that of an importer of dumped or subsidized goods, the Tribunal is of the view that it is in keeping with the underlying policy and objects of *SIMA* to exclude that producer from the definition of the domestic industry for the purposes of its injury determination. In the present case, since the CBSA has not found the goods to have been subsidized, the Tribunal will consider this question only in respect of dumped goods.

57. Factors that the Tribunal typically considers<sup>17</sup> when making its decision on whether to exclude a domestic producer from the definition of the domestic industry can be characterized as "structural" or "behavioural".

58. Structural factors are concerned with the characteristics of the domestic market and the producer's place in that market. *SIMA* requires the Tribunal to determine whether dumping has caused or threatens to cause injury in relation to the whole of the domestic production of like goods, whether sold for domestic consumption or export or used in downstream processing, and producer imports need to be viewed in this context. Structural factors include the ratio of the producer's sales of dumped goods to its total sales in the domestic market; the ratio of the producer's volume of dumped goods to its production of like goods; and the producer's actual volume of imports of dumped goods and its share of the total volume of dumped goods.

59. Behavioural factors focus on the behaviour of the producer (both directly and in terms of its association with related companies) and assist in the assessment of the circumstances that led to the structural outcomes observed in the market. For example, the Tribunal may consider whether the producer imported the dumped goods as a defensive measure against other dumped goods or as an aggressive measure to capture market share from other domestic producers of like goods. Similarly, it may assess whether the producer imported the dumped goods to fill a specific market niche or to compete broadly with the like goods produced by other domestic producers. The Tribunal may also consider whether the producer's own like goods compete in the domestic market with the dumped goods that it imports.

60. Accordingly, contrary to the argument of the domestic producers in this inquiry, the mere existence of what they describe as a cross-border business strategy will not alone suffice as a basis to exclude a domestic producer from the "domestic industry". Furthermore, the fact that a domestic producer did not

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16. *Refill Paper* (27 September 1996), NQ-96-001 (CITT).

17. In previous cases, the Tribunal has set out factors that it has taken into consideration in making the decision whether to exclude a domestic producer from the definition of the domestic industry. None of these factors is determinative, and no list that has been set out is considered either universally applicable or exhaustive.

express support for the complaint or did not provide full information to the Tribunal is not a relevant consideration, as there may be a number of possible causes for these behaviours. Finally, the Tribunal cannot find support either in the law or in the Tribunal's jurisprudence for the proposition that the fact that a domestic producer is both an importer and related to an exporter or importer effectively fetters its discretion, as is suggested by Vanguard and Bow.

61. The evidence on the record establishes that Uponor and Vanguard are both domestic producers of like goods and importers of the dumped goods. In addition, by its own admission, Uponor is related to an exporter of the dumped goods.<sup>18</sup> However, the evidence does not indicate that any subject goods were exported or imported by a related company in circumstances where Uponor or Vanguard was not the importer of record.

62. With respect to structural factors, imports by Uponor did account for a large proportion of the total volume of dumped goods in the market. However, the evidence shows that the volume of dumped goods imported by Uponor was modest in relation to its total domestic production of like goods. Further, although its sales of the dumped goods that it imported were significant in relation to its total sales in the domestic market, throughout the period of inquiry, Uponor sold a greater volume of like goods than of dumped goods.<sup>19</sup>

63. With respect to Uponor's behaviour, the evidence shows that the dumped goods imported by Uponor competed in the domestic market on an equal footing with its own like goods. The evidence indicates that the prices of Uponor's goods (whether domestically produced or imported) were generally higher than those of the other domestic producers. There is no evidence to indicate that Uponor imported the dumped goods as a defensive measure against other dumped goods or only to fill a specific market niche. At the same time, the evidence on pricing in the Canadian market appears to demonstrate that Uponor's imports did not have the nature of an aggressive measure designed to use pricing to capture market share from other domestic producers of like goods.<sup>20</sup>

64. Considering the foregoing,<sup>21</sup> the Tribunal takes the view that Uponor's activity in the Canadian market positions it primarily as a domestic producer of like goods and only secondarily as an importer of dumped goods.

65. Turning now to Vanguard, with respect to the structural factors, its imports accounted for a small proportion of the total volume of dumped goods in the market in 2005, the only period during which it imported. The volume of dumped goods imported by Vanguard was also small in relation to its total domestic production of like goods. Further, Vanguard's sales of the dumped goods that it imported were not

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18. Tribunal Exhibit NQ-2006-001-36.01, Administrative Record, Vol. 1.3 at 251.

19. *Protected Pre-hearing Staff Report*, revised 4 August 2006, Tribunal Exhibit NQ-2006-001-07A (protected), Administrative Record, Vol. 2.1 at 203; *Protected Pre-hearing Staff Report*, revised 18 August 2006, Tribunal Exhibit NQ-2006-001-7C (protected), Administrative Record, Vol. 2.1 at 357, 374.

20. *Protected Pre-hearing Staff Report*, revised 4 August 2006, Tribunal Exhibit NQ-2006-001-07A (protected), Administrative Record, Vol. 2.1 at 210; *Protected Pre-hearing Staff Report*, revised 18 August 2006, Tribunal Exhibit NQ-2006-001-7C (protected), Administrative Record, Vol. 2.1 at 372.

21. In certain instances, the Tribunal has also considered whether the decision to exclude a domestic producer would negate the existence of a domestic industry. That question is not relevant in the present case because, even if Uponor were excluded, there would remain other domestic producers of the like goods that do not import the dumped goods or are not related to exporters or importers of the dumped goods.

significant in relation to its total sales in the domestic market. Moreover, throughout the period of inquiry, Vanguard sold a greater volume of like goods than of dumped goods.<sup>22</sup>

66. With respect to Vanguard's behaviour, the evidence shows that the dumped goods that it imported competed in the domestic market on an equal footing with its own like goods. Further, while the evidence does not indicate whether Vanguard imported the dumped goods as a defensive measure against other dumped goods, the evidence on pricing in the Canadian market appears to demonstrate that Vanguard's imports did not have the nature of an aggressive measure designed to use pricing to capture market share from other domestic producers of like goods.<sup>23</sup>

67. Considering the foregoing, the Tribunal takes the view that Vanguard's activity in the Canadian market positions it primarily as a domestic producer of like goods and only secondarily as an importer of dumped goods.

68. The Tribunal therefore finds that, in addition to Bow, HeatLink, IPEX and Watts, the "domestic industry" includes Uponor and Vanguard.

## Injury

69. Subsection 37.1(1) of the *Special Import Measures Regulations*<sup>24</sup> prescribes that, in determining whether the dumping has caused injury to the domestic industry, the Tribunal consider the volume of the dumped goods, their effect on the price of like goods and their resulting impact on the state of the domestic industry.

### Volume of Dumped Goods

70. Paragraph 37.1(1)(a) of the *Regulations* requires that the Tribunal consider the volume of the dumped goods and, in particular, whether there has been a significant increase in the volume of imports of the dumped goods, either in absolute terms or relative to the production or consumption of the like goods.

71. The Tribunal agrees with Vanguard and Bow that the volume of the subject goods increased during the period of inquiry, noting that imports of the subject goods more than tripled between 2003 and 2005, but it also observes that they decreased by 23 percent in the first quarter of 2006, compared to the first quarter of 2005.<sup>25</sup> However, the Tribunal notes that the domestic industry is itself the largest importer of the subject goods. The increase in imports by the domestic industry accounted for the majority of the increase in the volume of the subject goods between 2003 and 2005, although, in relative terms, imports of the subject goods by non-producers also increased substantially between 2003 and 2005. Imports by non-producers were significantly higher in the first quarter of 2006 than in first quarter of 2005, whereas imports by the domestic industry were significantly lower.<sup>26</sup>

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22. *Protected Pre-hearing Staff Report*, revised 4 August 2006, Tribunal Exhibit NQ-2006-001-07A (protected), Administrative Record, Vol. 2.1 at 203; *Protected Pre-hearing Staff Report*, revised 18 August 2006, Tribunal Exhibit NQ-2006-001-7C (protected), Administrative Record, Vol. 2.1 at 357, 366.

23. *Protected Pre-hearing Staff Report*, revised 18 August 2006, Tribunal Exhibit NQ-2006-001-7C (protected), Administrative Record, Vol. 2.1 at 372.

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

25. *Pre-hearing Staff Report*, revised 4 August 2006, Tribunal Exhibit NQ-2006-001-6A, Administrative Record, Vol. 1.1 at 202.

26. *Protected Pre-hearing Staff Report*, revised 4 August 2006, Tribunal Exhibit NQ-2006-001-7A (protected), Administrative Record, Vol. 2.1 at 204.

72. Vanguard noted the large increase in Zurn's imports of the subject goods in the first quarter of 2006,<sup>27</sup> suggesting that it was consistent with a declining U.S. housing market and increases in capacity by Zurn Pex. Zurn stated that the increase was due to being under supply constraints from Zurn Pex and being required to take the goods when they became available. Further, Zurn testified that a large portion of the increase ended up in inventory, because it was product that did not meet its customers' preferences, and that it was consequently unable to sell.<sup>28</sup> Taking into account the testimony<sup>29</sup> with respect to the state of the market in early 2006, the Tribunal is of the view that the increase in Zurn's imports in the first quarter of 2006 was primarily a hedge against a possible injury finding.

73. As for imports of PEX tubing from non-subject countries, the evidence indicates that such imports are minimal, and witnesses did not view them as significant factors in the Canadian market.<sup>30</sup>

74. The Canadian market for PEX tubing increased by 46 million linear feet or nearly two thirds between 2003 and 2005, and by 21 percent in the first quarter of 2006, compared to the first quarter of 2005.<sup>31</sup> Although the market share held by the subject goods doubled between 2003 and 2005, almost all the increase was attributable to the imports of the domestic industry. For the first quarter of 2006 compared to the equivalent period in 2005, the market share held by the subject goods declined by almost half, due largely to the loss of market share held by the domestic industry's imports. The Tribunal notes that, when the domestic industry's sales of like goods and subject goods are combined, its total share of the market remained relatively stable, and very high, throughout the period of inquiry.<sup>32</sup>

75. The Tribunal also notes that domestic production increased substantially over the period of inquiry, growing by 52 percent between 2003 and 2005 and by 43 percent in the first quarter of 2006, compared to the first quarter of 2005.<sup>33</sup> However, the substantial increase in production between 2003 and 2005 was far less than the three-fold increase in the volume of dumped goods during the same period. As for the first quarter of 2006, as noted above, the volume of dumped goods fell compared to the first quarter of 2005. However, also as noted above, the Tribunal is of the view that the overall increase in the volume of subject goods during the period of the inquiry is attributable primarily to the actions of the domestic industry.

76. It was Zurn's position that the volume of subject goods was modest compared with the size of the Canadian market. The Tribunal agrees, noting that sales of the subject goods by non-producers, a subset of the total sales of subject goods, represented only a minor share of the market throughout the period of inquiry.<sup>34</sup>

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27. *Protected Pre-hearing Staff Report*, revised 18 August 2006, Tribunal Exhibit NQ-2006-001-07C (protected), Administrative Record, Vol. 2.1 at 357.

28. *Transcript of Public Hearing*, Vol. 2, 30 August 2006, at 216-19.

29. *Transcript of In Camera Hearing*, Vol. 2, 30 August 2006, at 247-48.

30. *Transcript of Public Hearing*, Vol. 1, 29 August 2006, at 82-83, 135-36; *Transcript of Public Hearing*, Vol. 2, 30 August 2006, at 231-32, 269-70; *Pre-hearing Staff Report*, revised 4 August 2006, Tribunal Exhibit NQ-2006-001-6A, Administrative Record, Vol. 1.1 at 199-200.

31. *Pre-hearing Staff Report*, revised 18 August 2006, Tribunal Exhibit NQ-2006-001-6C, Administrative Record, Vol. 1.1 at 366-67.

32. *Protected Pre-hearing Staff Report*, revised 18 August 2006, Tribunal Exhibit NQ-2006-001-7C (protected), Administrative Record, Vol. 2.1 at 368.

33. *Pre-hearing Staff Report*, revised 4 August 2006, Tribunal Exhibit NQ-2006-001-6A, Administrative Record, Vol. 1.1 at 202.

34. *Protected Pre-hearing Staff Report*, revised 18 August 2006, Tribunal Exhibit NQ-2006-001-7C (protected), Administrative Record, Vol. 2.1 at 368.



77. Based on the foregoing, the Tribunal is of the view that, although there was a significant increase in the volume of imports of the subject goods during the period of the inquiry, both in absolute terms and relative to the production and consumption of like goods, the domestic industry was largely responsible for this increase as a source of its sales in the domestic market. Further, for the reasons noted above, the Tribunal does not consider that the increase in imports by non-producers in the first quarter of 2006 indicates the beginning of a surge in dumped goods.

#### Effect of the Dumped Goods on the Price of Like Goods

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

79. As previously indicated,<sup>35</sup> the net price at which PEX tubing is sold in the market is the result of a series of discounts, rebates and incentives that are applied to a list price. In the discussion that follows, references to prices are to this final net price.

80. Parties generally agreed that price is a major factor influencing buying decisions for PEX tubing. In the Tribunal's opinion, the evidence on the record supports this view. "Lowest price" was rated as a "very important" factor in their buying decision by two thirds of the respondents to the Tribunal's Purchasers' Questionnaire on Market Characteristics. Furthermore, a majority of respondents reported that they purchased the lowest-price product either "always" or "usually".<sup>36</sup> Likewise, there was extensive testimony as to the importance of price in the purchasing decision.<sup>37</sup>

81. However, despite the generally accepted price sensitivity of PEX tubing, there is evidence, as argued by Zurn, that non-price factors also play an important role in the purchasing decision.

82. The evidence indicated that producers try to create demand for their brand of PEX tubing by differentiating the product through marketing and by responding to the needs of their customers, as well as to those of the ultimate end users, i.e. plumbers and plumbing contractors, with training and after-sales service.<sup>38</sup> The Tribunal's witnesses indicated that purchasers make their buying decisions by brand preference, taking into account factors such as perceived product quality, performance, logistics and service, given that the prices of competing brands of PEX tubing are within a narrow band.<sup>39</sup> For example, one of the Tribunal's witnesses described a situation in which three brands of PEX tubing were sold to different customers in the same region by the same distributor at slightly different prices because of brand preference.<sup>40</sup> One of the Tribunal's witnesses indicated that it chooses the particular brands of PEX tubing that it offers for sale according to preferences of its customers, i.e. "working from the customer back".<sup>41</sup>

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35. See paragraphs 38 to 40 of this statement of reasons.

36. *Pre-hearing Staff Report*, revised 4 August 2006, Tribunal Exhibit NQ-2006-001-06A, Administrative Record, Vol. 1.1 at 190, 193-94.

37. *Transcript of Public Hearing*, Vol. 1, 29 August 2006, at 92-93, 115-16; *Transcript of Public Hearing*, Vol. 2, 30 August 2006, at 175-76, 259-61; *Transcript of In Camera Hearing*, Vol. 2, 30 August 2006, at 239, 273-74.

38. *Transcript Public Hearing*, Vol. 1, 29 August 2006, at 90-96, 116; *Transcript of In Camera Hearing*, Vol. 1, 29 August 2006, at 76, 79, 273, 279; *Transcript Public Hearing*, Vol. 2, 30 August 2006, at 253-54, 279.

39. *Transcript of Public Hearing*, Vol. 2, 30 August 2006, at 254, 259-60, 279; *Transcript of In Camera Hearing*, Vol. 2, 30 August 2006, at 250-51, 261-62, 310-11.

40. *Transcript of In Camera Hearing*, Vol. 2, 30 August 2006, at 276-82, 288-93.

41. *Transcript of Public Hearing*, Vol. 2, 30 August 2006, at 257.

Further, the Tribunal heard testimony from witnesses that there are regional preferences for brands of PEX tubing, which, in its view, do not appear related to any regional price differences.<sup>42</sup>

83. The Tribunal also notes that any effect on purchasing behaviour attributable to the price of PEX tubing is diluted by the fact that purchasers may buy PEX tubing as part of a larger “basket” of goods, including non-subject and non-like goods, in transactions where the pricing of PEX tubing alone is only one of many components of the total price of the basket and may have very little influence on that total price, and thus on the decision to purchase.

84. Vanguard submitted that the market is transparent with regard to the pricing of PEX tubing, which aggravates the effects of dumping because, in instances where dumped goods have lower prices than domestic goods, customers use their knowledge of low prices to negotiate deeper discounts, higher rebates and more incentives. In other words, the incidence of any low pricing caused by dumping becomes known quickly throughout the market and creates a “ripple effect” on prices of like goods. While the Tribunal agrees that there is a certain degree of price transparency in the market, its conclusions on the impact of dumped prices will be discussed below. Finally, the Tribunal notes that, when a new product, such as PEX tubing, enters the market,<sup>43</sup> a degree of commoditization is a normal process over time that can have the effect of stabilizing or even reducing prices, and is likely to occur regardless of whether there are dumped goods present in the market.

#### Price Undercutting and Price Depression

85. Vanguard and Bow submitted that one of the effects of the dumped goods was to depress prices of domestic PEX tubing in the Canadian market. The Tribunal heard opposing arguments from parties about who started to drive the prices down in Canada, with the domestic industry blaming Zurn, and vice versa. Vanguard argued that the prices of the dumped goods forced it to provide additional discounting, rebating and incentives, resulting in lower prices. Bow contended that prices were driven down due to marketing incentives from U.S. exporters, more specifically from Zurn.

86. As previously noted, the two most common sizes of PEX tubing are 1/2 in. diameter and 3/4 in. diameter, and these sizes account for the vast majority of the domestic market. The volume of sales of 1/2 in. diameter PEX tubing is four times that of 3/4 in. diameter PEX tubing. Sales of other diameters of PEX tubing are marginal.<sup>44</sup> Because the unit prices of the two principal sizes of PEX tubing are very different, in the discussion that follows, the Tribunal finds it more useful to look at the unit prices of each of these sizes individually than at the overall average unit prices.

87. The Tribunal considered two types of pricing data. The first type is annual “market” prices that are based on responses by all the producers and non-producers that provided information to the Tribunal. Average market prices were calculated for each of 2003, 2004 and 2005 and the first quarters of 2005 and 2006. The second type is quarterly “benchmark” prices for each of the eight quarters from April 1, 2004, to March 31, 2006. These prices were calculated using the responses of the smaller number of producers and

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42. *Transcript of In Camera Hearing*, Vol. 2, 30 August 2006, at 231-34, 272-74, 278-79; *Transcript of Public Hearing*, Vol. 2, 30 August 2006, at 275, 279-80.

43. The evidence indicates that PEX tubing was first manufactured in Canada in 1997 and that it was imported into Canada as early as 1999. Tribunal Exhibit NQ-2006-001-11.03, Administrative Record, Vol. 3 at 65; Tribunal Exhibit NQ-2006-001-11.05, Administrative Record, Vol. 3 at 100; Tribunal Exhibit NQ-2006-001-15.05 (protected), Administrative Record, Vol. 6 at 24, 67; Tribunal Exhibit NQ-2006-001-14.05, Administrative Record, Vol. 5 at 32.

44. *Protected Pre-hearing Staff Report*, revised 4 August 2006, Tribunal Exhibit NQ-2006-001-07A (protected), Administrative Record, Vol. 2.1 at 257.

non-producers that provided such information in their responses to the Tribunal's questionnaires and, accordingly, are not necessarily comparable with the market prices for the same periods.

88. For both principal sizes, the average market price of domestic PEX tubing was essentially flat between 2003 and 2005, with a marginal decrease for 1/2 in. diameter PEX tubing and a marginal increase for the 3/4 in. diameter PEX tubing. In the first quarter of 2006, compared to the first quarter of 2005, the average market price of both sizes of domestic PEX tubing increased modestly. As well, the average market price of both sizes of the subject goods increased modestly between 2003 and 2005 and again in the first quarter of 2006, compared to the first quarter of 2005.<sup>45</sup> The Tribunal notes that the average market prices of the subject goods imported by the domestic industry and non-producers followed the same pattern, with the exception of the 3/4 in. diameter PEX tubing imported by domestic industry, which declined modestly in price between 2003 and 2005.<sup>46</sup> Based on the foregoing, the Tribunal is of the view that the market price data do not indicate price depression.

89. Likewise, an examination of benchmark prices of 1/2 in. diameter and 3/4 in. diameter PEX tubing does not indicate price depression. Looking at the eight quarters beginning in the second quarter of 2004, the average benchmark price of both sizes of domestic PEX tubing fluctuated from quarter to quarter, without continuous trends over the period. The average benchmark prices of both sizes of imports of the subject goods by non-producers behaved similarly.<sup>47</sup>

90. As for evidence of price undercutting, the Tribunal notes that, for both 1/2 in. diameter and 3/4 in. diameter PEX tubing, the consistently highest average market price belonged to the subject goods imported by the domestic industry. Further, the data show that the average market prices of both sizes of PEX tubing imported by non-producers, with the exception of 2003 for 1/2 in. diameter PEX tubing, were also higher than the average market prices of the domestically produced PEX tubing.<sup>48</sup> Looking only at the data for the parties, the Tribunal agrees with Zurn that the evidence shows that its market prices of both sizes of PEX tubing were higher than those of either Vanguard or Bow.<sup>49</sup>

91. On a quarterly basis, for both sizes of PEX tubing, the average benchmark price of subject goods did undercut the average benchmark price of domestic PEX tubing in some quarters: five of eight quarters for 1/2 in. diameter PEX tubing and four of eight quarters for 3/4 in. diameter PEX tubing.<sup>50</sup> However, the Tribunal notes that the degree of price undercutting is minimal. In this regard, the Tribunal is of the view that brand preferences and other factors are important considerations in the purchase decision when the prices of competing brands are relatively similar.<sup>51</sup> When it examines the data for the parties only, it observes that there is less price undercutting and that no undercutting is evident for 3/4 in. diameter PEX tubing and there is price undercutting in only two of eight quarters for 1/2 in. diameter PEX tubing.<sup>52</sup>

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45. *Ibid.* at 216.

46. *Ibid.* at 217-18.

47. *Ibid.* at 220-21. There is not enough information on the record for the subject goods imported by the domestic industry to show a trend for the quarterly benchmark price data.

48. *Ibid.* at 217-18.

49. *Protected Pre-hearing Staff Report*, Tribunal Exhibit NQ-2006-001-7D (protected), Administrative Record, Vol. 2.1 at 390-92.

50. *Protected Pre-hearing Staff Report*, revised 4 August 2006, Tribunal Exhibit NQ-2006-001-07A (protected), Administrative Record, Vol. 2.1 at 220-21.

51. *Transcript of Public Hearing*, Vol. 2, 30 August 2006, at 254, 259-60, 279; *Transcript of In Camera Hearing*, Vol. 2, 30 August 2006, at 250-51, 261-62, 310-11.

52. *Protected Pre-hearing Staff Report*, revised 4 August 2006, Tribunal Exhibit NQ-2006-001-07A (protected), Administrative Record, Vol. 2.1 at 220-21.

92. The Tribunal's witnesses testified that domestic and imported brands of PEX tubing are generally competitive within a narrow price band and that neither importers nor the domestic industry was perceived as acting as price leader.<sup>53</sup>

93. Parties in support of an injury finding argued that the best price data by which to gauge the influence of the subject goods on the price of like goods is account specific. To support their argument, Vanguard and Bow provided evidence of alleged price depression and undercutting at various accounts.<sup>54</sup>

94. In the Tribunal's view, in several instances, the evidence on prices and the circumstances of these sales given by the domestic producers and Zurn or customers during the hearing<sup>55</sup> was inconsistent with the evidence already on the record. Although there may have been some price undercutting at particular accounts due to the presence of the subject goods, in the Tribunal's opinion, the evidence was generally inconclusive. The Tribunal notes that substantial intra-industry competition exists in the Canadian market and that, in particular, Vanguard and Bow compete head-to-head at many accounts.<sup>56</sup> Furthermore, it is of the view that the data discussed above indicate that any price undercutting at particular accounts did not cause a general trend of significant price depression.

95. In sum, the Tribunal does not consider that the data show that the dumped goods significantly undercut or depressed the price of like goods over the period of inquiry. To the extent that domestic prices did decrease at some points during the period of inquiry, these decreases were small, and the evidence does not indicate that this was necessarily the result of the dumping of the subject goods.

#### Price Suppression

96. Parties in support of an injury finding submitted that the prices of the dumped goods have significantly suppressed the price of like goods. More specifically, Bow named an account where it claimed that it was not able to pass on an increase in costs to its customer through a price increase because of the presence of low-priced subject goods. Vanguard contended that break-even selling prices and profits turn on a penny a foot more or less<sup>57</sup> and that the presence of the dumped goods had prevented it from increasing its prices to a sufficient degree to cover its increased costs.

97. The Tribunal observes that the average unit cost of goods sold increased only slightly from 2003 to 2004 and then marginally decreased in 2005, before increasing again to a modest degree in the first quarter of 2006, compared to the first quarter of 2005.<sup>58</sup> In 2004, the average unit general, selling and administration costs and financial expenses declined by more than enough to offset the small increase in the average unit cost of goods sold. In the first quarter of 2006, although the decline in average unit general, selling and administration costs and financial expenses did not offset the increase in the average unit cost of

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53. *Transcript of In Camera Hearing*, Vol. 1, 29 August 2006, at 275-76, 278-79.

54. Tribunal Exhibit NQ-2006-001-11.03, Administrative Record, Vol. 3 at 75; Tribunal Exhibit NQ-2006-001-12.03 (protected), Administrative Record, Vol. 4 at 84-86; Tribunal Exhibit NQ-2006-001-11.05, Administrative Record, Vol. 3 at 108; Tribunal Exhibit NQ-2006-001-12.05 (protected), Administrative Record, Vol. 4 at 279-81.

55. *Transcript of In Camera Hearing*, Vol. 2, 30 August 2006, at 157-59; 293-97.

56. *Ibid.* at 231-33, 272.

57. Manufacturer's Exhibit A-01, para. 42, Administrative Record, Vol. 11; Manufacturer's Exhibit A-03, paras. 50, 80, Administrative Record, Vol. 11.

58. *Protected Pre-hearing Staff Report*, revised 4 August 2006, Tribunal Exhibit NQ-2006-001-07A (protected), Administrative Record, Vol. 2.1 at 226. The Tribunal notes that certain domestic producers reported increases in some periods in the price of resin, which is the major material component used in the production of PEX tubing. These increases are reflected in the average unit cost of goods sold for the domestic industry.

goods sold, the domestic industry was nonetheless able to increase its prices to cover the net increase in costs, and even to increase net unit profits marginally.<sup>59</sup> Therefore, it would appear that the domestic industry did not need to increase its prices to a significant extent to cover increased costs and, thus, the subject goods cannot be said to have prevented price increases that would otherwise likely have occurred to reflect such cost increases.

98. Therefore, the Tribunal does not consider that the dumped goods have significantly suppressed the price of like goods.

#### Conclusion

99. Basing its conclusions on the foregoing, the Tribunal concludes that the effect of the dumped goods on the price of like goods was not significant.

#### Resulting Impact of the Dumped Goods on the State of the Domestic Industry

100. Paragraph 37.1(1)(c) of the *Regulations* requires the Tribunal to consider the resulting impact of the dumped goods in light of all relevant economic factors and indices that have a bearing on the state of the domestic industry.

101. According to Vanguard, the impact of the dumped goods was the reduction of profitability, market share and capacity utilization from the levels that the domestic industry would have achieved but for the dumping. In particular, Vanguard compared its results in 2002, prior to the time that it submitted that the dumped goods entered the Canadian market, to the more negative results that it experienced in later years. Bow argued that it had experienced the same negative impact from the dumped goods. Vanguard and Bow submitted that Zurn did not refute any allegations of price suppression or depression or lost sales that Vanguard and Bow attributed to it. For its part, Zurn argued that factors other than the dumping of the subject goods, including significant intra-industry competition, were responsible for any injury experienced by the domestic industry.

102. The Tribunal notes that there was no decline in output by the domestic industry over the period of inquiry. Domestic production of PEX tubing actually grew substantially during the period of inquiry, increasing by nearly 50 percent in 2004 and by a further 3 percent in 2005, with the first quarter of 2006 showing an increase of more than 40 percent, compared to the first quarter of 2005. Moreover, although Uponor ceased production of PEX-B tubing in 2005, two other producers entered the industry and began producing PEX-B tubing in that same year.<sup>60</sup>

103. The Tribunal also notes that there was no decline in the domestic industry's sales volume. Sales from domestic production actually show a noticeable increase in every period, by 26 percent in 2004 and then by 13 percent in 2005. It notes that the improvement in the performance of the domestic industry was especially strong between the first quarter of 2006 and the first quarter of 2005, with an increase in sales of like goods of 42 percent.<sup>61</sup>

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59. *Ibid.*

60. *Pre-hearing Staff Report*, revised 4 August 2006, Tribunal Exhibit NQ-2006-001-06A, Administrative Record, Vol. 1.1 at 184, 203.

61. *Pre-hearing Staff Report*, revised 18 August 2006, Tribunal Exhibit NQ-2006-001-06C, Administrative Record, Vol. 1.1 at 367.

104. As to the alleged instances of lost accounts and lost sales volume at specific accounts, the Tribunal is of the same view as with respect to the claims of price undercutting at specific accounts, namely, that the evidence presented is not conclusive as to the role of the subject goods in any losses. In any event, the domestic industry's total sales of PEX tubing experienced robust growth during the period of inquiry and its market share, taking into account sales of both domestic PEX tubing and the subject goods, remained relatively stable.<sup>62</sup> As discussed above, the Tribunal is of the view that the impact of the subject goods on the market share held by domestic industry was not significant.

105. The Tribunal notes that the domestic industry's financial performance was positive over the period of inquiry. Net profits steadily increased both in terms of total dollars and on a per unit basis. While the unit gross margin declined to a small extent over the period of inquiry, the total gross margin actually increased significantly.<sup>63</sup> Further, the positive financial results achieved by the domestic industry suggest to the Tribunal that, all other things being equal, the industry likely experienced good cash flow and ability to raise capital. In this regard, the Tribunal notes that the domestic industry made significant capital investments during the period of inquiry.

106. The Tribunal notes that the domestic industry's capacity utilization increased significantly from 2003 to 2004, and decreased to almost the same extent in 2005. However, this reflects the fact that, although the volume of production increased substantially between 2004 and 2005, the increase in plant capacity exceeded this significantly, almost doubling in the same period, as new players entered the industry and certain existing producers added to their capacity. Vanguard and Bow submitted that they had made investments in additional capacity in part because of the growth in market demand resulting from the conversion from copper tubing to PEX tubing. Similarly, when comparing the first quarter of 2006 with the first quarter of 2005, the capacity utilization declined by almost one third. This situation can be explained by the fact that, although the volume of production increased, the plant capacity increased by a much greater amount.<sup>64</sup>

107. The Tribunal is not persuaded that, in the absence of the dumping, Vanguard and Bow would have achieved substantially different results. As indicated above, it is of the view that the loss of sales volume for domestically produced PEX tubing was largely attributable to the imports by the domestic industry itself. Consequently, the Tribunal does not consider that production would have been substantially higher in the absence of the dumping and that, accordingly, the domestic industry's capacity utilization would have been higher.

108. With respect to other possible indicia of injury, the Tribunal first notes that productivity did decrease, as the growth in the number of employees and hours worked outpaced the increase in production.<sup>65</sup> However, both the total number of employees in the domestic industry and the total number of hours worked by those employees increased significantly during the period of inquiry.<sup>66</sup> The evidence also

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62. *Protected Pre-hearing Staff Report*, revised 18 August 2006, Tribunal Exhibit NQ-2006-001-07C (protected), Administrative Record, Vol. 2.1 at 368.

63. *Protected Pre-hearing Staff Report*, revised 4 August 2006, Tribunal Exhibit NQ-2006-001-07A (protected), Administrative Record, Vol. 2.1 at 226.

64. *Ibid.* at 235-36.

65. *Ibid.* at 203, 233-34.

66. *Pre-hearing Staff Report*, revised 4 August 2006, Tribunal Exhibit NQ-2006-001-06A, Administrative Record, Vol. 1.1 at 233.

indicates that the domestic industry did not experience a run-up in inventory, as the level of inventories as a percentage of both production and sales remained relatively stable during the period of inquiry.<sup>67</sup>

109. The Tribunal must also consider the magnitude of the margin of dumping. In this instance, the margin of dumping was substantial. However, despite this, as discussed above, the evidence does not indicate that the subject goods had a significant effect on the price of like goods.

110. In sum, the Tribunal notes that most of the key economic performance indicia improved during the period of inquiry, as the domestic industry enjoyed higher levels of production, sales volume and employment, while achieving positive financial results. As for those indicia where there was deterioration, for example, the market share for domestically produced PEX tubing and capacity utilization, the Tribunal is not persuaded that the negative outcomes were attributable to the dumped goods. Therefore, having considered all the relevant factors, the Tribunal is of the view that the resulting impact of the dumped goods on the domestic industry, in light of relevant economic factors and indices, was not material and that, further, during the period of inquiry, the domestic industry did not experience any material injury, whether due to the dumped goods or to any other factors.

111. Based on the foregoing, the Tribunal concludes that the dumping of the subject goods has not caused injury.

### **Threat of Injury**

112. Having found that the dumping of the subject goods has not caused injury, the Tribunal must now consider whether that dumping is threatening to cause injury. It is guided in its consideration of this question by subsection 37.1(2) of the *Regulations*, which prescribes factors to be taken into account for the purposes of its threat of injury analysis. Further, the Tribunal notes that subsection 2(1.5) of *SIMA* indicates that a threat of injury finding cannot be made unless the circumstances in which the dumping of the goods would cause injury are clearly foreseen and imminent.

113. In the Tribunal's view, demand for PEX tubing in Canada will continue to increase in the near term because of strong housing demand and the continuing conversion by the construction industry from copper tubing to PEX tubing.<sup>68</sup> Acceptance of PEX tubing by the plumbing industry is increasing, even in the Toronto area,<sup>69</sup> where copper tubing has had a strong hold, driven in part by the strong upward trend in the price of copper tubing over the past few years. Further, to the extent that prices of copper tubing continue to increase,<sup>70</sup> PEX tubing will become an even more attractive substitute for copper tubing. Given its large

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67. *Protected Pre-hearing Staff Report*, revised 4 August 2006, Tribunal Exhibit NQ-2006-001-7A (protected), Administrative Record, Vol. 2.1 at 238; *Protected Pre-hearing Staff Report*, revised 18 August 2006, Tribunal Exhibit NQ-2006-001-7C (protected), Administrative Record, Vol. 2.1 at 353, 366.

68. Tribunal Exhibit NQ-2006-001-26.03, Administrative Record, Vol. 1 at 114.9-114.29, 114.32-114.34; *Transcript of Public Hearing*, Vol. 1, 29 August 2006, at 14, 30-32, 55-56; *Transcript of Public Hearing*, Vol. 2, 30 August 2006, at 179, 252, 263, 276, 280.

69. *Transcript of Public Hearing*, Vol. 1, 29 August 2006, at 118-19; Manufacturer's Exhibit B-03, para. 18, Administrative Record, Vol. 11.

70. *Transcript of Public Hearing*, Vol. 1, 29 August 2006, at 56; *Pre-hearing Staff Report*, revised 4 August 2006, Tribunal Exhibit NQ-2006-001-06A, Administrative Record, Vol. 1.1 at 195; Tribunal Exhibit NQ-2006-001-26.03, Administrative Record, Vol. 1 at 114.38; Tribunal Exhibit NQ-2006-001-26.04, Administrative Record, Vol. 1.01 at 2-3; Tribunal Exhibit NQ-2006-001-26.05, Administrative Record, Vol. 1.01 at 5; Tribunal Exhibit NQ-2006-001-26.06, Administrative Record, Vol. 1.01 at 17, 26.

excess capacity,<sup>71</sup> the domestic industry will likely be able to supply all or a high proportion of the growth in demand for PEX tubing.

114. Vanguard and Bow submitted that, in part, the domestic industry's additional capacity was put in place in anticipation of receiving an S101 certification, which will open up the B.C. high-rise market. The Tribunal is of the view that, if the application for S101 certification is successful, this will cause some intra-industry adjustment, as other domestic producers will probably gain some market share from Uponor in the B.C. high-rise market, which will likely result in Uponor being forced to lower its prices in that market.

115. The Tribunal observes that Canada appears to be the major or only export market for the U.S. producers and, hence, that imports of the subject goods would likely increase significantly in Canada at low prices if the U.S. producers were to experience significant pressure to export. However, the U.S. domestic price is currently higher than the Canadian price,<sup>72</sup> and the Tribunal therefore agrees with Zurn that U.S. producers have an incentive to sell as much in the United States as they can, rather than exporting to Canada.

116. According to the evidence, the market for PEX tubing in the United States is not as strong as it is in Canada, given that housing starts are forecast to decrease.<sup>73</sup> There is also evidence of significant recent additions to capacity, with announcements of even further additions planned for the future.<sup>74</sup> However, it is not clear to what extent this will result in excess supply in the United States in the near term. Zurn testified that, due to the need to rebuild following Hurricane Katrina and other storms experienced in the United States, no excess supply is expected, and noted that it currently has difficulty getting sufficient supply from Zurn Pex, its related U.S. company.<sup>75</sup>

117. In sum, in the Tribunal's view, there is no convincing evidence that the U.S. PEX tubing industry, in general, will experience significant pressure in the near term to increase exports to Canada.

118. The Tribunal also considered the circumstances of the major U.S. exporters individually. The two largest sources of non-producer imports over the period of inquiry were Zurn Pex and Rehau Incorporated.

119. Vanguard submitted that Zurn Pex will increase its exports of the subject goods because of the potential of the high-rise market. However, Zurn Pex does not have S101 certification and, according to the witness for Zurn, has no plans to pursue such certification.<sup>76</sup> Given that, as discussed above, it appears virtually certain that there will shortly be six sources of S101 certified PEX tubing, the market will likely start to demand S101 certification for high-rise construction all across Canada, rather than merely in Vancouver and potentially other B.C. markets. Accordingly, it is unlikely that Zurn Pex will be able to sell

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71. *Protected Pre-hearing Staff Report*, revised 4 August 2006, Tribunal Exhibit NQ-2006-001-07A (protected), Administrative Record, Vol. 2.1 at 235-36.

72. *Transcript of Public Hearing*, Vol. 2, 30 August 2006, at 217; *Transcript of Public Hearing*, Vol. 1, 29 August 2006, at 41.

73. Importer's Exhibit C-01 at 27-28, Administrative Record, Vol. 13; Manufacturer's Exhibit A-06, Administrative Record, Vol. 11; Manufacturer's Exhibit A-07, Administrative Record, Vol. 11; Tribunal Exhibit NQ-2006-001-26.03, Administrative Record, Vol. 1 at 114.35-114.37.

74. Manufacturer's Exhibit A-01 at 13, Administrative Record, Vol. 11; *Protected Pre-hearing Staff Report*, revised 4 August 2006, Tribunal Exhibit NQ-2006-001-07A (protected), Administrative Record, Vol. 2.1 at 241.

75. *Transcript of In Camera Hearing*, Vol. 2, 30 August 2006, at 131-32; *Transcript of Public Hearing*, Vol. 2, 30 August 2006, at 156, 216.

76. *Transcript of Public Hearing*, Vol. 2, 30 August 2006, at 151-52, 215.



material amounts of its PEX tubing into the high-rise market, even it were interested in this segment of the market and had excess production to export to Canada.

120. Domestic producers have accepted Rehau Incorporated<sup>77</sup> as a partner in the S101 certification process, which suggests that the domestic industry does not view Rehau Incorporated as a significant source of injury in the past or likely injury in the near term. Although Rehau Incorporated may gain volume in the high-rise market as a result of the S101 certification, along with the newly certified domestic producers, the evidence does not indicate that this is likely to cause injury in the near term.

121. In considering other U.S. suppliers that could potentially export the subject goods, the Tribunal notes that Watts Radiant would likely make any sales through its affiliated company, Watts Canada, while Uponor's affiliated U.S. producer would likely continue its practice of selling through Uponor. Further, the Tribunal notes that Vanguard's U.S. partner has agreed with Vanguard not to sell PEX tubing in Canada. Given the undoubted interest of these U.S. suppliers in the well-being of the established domestic producers with which they are affiliated, there is little likelihood that they would change their exporting practices in a fashion that risks causing injury to their affiliates.

122. The Tribunal notes that, in considering the U.S. producers individually, it has not attempted to cover all producers, but that the remaining producers represent only a very small fraction of the volume of subject goods.

123. Based on the foregoing, the Tribunal finds that the dumping of the subject goods is not threatening to cause injury.

## CONCLUSION

124. Therefore, pursuant to subsection 43(1) of *SIMA*, the Tribunal hereby finds that the dumping of the subject goods has not caused injury or retardation and is not threatening to cause injury.

Ellen Fry  
Ellen Fry  
Presiding Member

James A. Ogilvy  
James A. Ogilvy  
Member

Serge Fréchette  
Serge Fréchette  
Member

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77. The evidence is not clear that Rehau Incorporated or its Canadian affiliate, Rehau Industries Inc., was directly involved.