



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Dumping and Subsidizing

ORDER AND REASONS

Expiry Review No. RR-2018-004

Thermoelectric Containers

*Order and reasons issued
Thursday, September 5, 2019*

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IN THE MATTER OF an expiry review, pursuant to subsection 76.03(3) of the *Special Import Measures Act*, of the order made by the Canadian International Trade Tribunal on December 9, 2013, in Expiry Review No. RR-2012-004, continuing, without amendment, its finding made on December 11, 2008, in Inquiry No. NQ-2008-002, concerning:

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

ORDER

The Canadian International Trade Tribunal, pursuant to subsection 76.03(3) of the *Special Import Measures Act*, has conducted an expiry review of its order made on December 9, 2013, in Expiry Review No. RR-2012-004, continuing, without amendment, its finding made on December 11, 2008, in Inquiry No. NQ-2008-002, concerning 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.

Pursuant to paragraph 76.03(12)(b) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby continues its order in respect of the aforementioned goods.

Georges Bujold
Georges Bujold
Presiding Member

Cheryl Beckett
Cheryl Beckett
Member

Susan D. Beaubien
Susan D. Beaubien
Member

Place of File Hearing: Ottawa, Ontario
Date of File Hearing: June 24, 2019

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Cheryl Beckett, Member
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STATEMENT OF REASONS

INTRODUCTION

1. The Canadian International Trade Tribunal, pursuant to subsection 76.03(3) of the *Special Import Measures Act (SIMA)*, has conducted an expiry review of its order made on December 9, 2013, in Expiry Review No. RR-2012-004. That order continued, without amendment, the Tribunal's finding of December 11, 2008, in Inquiry No. NQ-2008-002. At issue throughout, has been 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 (the subject goods).

2. Under *SIMA*, findings of injury or threat of injury to the domestic industry from the dumping and/or subsidizing of the goods at issue give rise to protection. Anti-dumping and/or countervailing duties are imposed for a period of five years from the date of the finding. If one or more orders continuing the finding have been made, the duties expire five years after the date of the most recent order made under paragraph 76.03(12)(b), unless an expiry review has been initiated before that date.

3. The order in Expiry Review No. RR-2012-004 was scheduled to expire on December 8, 2018. The Tribunal initiated its expiry review on October 30, 2018.

4. The period of review (POR) in this expiry review is three full calendar years, from January 1, 2016 to December 31, 2018.

PROCEDURAL BACKGROUND

5. On October 31, 2018, the Canada Border Services Agency (CBSA) initiated an investigation to determine whether the expiry of the Tribunal's order was likely to result in the continuation or resumption of dumping and/or subsidizing.

6. On March 29, 2019, the CBSA determined, pursuant to paragraph 76.03(7)(a) of *SIMA*, that the expiry of the order was likely to result in the continuation or resumption of dumping and subsidizing of the subject goods.¹

7. The Tribunal requested domestic producers, importers and foreign producers of thermoelectric containers to complete questionnaires. The questionnaires were distributed on April 1, 2019.

8. There were no replies to the foreign producers' questionnaire. From the replies to the questionnaires that were received, and other information on the record, public and protected investigation reports were prepared by May 21, 2019. Revisions to those reports were subsequently made on June 11, 2019.

9. The Tribunal received submissions in support of a continuation of the order from Koolatron Corporation (Koolatron) and United Steelworkers (USW) on May 29, 2019. The Tribunal did not receive any submissions opposing a continuation of the order.

10. Given that this proceeding was unopposed, on June 11, 2019, the Tribunal invited parties to file submissions on whether it would be appropriate to conduct a hearing by way of written submissions in this expiry review. Koolatron and USW filed submissions with the Tribunal on June 14, 2019 indicating their

1. Exhibit RR-2018-004-03A, Vol. 1 at 1.

support for proceeding by way of a file hearing. Canadian Tire Corporation (CTC) indicated that it took no position on this matter.

11. After due consideration, the Tribunal was satisfied that it could dispose of the matter on the basis of the written documentation before it. The Tribunal decided to hold a hearing by way of written submissions pursuant to Rule 25.1 of the *Canadian International Trade Tribunal Rules*. The Tribunal notified the parties of its interlocutory decision on this issue on June 18, 2019.

12. On June 19, 2019, CTC advised the Tribunal that it would not be filing any supplemental documents or submissions in these proceedings.

13. The Tribunal did not receive any requests for product exclusions.

14. The Tribunal held its file hearing on June 24, 2019.

PRODUCT

Product Definition

15. The subject goods are defined as follows:²

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.

Product Information

16. The CBSA provided the following additional product information:³

[22] 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.

[23] Thermoelectric containers can, therefore, be used to either cool or warm the interior air volume of the container, relative to the temperature gradient with the ambient air.

[24] The thermoelectric containers operate using a DC power cord, a battery or a 120-volt alternative current (AC) power adapter.

[25] Although the interior is normally made of plastic, the exterior can either be made of plastic, metal, a combination of plastic and metal or of a soft-shell that covers the plastic interior. The containers have a lid or door that is composed of plastic, metal, glass or a combination of these materials.

[26] Thermoelectric containers are generally categorized according to their marketed uses as:

- a. travel coolers and warmers;
- b. home use coolers and warmers;
- c. wine (or display) coolers; and
- d. commercial coolers and warmers.

2. Exhibit RR-2018-004-03A, Vol. 1 at 5.

3. Exhibit RR-2018-004-03A, Vol. 1 at 5-6.

[27] Due to limitations associated with thermoelectric refrigeration using modules paired to passive heat sinks, the size of containers is generally limited to approximately 100 litres.

[28] The exclusion of liquid dispensers from the definition is intended to exclude such products as water coolers, cream dispensers and milk dispensers.

LEGAL FRAMEWORK

17. The Tribunal is required, pursuant to subsection 76.03(10) of *SIMA*, to determine whether the expiry of the order issued in Expiry Review No. RR-2012-004 in respect of the subject goods is likely to result in injury or retardation for the domestic industry.⁴

18. Pursuant to subsection 76.03(12), if the Tribunal determines that the expiry of the order is unlikely to result in injury, it is required to rescind the order. However, if it determines that the expiry of the order is likely to result in injury, the Tribunal is required to continue it, with or without amendment.

19. Before proceeding with its analysis of the likelihood of injury, the Tribunal must first determine what constitutes “like goods.” Once that determination has been made, the Tribunal must determine what constitutes the “domestic industry”.

20. Given that this expiry review concerns both the dumping and subsidizing of the subject goods, the Tribunal must also determine whether it will make an assessment of the cumulative effect of this dumping and subsidizing on the domestic industry.

LIKE GOODS AND CLASSES OF GOODS

21. In order for the Tribunal to determine whether the resumed or continued dumping and subsidizing of the subject goods is likely to cause material injury to the domestic producers of like goods, it must determine which domestically produced goods, if any, constitute like goods in relation to the subject goods. The Tribunal must also assess whether there is, within the subject goods and the like goods, more than one class of goods.⁵

22. 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.

23. In deciding the issue of like goods when goods are not identical in all respects to the other goods, the Tribunal typically considers a number of factors, including the physical characteristics of the goods, such as composition and appearance, and their market characteristics, such as substitutability, pricing, distribution channels, end uses and whether the goods fulfill the same customer needs.⁶

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

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

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

24. The Tribunal has previously concluded that domestically produced thermoelectric containers are like goods in relation to the subject goods and that there is a single class of goods. In *TC 2008 NQ*,⁷ the Tribunal found that domestically produced thermoelectric containers closely resembled the subject goods in terms of physical and market characteristics, could generally be substituted for them and competed directly with them in the Canadian market. On that basis, the Tribunal determined that domestically produced thermoelectric containers constituted like goods in relation to the subject goods.⁸

25. Also, as part of *TC 2008 NQ*, the Tribunal reviewed evidence regarding whether certain categories of thermoelectric containers constituted separate classes of goods and concluded that they did not. This finding was maintained in *TC 2013 RR*.⁹

26. No submissions have been made in this expiry review concerning the Tribunal's previous findings on classes of goods and like goods. Accordingly, the Tribunal concludes that there is no basis to revisit or reverse its previous findings on these issues. As such, for the purposes of this expiry review, the Tribunal finds that there is one class of goods and that domestically produced thermoelectric container are "like goods" in relation to the subject goods.

DOMESTIC INDUSTRY

27. 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.

28. The Tribunal must therefore determine whether there is a likelihood of injury to the domestic producers as a whole or alternatively to those domestic producers whose production represents a major proportion of the total production of like goods.¹⁰

29. Over the POR, there were two known producers of thermoelectric containers in Canada: Koolatron and MTL Technologies Inc. (MTL).¹¹ MTL did not participate in this expiry review, but it did provide some information by way of a response to the Tribunal's questionnaire.

7. *Thermoelectric Containers* (11 December 2008), NQ-2008-002 (CITT) [*TC 2008 NQ*].

8. *TC 2008 NQ* at para. 40.

9. *Thermoelectric Containers* (9 December 2013), RR-2012-004 (CITT) [*TC 2013 RR*] at para. 22.

10. The term "major proportion" means an important or significant proportion of total domestic production of the like goods and not necessarily a majority of these goods: *Japan Electrical Manufacturers Assn. v. Canada* (Anti-Dumping Tribunal), [1986] F.C.J. No. 652 (FCA); *McCulloch of Canada Limited and McCulloch Corporation v. Anti-Dumping Tribunal*, [1978] 1 F.C. 222 (FCA); *China – Anti-dumping and Countervailing Duties on Certain Automobiles from the United States* (23 May 2014), WTO Docs. WT/DS440/R, Report of the Panel at para. 7.207; *European Community – Definitive Anti-dumping Measures on Certain Iron or Steel Fasteners from China* (15 July 2011), WTO Docs. WT/DS397/AB/R, Report of the Appellate Body at paras. 411, 412, 419; *Argentina – Definitive Anti-dumping Duties on Poultry from Brazil* (22 April 2003), WTO Docs. WT/DS241/R, Report of the Panel at para. 7.341.

11. Exhibit RR-2018-004-03A, Vol. 1 at 8; *TC 2013 RR* at para. 25.

30. All thermoelectric containers produced by MTL were sold exclusively in the U.S. market; MTL did not produce these products for the domestic market.¹² No evidence was provided indicating MTL's sales volumes to the United States. MTL also indicated that it no longer produces thermoelectric containers due to rising production costs (i.e. tariffs on imports of heat sinks from China) and new energy efficiency regulations in Canada and the United States.¹³

31. There is no evidence indicating that MTL intends to resume production of thermoelectric containers. In his witness statement, Mr. Don Guest of USW indicated that, to his knowledge, Koolatron is the only remaining manufacturer of thermoelectric containers in Canada.¹⁴

32. Accordingly, it appears that Koolatron is now the sole domestic producer of like goods and currently accounts for the totality of the domestic production. At the very least, there is no evidence to indicate that the Tribunal should depart from its previous finding that Koolatron accounts for the vast majority of total domestic production.¹⁵ The Tribunal considers it appropriate, as it did in *TC 2013 RR*, to restrict its analysis of the likelihood of injury to Koolatron. Any references herein to the domestic industry or domestic producers are references to Koolatron.

CROSS-CUMULATION

33. The Tribunal must also determine whether it will make an assessment of the cumulative effect of the dumping and subsidizing of the subject goods. In its analysis in *TC 2008 NQ* and later in *TC 2013 RR*, the Tribunal did not differentiate the effects resulting from the dumping of the subject goods from the effects resulting from the subsidizing of the same goods. The Tribunal explained that it was not possible to isolate the effects caused by the dumping from those caused by the subsidizing. As the effects were so closely intertwined, it was impossible to unravel them so as to allocate discrete portions to the dumping and the subsidizing respectively.¹⁶

34. No evidence or argument was presented during this expiry review to warrant a departure from the approach previously taken by the Tribunal. Therefore, in its analysis below, the Tribunal has cumulatively assessed the likely impact of the continuation or resumption of dumping and subsidizing of the subject goods on the domestic industry should the order be rescinded.

LIKELIHOOD OF INJURY ANALYSIS

35. An expiry review is forward-looking.¹⁷ It follows that evidence from the period during which an order or a finding was being enforced is relevant insofar as it bears upon the prospective analysis of whether the expiry of the order or finding is likely to result in injury.¹⁸

12. Exhibit RR-2018-004-15.01, Vol. 3 at 1, 4.

13. Exhibit RR-2018-004-15.01, Vol. 3 at 1-4.

14. Exhibit RR-2018-004-B-01, Vol. 11 at 1.

15. *TC 2013 RR* at para. 25.

16. *TC 2008 NQ* at paras. 70-71; *TC 2013 RR* at paras. 26-27.

17. *Certain Dishwashers and Dryers* (procedural order dated 25 April 2005), RR-2004-005 (CITT) at para. 16.

18. *Copper Pipe Fittings* (17 February 2012), RR-2011-001 (CITT) at para. 56. In *TC 2013 RR* at para. 14, the Tribunal stated that the analytical context pursuant to which an expiry review must be adjudged often includes the assessment of retrospective evidence supportive of prospective conclusions. See also *Aluminum Extrusions* (17 March 2014), RR-2013-003 (CITT) at para. 21.

36. There is no presumption of injury in an expiry review; findings must be based on positive evidence, in compliance with domestic law and consistent with the requirements of the World Trade Organization.¹⁹ In the context of an expiry review, positive evidence can include evidence based on past facts that tend to support forward-looking conclusions.²⁰

37. More specifically, as stated by the Tribunal in *TC 2013 RR*:

The requirement in an expiry review is that the Tribunal draw logical conclusions from the relevant information before it, and that information will often appropriately include the performance of the domestic and foreign industries during the POR, when anti-dumping and countervailing duties were in place. An aid to the proper contextualization of that information can include the performance of the domestic and foreign industries during the initial injury inquiry's period of investigation, when anti-dumping and countervailing duties had yet to be applied. For instance, while not dispositive, a significant improvement in domestic market and industry performance indicators during the POR relative to the period of investigation is suggestive of the pivotal role played by anti-dumping and countervailing duties and is prima facie evidence that the rescission of the extant finding would likely result in injury to the domestic industry.²¹

[Footnotes omitted]

38. Therefore, relevant evidence of past facts tending to support forward-looking conclusions is not limited to information on the performance of the relevant industries during the POR.²² The Tribunal must consider the totality of the evidence before it to assess what would likely happen if the duties were no longer in place.

39. In making its assessment of likelihood of injury, the Tribunal has consistently taken the view that it should focus on circumstances that can reasonably be expected to exist in the near to medium term. This is generally considered to be the period comprising 18 to 24 months from the date on which the finding or order would expire. In this case, the Tribunal finds no reason to depart from its usual approach.

40. Subsection 37.2(2) of the *Special Import Measures Regulations*²³ lists factors that the Tribunal may consider in addressing the likelihood of injury in cases where the CBSA has determined that there is a likelihood of continued or resumed dumping or subsidizing. First, the Tribunal looks at the changes that have occurred in the international and domestic markets over the past five years. Then, the Tribunal considers how Canadian producers will likely fare if the duties were to stay in place. Finally, the Tribunal analyzes what would happen if the duties were not in place, and in particular, the likely effects of the subject goods on the performance of Canadian producers in the future. The factors that the Tribunal considers relevant in this expiry review, which are further explained below, can be summarized as follows:

- With the order in place, prices of the subject goods have increased to fairly-traded levels.
- Koolatron has been able to compete, invest and adapt to a very competitive environment in which pricing pressures from customers are constant on suppliers of thermoelectric containers. However, even with the benefit of the order, Koolatron will continue to face challenges in the near to medium term.

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

20. *TC 2013 RR* at para. 14; *Aluminum Extrusions* at para. 21.

21. *TC 2013 RR* at para. 14.

22. Due to the small number of participants involved in this expiry review, most of the import, sales, pricing, production and financial data, even in aggregate form, cannot be disclosed in order to protect the confidentiality of the information. Where possible, approximate percentages or general ranges of magnitude are referenced.

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

- While Koolatron is currently profitable,²⁴ subject goods remain a significant threat to the viability of the domestic industry. Indeed, the presence of subject goods, at fairly-traded prices, remains significant in the domestic market. This suggests that, without the order, Chinese producers would clearly be interested in the market and able to sell the subject goods at very aggressive prices in order to gain market share.
- In the absence of the order, a significant increase in the volume of subject goods at prices which will create substantial downward pressure on the price of the like goods is likely to occur. China's massive capacity to produce thermoelectric containers, its restricted access to the export market in the United States in the near to medium term due to tariffs on Chinese imports (increasing the attractiveness of the Canadian market), and the market conditions that prevailed during the initial period of the injury inquiry investigation, when anti-dumping and countervailing duties had yet to be applied (which would likely reappear) are the main factors that support this conclusion.
- The end result would likely be very damaging to the performance of the domestic industry, as it would have to either lower its prices to make sales or lose sales to Chinese producers, which would necessarily have a significant negative impact on its performance. Therefore, it is likely that the subject goods would cause material injury to the domestic industry in the near to medium term if the order is rescinded.

Changes in Market Conditions

41. In order to assess the likely volumes and prices of the subject goods and their impact on the domestic industry if the order was rescinded, the Tribunal will first consider changes in international and domestic market conditions since the order in *TC 2013 RR* was put in place.²⁵

International Market Conditions

42. Koolatron submitted that developments in international market conditions have made the domestic industry more vulnerable. These conditions include China's increased production capacity and export orientation resulting from the expanding Chinese market for thermoelectric containers and moderating economic growth. Moreover, recent trade tariffs on Chinese imports in the United States have created a new risk of diversion.

– Expanding Chinese Market for Thermoelectric Containers

43. Koolatron submitted that the demand for thermoelectric containers in China is growing.²⁶ This is partly in response to the expanding wine market in China. According to Agriculture and Agri-Food Canada's market analysis in 2016, the Chinese grape wine market was expected to increase by 81 percent reaching an anticipated value of US\$69.3 billion by 2019.²⁷ It has been projected that over the next five years, China will soon become the second largest market for wine after the United States.²⁸ Another factor

24. Exhibit RR-2018-004-A-01, Vol. 11 at para. 116.

25. See paragraph 37.2(2)(j) of the *Regulations*.

26. In *TC 2013 RR*, the Tribunal found that decades of strong economic growth resulting in greater household spending, wine consumption and automobile ownership, likely contributed to increased demand for thermoelectric containers in China. See *TC 2013 RR* at para. 36.

27. Exhibit RR-2018-004-A-03, Vol. 11 at 53.

28. Exhibit RR-2018-004-A-03, Vol. 11 at 80.

that has fueled demand for thermoelectric containers is the increasing use of automobiles in China.²⁹ That said, it has been noted that after nearly 15 years of growth, China's auto industry has reached a maturity phase of development.³⁰

44. To meet the growing demand, Koolatron argued that Chinese producers have increased their production capacity for thermoelectric containers and as a consequence, there is a greater range and quantity of products available for export.³¹ The Tribunal finds that this has contributed to China's excess production capacity, which is discussed in more detail below.

– Slowing Economic Growth in China

45. Koolatron contended that the recent weakening of the Chinese economy has slowed consumer demand. The moderation of China's economic growth has been described as being attributable to the escalating trade tensions between China and the United States, softening domestic demand, and the decrease in the value of the renminbi against the U.S. dollar.³²

46. A 2019 report from the World Bank projects that growth in China will slow from 6.5 percent in 2018 to 6.2 percent on average in 2019-2020.³³ According to a report by the International Monetary Fund issued in April 2019, spending on durable consumption in China has softened, with automobile sales declining in 2018.³⁴ Despite fiscal stimulus and no further tariff increases by the United States relative to those from September 2018, economic growth is projected to be slow in 2019-2020.³⁵

47. Koolatron submitted that the recently established production capacity and decreasing consumer demand in China has increased Chinese producers' export orientation which, in turn, increases the likelihood that large volumes of subject goods will be exported to Canada if the order is rescinded. The Tribunal finds that Koolatron has tendered credible evidence to support its position, especially since, as discussed below, there is clear evidence of significant excess production capacity in China for thermoelectric containers.³⁶

– U.S. Trade Tariffs

48. Since early 2018, China and the United States have engaged in rounds of retaliatory tariffs which have resulted in at least \$250 billion worth of Chinese imports being subject to tariffs in the United States (the "Section 301 tariffs"). These tariffs were implemented in phases between June 2018 and May 2019.³⁷ All Chinese imports falling under a prescribed list of HS Codes are currently subject to a 25 percent tariff.

29. See *TC 2013 RR* at para. 54; Exhibit RR-2018-004-A-03, Vol. 11 at 247-248.

30. Exhibit RR-2018-004-A-03, Vol. 11 at 74.

31. Exhibit RR-2018-004-A-03, Vol. 11 at paras. 147. See *TC 2013 RR* at para. 36.

32. Exhibit RR-2018-004-A-03, Vol. 11 at 100-102; see Exhibit RR-2018-004-A-03, Vol. 11 at 150.

33. Exhibit RR-2018-004-A-03, Vol. 11 at 414.

34. Exhibit RR-2018-004-A-03, Vol. 11 at 442.

35. Exhibit RR-2018-004-A-03, Vol. 11 at 453.

36. See paragraphs 79-80.

37. The first two rounds of 25 percent tariffs came into effect on July 6 (on \$34 billion worth of products) and on August 23 (on \$16 billion worth of products). The third round of tariffs came into effect on September 24, 2018 (on \$200 billion worth of products), initially at 10 percent tariffs, which increased to 25 percent on May 10, 2019. An additional list of products to be subject to a 25 percent tariff was proposed on May 13, 2019. See Exhibit RR-2018-004-A-03, Vol. 11 at 41, 42, 117, 118, 236.

49. In his witness statement, Mr. Kulkarni noted that thermoelectric products and/or their inputs were included in the affected HS Codes. The Tribunal notes that some of the HS codes identified on the product lists (e.g. HS 8418.29.20, 8418.69.01 and 8418.50.00) as described by Mr. Kulkarni, are the same subheadings used to classify subject goods in Canada.³⁸ Koolatron submitted that these new tariffs restrict China's access to the U.S. export market and will cause thermoelectric containers from China to be diverted into Canada.

50. While there was little evidence of diversion during the POR, the Tribunal agrees that the subject goods will be less competitive in the U.S. market due to Section 301 tariffs and because Chinese producers face restricted market access in the near and medium term. As a result, there is a risk that thermoelectric containers previously destined for the U.S. market will be diverted into the Canadian market. This risk was not present at the time of the last expiry review. At the very least, the imposition of Section 301 tariffs ensures that, if the order is rescinded, Canada will be a more attractive North American market for the subject goods.

51. On March 8, 2018, the United States also imposed a 10 percent tariff on all imported aluminum products ("Section 232 tariffs"). Koolatron submitted that the imposition of these tariffs will increase input costs for aluminum raw material.

52. The World Bank has reported that 2018 aluminum prices were volatile and were the highest since 2012. Aluminum prices are expected to rise in 2019 (following a 9 percent decline in Q3 2018).³⁹ Although Koolatron has not yet felt the impact of these tariffs due to its shipment cycle for aluminum, the Tribunal notes that Koolatron's aluminum costs have already increased over the past two years.⁴⁰

53. While there is insufficient evidence to predict with certainty the impact of Section 232 tariffs on the price of Koolatron's aluminum raw materials, it is reasonable to infer that the forecasted rise of aluminum prices in the near term constitutes a competitive challenge that the domestic industry is likely to face over the next few months.

Domestic Market Conditions

54. The evidence indicates that the defining characteristics of the domestic market for thermoelectric containers have generally remained the same since the issuance of the Tribunal's original finding in *TC 2008 NQ*. Mass merchandisers, including in particular CTC, remain the dominant players who significantly impact prices in the market and competition among them remains intense.⁴¹ This competitive dynamic results in merchandisers seeking to purchase thermoelectric containers at the lowest possible prices.

55. Indeed, the Tribunal was presented with no evidence indicating that its earlier findings on the dynamics of the domestic retail market have changed in recent years. In *TC 2008 NQ*, the Tribunal found that CTC greatly influenced prices for other retailers. CTC's desire to sell products at attractive price points "pulls down retail prices generally and, consequently, affects the price at which retailers and importers seek to purchase thermoelectric containers."⁴² In *TC 2013 RR*, the Tribunal found that due to CTC's "high-low"

38. Exhibit RR-2018-004-A-03, Vol. 11 at 41, 42; Exhibit RR-2018-004-05, Vol. 1.1 at 9.

39. Exhibit RR-2018-004-A-03, Vol. 11 at 708, 709.

40. Exhibit RR-2018-004-A-03, Vol. 11 at para. 118; Exhibit RR-2018-004-A-04, Vol. 12 (protected) at para. 118.

41. *TC 2008 NQ* at paras. 94-96. Remaining big-box retailers noted as being CTC, Wal-Mart, Costco and Home Depot, see Exhibit RR-2018-004-03A, Vol. 1 at 14.

42. *TC 2008 NQ* at para. 96.

price strategy (i.e. sales are promoted by periodically selling products at discounts throughout the season), low pricing must be of paramount importance for other “big box” retailers in seeking new customers.⁴³ According to Mr. Kulkarni, Koolatron’s market research indicated that CTC may lower prices periodically by as much as 85 percent, with 50 percent discounts being quite common.⁴⁴

56. In addition, Koolatron submitted that Amazon’s dominance of online retail and growing popularity of online shopping in Canada has increased competition among Canadian mass merchandisers. In this regard, there is evidence indicating that Amazon has increasing influence on pricing in the market. According to Mr. Kulkarni, Amazon will price match, even if it sells at a loss. This tactic imposes major pressure on brick and mortar retailers.⁴⁵ Given the importance of Amazon in online sales, the Tribunal finds that it is likely to become an important competitor for CTC in the near to medium term. Furthermore, Amazon will likely place additional downward pressure on retail prices of thermoelectric containers in the near to medium term considering its global importance as an online retailer and tendency to price aggressively, as noted by Koolatron. Thus, on the basis of Mr. Kulkarni’s evidence, the Tribunal finds that the availability of low-priced imported thermoelectric containers remains attractive for mass merchandisers looking to increase their profit margins.⁴⁶

57. The Tribunal now turns to evidence with respect to specific developments in the domestic market in terms of key market indicators.

58. Over the POR, there has generally been a reduction in the size of the domestic market for thermoelectric containers. The total apparent market volume decreased in 2017 by 20 percent and increased by only 6 percent in 2018. These figures represent an overall decrease of 15 percent over the POR. This contraction suggests that demand for thermoelectric containers is flat and that the market may now be mature or saturated.

59. Sales volumes from domestic production increased by 5 percent in 2017, remaining flat thereafter. Sales volumes from imports decreased by 39 percent in 2017 and increased by 14 percent in 2018.⁴⁷ Between 97 to 99 percent of sales from imports were travel coolers/warmers with 97 to 99 percent of sales being made directly to consumers/end users.⁴⁸

60. On the whole, Koolatron has expanded its share of the market over the POR. In 2017, its share increased by 13 percentage points and in 2018, fell by 3 percentage points. The market share of imports remains quite significant relative to the share of domestic industry. Imports from non-subject countries have decreased their market share over the POR, falling by 9 percentage points in 2017 and 3 percentage points in 2018.⁴⁹ Meanwhile, subject imports increased their market share over the POR, increasing 6 percentage points in 2018 after a 4 percentage point decrease in 2017.⁵⁰ The market share of subject goods, although lower than that of domestically produced like goods, remains significant.⁵¹ In 2018, the subject goods had a materially greater share of the market than imports from non-subject countries.⁵²

43. *TC 2013 RR* at paras. 67-68.

44. Exhibit RR-2018-004-A-03, Vol. 11 at para. 58.

45. Exhibit RR-2018-004-A-03, Vol. 11 at para. 104.

46. Exhibit RR-2018-004-A-03, Vol. 11 at para. 109.

47. Exhibit RR-2018-004-05, Table 7, Vol. 1.1.

48. Exhibit RR-2018-004-05, Table 10, Vol. 1.1.

49. Exhibit RR-2018-004-05, Table 9, Vol. 1.1.

50. Exhibit RR-2018-004-05, Table 9, Vol. 1.1.

51. Exhibit RR-2018-004-06, Table 8 (protected), Vol. 2.1.

52. Exhibit RR-2018-004-06, Table 8 (protected), Vol. 2.1.

61. Over the POR, prices of the subject goods have increased to fairly-traded levels.⁵³ Indeed, the imposition of anti-dumping and countervailing duties as a result of the order in *TC 2013 RR* appears to have offset any price advantage caused by the dumping and subsidizing and has given the domestic industry an opportunity to compete fairly with the subject goods. In these conditions, Koolatron has been able to steadily increase its prices during the POR. Aggregate average unit values for the domestic like goods increased by 11 percent in 2017 and a further 1 percent in 2018.⁵⁴ However, it bears repeating that subject goods accounted for an important share of the total domestic market even with duties in place. Despite the imposition of duties and the overall decline in the size of the apparent market, as noted above, the market share for subject goods exceeded that of imports from non-subject countries at the end of the POR.

62. Finally, the Tribunal notes the presence of imports of thermoelectric containers using heat pipe technology (heat pipe products) in the domestic market, which do not form part of the subject goods.⁵⁵ Heat pipe products began being imported after the Tribunal's order in 2013. According to the CBSA, heat pipe products amount to approximately 10 percent of the import market over the period of review for the CBSA's investigation (January 1, 2015 to September 30, 2018). According to Koolatron, imports of heat pipe products have been increasing in recent years.⁵⁶ Based on the evidence on the record, the Tribunal finds that these products are functionally equivalent to the subject and like goods and therefore are competitor products.⁵⁷ This development is therefore likely to adversely affect demand for the subject and like goods in the near to medium term.

63. Koolatron estimated that in 2018, heat pipe coolers represented a relatively small share of the total Canadian market for thermoelectric products.⁵⁸ The CBSA noted that if the order is rescinded importers could revert to purchasing more subject goods instead of heat pipe products.⁵⁹ Absent further evidence with respect to this type of thermoelectric container, it is difficult to probe the CBSA's statements. For instance, there is no evidence with respect to pricing of heat pipe products. However, any increase in the market share held by heat pipe products in the near to medium term would mean that suppliers of traditional types of thermoelectric containers, including Koolatron, would likely compete for a smaller pool of potential consumers.

Likely Performance of the Domestic Industry if the Order Is Continued

64. The Tribunal will examine the likely performance of the domestic industry if the order is continued, taking into account that industry's recent performance.⁶⁰ For the purposes of this analysis, the Tribunal will consider whether there are any relevant factors other than the dumping and subsidizing of the subject goods affecting or likely to affect the domestic industry's performance in the near to medium term.⁶¹

53. Exhibit RR-2018-004-06, Table 13 (protected), Vol. 2.1.

54. Exhibit RR-2018-004-05, Table 14, Vol. 1.1; Exhibit RR-2018-004-06, Table 13 (protected), Vol. 2.1.

55. The CBSA determined these products fall outside the scope of the product definition and therefore are currently not subject to *SIMA* duties. Exhibit RR-2018-004-03A, Vol. 1 at 18; Exhibit RR-2018-004-A-03, Vol. 11 at para. 112.

56. Exhibit RR-2018-004-A-04, Vol. 12 (protected) at 51.

57. Exhibit RR-2018-004-03A, Vol. 11 at 18.

58. Exhibit RR-2018-004-A-01, Vol. 11 at para. 29; Exhibit RR-2018-004-A-02, Vol. 12 (protected) at para. 29; Exhibit RR-2018-004-A-03, Vol. 11 at paras. 111-113; Exhibit RR-2018-004-A-04, Vol. 12 (protected) at paras. 111-113.

59. Exhibit RR-2018-004-03A, Vol. 1 at 18.

60. See paragraph 37.2(2)(c) of the *Regulations; Hot-rolled Carbon Steel Plate and High-strength Low-alloy Steel Plate* (7 January 2014), RR-2013-002 (CITT) at para. 85.

61. See paragraph 37.2(2)(k) of the *Regulations*.

Recent Performance

65. Koolatron's financial performance from domestic sales was positive over the POR. Gains were seen in each year for domestic net sales volume, total net sales value and total gross margin.⁶² These results were seen despite increases in cost of goods sold (COGS) in each year.⁶³ Financial performance from export sales also remained positive with some weakening in 2018.⁶⁴

66. Total production decreased by 5 percent in 2017 and increased by 8 percent in 2018. Domestic production for domestic sales fell only by 3 percent in 2017 followed by a 7 percent increase in 2018, surpassing levels in 2016. After falling by 8 percent in 2017, domestic production for export sales increased by 10 percent in 2018.⁶⁵ The proportion of domestic sales and export sales remained steady over the POR.⁶⁶ Practical plant capacity increased in 2017 remaining flat thereafter. Capacity utilization rates for total production fell in 2017 but recovered to almost the same rate in 2018.⁶⁷

67. Direct employment numbers increased over the POR, while indirect employment remained steady. Wages for both direct and indirect employment increased in each year. Total productivity has also remained steady.⁶⁸

68. With respect to investments, Koolatron has invested in its production facilities and in research and development of new products. It has made investments in each year of the POR to improve productivity and product design at the Brantford plant.⁶⁹ According to Mr. Kulkarni, productivity gains from its investments in R&D and plant infrastructure have allowed Koolatron to maintain reasonable margins despite lower unit prices.⁷⁰

69. Koolatron characterized its performance as being "moderately positive", attributing its recovery to the stabilizing effect of the Tribunal's previous findings in respect of the subject goods.⁷¹ That said, Mr. Kulkarni maintains that per-unit domestic prices remain at levels established in 2007, which is lower than the original period of inquiry.⁷² Accordingly, it has not made a full recovery due to pressures placed on its pricing. The Tribunal notes that market unit value prices in 2018 were similar to prices in 2007; unit values in each year of the POR were lower than prices in 2005 and 2006.⁷³

62. Exhibit RR-2018-004-06, Table 29 (protected), Vol. 2.1.

63. Exhibit RR-2018-004-06, Table 29 (protected), Vol. 2.1.

64. Exhibit RR-2018-004-06, Table 30 (protected), Vol. 2.1.

65. Exhibit RR-2018-004-06, Table 32 (protected), Vol. 2.1; Exhibit RR-2018-004-05, Table 33, Vol. 1.

66. Exhibit RR-2018-004-06, Table 34 (protected), Vol. 2.1.

67. Exhibit RR-2018-004-06, Table 32 (protected), Vol. 2.1; Exhibit RR-2018-004-05, Table 33, Vol. 1.

68. Exhibit RR-2018-004-06, Table 32 (protected), Vol. 2.1.

69. Exhibit RR-2018-004-A-03, Vol. 11 at para. 18; Exhibit RR-2018-004-A-04, Vol. 12 (protected) at para. 18; Exhibit RR-2018-004-16.02, Vol. 4 (protected) at 13; Exhibit RR-2018-004-06, Table 32 (protected), Vol. 2.1.

70. Exhibit RR-2018-004-A-03, Vol. 11 at paras. 55-66.

71. Exhibit RR-2018-004-A-03, Vol. 11 at 18-28; Exhibit RR-2018-004-A-04, Vol. 12 (protected) at 15-25. Mr. Kulkarni provided the Tribunal with data demonstrating the positive effect the current order has had on Koolatron's production, prices, employment and financial performance.

72. Exhibit RR-2018-004-A-03, Vol. 11 at para. 55; Exhibit RR-2018-004-A-04, Vol. 12 (protected) at para. 55.

73. Exhibit RR-2018-004-11.02A, Table 34 (protected), Vol. 2.3; Exhibit RR-2018-004-06, Table 13 (protected), Vol. 2.1.

70. Based on this credible and uncontradicted evidence, the Tribunal agrees that the order under review was instrumental in Koolatron's recovery, in particular in respect of its production levels, pricing, and sales volume.

Likely Performance if the Order Is Continued

71. Looking ahead, the evidence indicates that Koolatron should be in a position to remain competitive, invest in its production facility and pursue research and development initiatives if the order is continued. In this regard, Mr. Kulkarni indicated that Koolatron has planned meaningful investments between 2019 and 2021.⁷⁴

72. However, there is evidence that recent and forecasted market conditions are likely to adversely affect the performance of the domestic industry even if the order is continued. The Tribunal may consider such factors pursuant to paragraph 37.2(2)(k) of the *Regulations*. These may include the role of heat pipe products in the market, rising input and other costs.

73. With respect to heat pipe products, as noted above, these products compete directly with thermoelectric containers. To the extent that heat pipe products may displace like goods, the domestic industry's performance could be negatively impacted as a result of this development even if the order continues. The Tribunal cannot rule out the possibility of this materializing over the near to medium term.

74. The domestic industry may also have to contend with increasing costs. In addition to rising aluminum prices as described above, Mr. Kulkarni also noted cost increases with respect to various other inputs as well as in labour costs.⁷⁵

75. Moreover, there is increasing pressure to invest in online services to respond to the growing popularity of online shopping.⁷⁶ In addition to Amazon's growing dominance in online sales, Mr. Kulkarni describes CTC as remaining focused on improving its online services, including with respect to home delivery, in-store pick-up, and self-serve storage towers.⁷⁷ Koolatron has increased its reliance on direct marketing to the consumer through the internet and infomercials to better compete with U.S. and Chinese competitors.⁷⁸

76. In summary, the Tribunal finds that the domestic industry has been able to compete, invest and adapt to a very competitive environment with ongoing and constant pricing pressures on suppliers of thermoelectric containers. The Tribunal expects that if the order is continued, Koolatron will continue to be challenged by rising input costs in the face of continued pressure to lower prices to remain competitive due to the aggressive pricing strategies implemented by major retailers. It might also have to face increased competition from non-subject heat pipe containers. During the POR, these challenges have not prevented Koolatron from performing relatively well. This indicates that such factors unrelated to dumping and subsidizing were not *per se* a cause of injury to the domestic industry during the POR.

74. Exhibit RR-2018-004-06, Table 32 (protected) Vol. 2.1.

75. Exhibit RR-2018-004-A-03, Vol. 11 at paras. 118-119; Exhibit RR-2018-004-A-04, Vol. 12 (protected) at paras. 118-119. See also table at Exhibit RR-2018-004-A-04, Vol. 12 (protected) at 62. Exhibit 2018-004-06, Table 30 (protected), Vol. 2.1.

76. Exhibit RR-2018-004-A-03, Vol. 11 at paras. 104-109; Exhibit RR-2018-004-A-03, Vol. 11 at 67-69.

77. Exhibit RR-2018-004-A-03, Vol. 11 at para. 106. See also Exhibit RR-2018-004-A-03, Vol. 11 at 132.

78. Exhibit RR-2018-004-A-03, Vol. 11 at para. 36.

Likely Performance of the Domestic Industry if the Order Is Rescinded

Likely Import Volume of Dumped and Subsidized Subject Goods

77. The likely volume of the dumped or subsidized goods if the order is allowed to expire, is a relative factor for the Tribunal to consider, according to paragraph 37.2(2)(a) of the *Regulations*. In particular, the Tribunal may consider whether there is likely to be a significant increase in the volume of imports of the dumped or subsidized goods, either in absolute terms or relative to the production or consumption of like goods.

78. The Tribunal's assessment of the likely volumes of dumped and subsidized imports comprises a consideration of the likely performance of the foreign industry, the potential for the foreign producers to produce goods in facilities that are currently used to produce other goods, evidence of the imposition of anti-dumping and/or countervailing measures in other jurisdictions in respect of goods of the same description or similar goods, and whether measures adopted by other jurisdictions are likely to cause a diversion of the subject goods to Canada.⁷⁹

79. China's significantly large capacity to produce subject goods is relevant to the potential for high volumes of subject goods to enter the Canadian market, should the order be rescinded. According to Koolatron, Chinese producers have a significantly large capacity to produce subject goods. As evidence, Koolatron submitted evidence of the production capacities of certain Chinese companies. In reviewing the available data for three of four Chinese producers discussed in Mr. Kulkarni's witness statement, it is clear that there is significant excess capacity in China. For instance, Ningbo Iceberg Electric Appliance Co. Ltd. had an excess capacity of 200,000 units or 67 percent;⁸⁰ Guangdong Fuxin Technology Co., Ltd. had an excess capacity of 480,000 units or 44 percent; and Homesun Electric Appliance Co., Ltd., an excess capacity of 220,000 units or 41 percent.⁸¹

80. As such, the capacity and excess capacity of only three producers in China is much larger than the size of the total apparent market in Canada. There is also evidence that there are more than three producers of thermoelectric containers in China.⁸² Therefore, the Tribunal finds that capacity and excess capacity of Chinese producers is very large relative to the domestic market.

81. Having found that there is substantial production, capacity and excess capacity in China, the Tribunal will now turn to an assessment of the likely import volumes of the subject goods in Canada if the order is allowed to expire. In this regard, the evidence points to only one conclusion, that is, a substantially larger volume of the subject goods will be present in the domestic market in the near to medium term, if the current Order is rescinded.

79. Paragraphs 37.2(2)(a), (d), (f), (h) and (i) of the *Regulations*.

80. The Tribunal notes that this data may include non-subject goods.

81. Figures were calculated by Tribunal staff using data contained in Mr. Kulkarni's witness statement. See Exhibit 2018-004-A-03, Vol. 11 at 485, 500, 506.

82. The CBSA's public research articles include an additional four companies that produce thermoelectric containers: Jiaxing Elecstar Refrigeration Equipment, Zhongshan Yousheng Electric Appliances Co., Ltd., Dometic Corporation, and Ningbo Yutong Electric Appliance Co. Ltd. See Exhibit 12.11, Vol. 1.4 at 1028, 1030, 1033, 1034. See also Exhibit RR-2018-004-03A, Vol. 1 at para. 95. In the last expiry review, the Tribunal accepted Koolatron's testimonial evidence that there were, at the time of the proceedings, 15 to 20 Chinese producers of thermoelectric containers. See *TC 2013 RR* at paras. 50-51.

82. Subject goods have remained active in the domestic market throughout the POR. Following a 33 percent decline in subject imports in 2017, volumes increased in 2018 by 37 percent, reaching levels close to the volume seen in 2016.⁸³ The share of total imports of the subject goods has also increased in each year of the POR. In 2016, subject goods already represented a significant share of all imports, a share that increased in both 2017 and 2018.⁸⁴ Overall, imports of subject goods relative to domestic production and sales of domestic production have decreased.⁸⁵

83. This evidence supports Koolatron's argument that Chinese exporters continue to be interested in the Canadian market despite the imposition of *SIMA* duties. Koolatron submits that it is likely that if the order is rescinded, volumes of subject imports would increase as the removal of duties would allow for Chinese products to be priced more competitively. Based on the above-noted evidence, the Tribunal agrees that the rescission of the order would likely increase the attractiveness of the Canadian market for Chinese suppliers and exporters. The Tribunal finds that Koolatron's position that Chinese exporters would have strong motives and opportunities to further increase their exports to Canada were the order rescinded is supported by the evidence.

84. In his witness statement, Mr. Kulkarni estimated that a substantial volume of subject goods will enter the market if the order is rescinded – an amount equal to the combined annual sales by the domestic industry and imports from the United States. This is based on the high volumes of subject goods imported prior to the original finding in *TC 2008 NQ*.⁸⁶ The Tribunal notes from its previous finding that in the first six months of 2008, Koolatron's sale of like goods virtually collapsed while its market share was reduced to an almost insignificant level.⁸⁷ The Tribunal finds that Koolatron's submissions with respect to likely volumes are supported by the evidence on the record.

85. Moreover, the Tribunal cannot ignore the potential impact of trade measures and most notably, measures taken by the United States against Chinese producers. As discussed above, Koolatron contends that due to recent tariffs implemented by the United States, i.e. the Section 301 tariffs, thermoelectric containers from China are at risk of being diverted into Canada. While there is limited evidence supporting diversion during the POR, this development makes the Canadian market even more attractive for Chinese exporters if the order is rescinded.

86. In summary, considering the large scale of the Chinese thermoelectric container industry, the export orientation of Chinese producers, the ongoing interest of Canadian retailers and distributors in the subject goods, and the fact that the concerns raised by China's excess capacity are exacerbated by current international market conditions as described above, including the diversion risk caused by the Section 301 tariffs and moderating economic growth in China, a substantially larger volume of the subject goods is likely to be present in the domestic market in the near to medium term if the order is allowed to expire. Without the discipline imposed by the continuance of the order, Chinese producers would likely be able and willing to sell the subject goods at aggressive prices in order to regain market share. Indeed, as the market is dominated by retailers motivated to maintain low prices and maximize their profit margins, the volume of imports of low-priced subject goods is likely to increase rapidly.

83. Exhibit RR-2018-004-06, Table 2 (protected), Vol. 2.1; Exhibit RR-2018-004-05, Table 3, Vol. 1.

84. Exhibit RR-2018-004-06, Table 4 (protected), Vol. 2.1.

85. Exhibit RR-2018-004-06, Table 5 (protected), Vol. 2.1; Exhibit RR-2018-004-05, Table 5, Vol. 1.

86. Exhibit RR-2018-004-A-03, Vol. 11 at paras. 91-93; Exhibit RR-2018-004-A-04, Vol. 12 (protected) at paras. 91-93.

87. *TC 2008 NQ* at para. 133.

87. Accordingly, the Tribunal finds that, if the order is rescinded, there will likely be a significant increase in the volume of imports of the subject goods, both in absolute terms and relative to the production or consumption of like goods.

Likely Price Effects of the Dumped and Subsidized Goods

88. The Tribunal also considers the likely prices of the dumped and subsidized goods if the order is allowed to expire and their effect on the prices of like goods.

89. In considering price effects, the Tribunal assesses, in particular, whether the dumping and subsidizing of goods is likely to significantly undercut the prices of like goods, depress those prices, or suppress them by preventing increases in those prices that would likely have otherwise occurred.⁸⁸ This analysis involves, firstly, assessing the prices at which the dumped or subsidized goods are likely to enter the Canadian market and, secondly, determining the likely price effects of the dumped and subsidized goods on the like goods. With respect to the second step, the Tribunal distinguishes the price effects of the dumped and subsidized goods from any price effects on the like goods that would likely result from other factors affecting prices.

90. As mentioned above, as the Tribunal found in previous proceedings, thermoelectric containers are very price sensitive. In particular, there is no evidence suggesting that the following findings made by the Tribunal in *TC 2013 RR* no longer aptly describe the price and retail dynamics in the domestic market, namely, that low pricing is important for CTC to attract new customers to thermoelectric containers and that low pricing must be of paramount importance for other “big box” retailers due to CTC’s “high-low” strategy.⁸⁹

– Price Undercutting

91. Although average selling prices during the POR did not indicate that the prices of domestically produced like goods were undercut by the prices of the subject goods, there was undercutting when prices of benchmark products were compared.⁹⁰ The benchmark data represents a significant share of the market and therefore provides a more accurate pricing picture, by removing product mix.

92. Specifically, the benchmark data, which includes seven different product types, represents 88 percent of total sales in 2017 and 87 percent of total sales in 2018. There was competition between subject and like goods for all seven benchmark products and there was head-to-head competition in 52 out of the 56 quarters examined.⁹¹ There was price undercutting by subject goods for two of the seven benchmark products in 10 of the quarters in which there was head-to-head competition.⁹² To the extent that there was price undercutting by the subject goods when they were imported at normal values with the order in place, it is reasonable to infer that significant price undercutting is likely to occur in the absence of anti-dumping and countervailing duty liability.

93. The Tribunal notes that the undercutting did not occur for products which generate higher sales for Koolatron.⁹³ No evidence was presented indicating that subject goods would not be priced aggressively

88. Paragraph 37.2(2)(b) of the *Regulations*.

89. *TC 2013 RR* at para. 68.

90. Exhibit RR-2018-004-06, Table 13 (protected), Vol. 2.1. There is substantial price variance depending on product type.

91. Exhibit RR-2018-004-05, Table 22, Vol. 1.1; Exhibit RR-2018-004-05A, Table 25, Vol. 1.1.

92. Exhibit RR-2018-004-06, Tables 23, 24 (protected), Vol. 2.1.

93. Exhibit RR-2018-004-06, Tables 22, 23 (protected), Vol. 2.1.

lower in these product categories (i.e. those representing higher sales) if the order were rescinded in order to gain market share.

94. Koolatron also argued that if the order is rescinded, the subject goods will be priced low to compete with prices of imports from other non-subject countries excluding the United States (the “Other Countries”). The consolidated data on average selling prices indicates that imports from Other Countries undercut prices of like goods in 2016 and 2017; there was no undercutting in 2018. The comparison of prices of benchmark products indicates that imports from Other Countries undercut subject goods in six of the quarters examined for two of the benchmark products. This evidence indicates that subject goods will likely have to be priced lower in certain product categories, in order to gain market share in Canada.

95. Additionally, to illustrate the price effects of the subject goods if the order is rescinded, Koolatron submitted evidence of undercutting by subject goods that existed in the market before and after the Tribunal’s decision in *TC 2008 NQ*, i.e. between 2005 to 2012.⁹⁴ The Tribunal accepts this as further evidence of the potential aggressive pricing strategy that may be used by Chinese producers to gain market share by undercutting prices of like goods.

96. Based on the evidence above, the Tribunal finds that if the order is allowed to expire, imports of the subject goods will enter Canada at prices that will significantly undercut the prices of the like goods.

– Price Depression

97. According to Koolatron, if the order is rescinded, the existing low-price competition would intensify and would likely cause Canadian market prices to be driven down by at least another \$10.00 per unit on average – but likely by an even larger amount for the higher-volume benchmark products.⁹⁵

98. Considering that Koolatron will be faced with significantly increased undercutting by the subject goods if the order is rescinded, the Tribunal finds that Koolatron would likely be compelled to reduce its prices in order to maintain its sales volume. In the absence of evidence that would call into question the correctness or credibility of Mr. Kulkarni’s estimation concerning the degree of likely price depression, the Tribunal can only find the predicted magnitude of the expected price depression to be reasonable. Accordingly, the Tribunal finds that if the order expires, there would be significant price depression caused by the subject goods.

– Price Suppression

99. Given Koolatron’s financial performance in the face of rising input costs, as discussed above, there is little evidence that Koolatron’s prices were suppressed during the POR.⁹⁶ However, looking ahead, if the order is rescinded, Koolatron will likely experience significant price suppression, as the significantly depressed prices for like goods will prevent it from passing on the expected future increases in costs of production. Price suppression is likely given the competition Koolatron would undoubtedly face, together with intense pressure to maintain low pricing.

94. See table at Exhibit RR-2018-004-A-02, Vol. 12 (protected) at para. 98; Exhibit RR-2018-004-A-01, Vol. 11 at 24.

95. Exhibit RR-2018-004-A-01, Vol. 11 at para. 94.

96. Exhibit RR-2018-004-A-03, Vol. 11 at paras. 118-119; Exhibit RR-2018-004-A-04, Vol. 12 (protected) at paras. 118-119. See also table at Exhibit RR-2018-004-A-04, Vol. 12 (protected) at 62. Exhibit 2018-004-06, Table 30 (protected), Vol. 2.1.

100. Based upon the findings indicated above with respect to undercutting, price depression and price suppression, the Tribunal is of the view that the likely price effects of the subject goods will have a significant adverse impact on the prices of like goods.

Likely Impact on the Domestic Industry if the Order Is Rescinded

101. The Tribunal will assess the likely impact of the above volumes and prices on the domestic industry if the order is rescinded.⁹⁷ In doing so, the Tribunal takes into consideration the likely performance of the domestic industry should the order be continued. In this analysis, the Tribunal distinguishes the likely impact of the dumped and subsidized goods from the likely impact of any other factors affecting or likely to affect the domestic industry.⁹⁸

102. As discussed above, Koolatron faces challenges going forward even if the order is continued. However, there is insufficient evidence to find that factors other than the dumping and subsidizing of the subject goods are likely to injure the domestic industry in the near to medium term. On balance, the evidence indicates that Koolatron would be able to remain competitive if *SIMA* duties continue to discipline the prices at which the subject goods can be sold in the Canadian market.

103. The key issue is whether this state of affairs would change without the remedial impact of the order. In this regard, Koolatron would undoubtedly be materially worse off if the order is rescinded. For the reasons set out below, the Tribunal finds that Koolatron is unlikely to be able to maintain its relatively positive performance of the recent years, taking into account the existing and forecasted competitive challenges that increase its vulnerability, if the order is rescinded.

104. Thermoelectric containers are very price-sensitive. The Tribunal accepts from evidence of Koolatron's historical performance that the domestic industry would likely be injured by the continuation or resumption of dumping and subsidizing without the order in place. Following the Tribunal's original finding in 2008, there has been an increase in domestic sales and Koolatron has gained market share.⁹⁹ There have also been positive gains in Koolatron's net income,¹⁰⁰ domestic production and employment.¹⁰¹ The evidence clearly demonstrates that duties under *SIMA* have been a key part of Koolatron's recovery.

105. The evidence concerning likely volumes and likely prices of the subject goods supports the conclusion that subject goods will likely dominate the market again if the order is rescinded. In the absence of duties, Chinese producers, who have been unable to compete at normal values, will seek to regain market share.¹⁰² Due to the highly competitive dynamic among "big box" retailers, it is also reasonable to conclude that Koolatron's sales volumes and prices will decline, as these retailers seek lower-cost imports.

97. Paragraphs 37.2(2)(e) and (g) of the *Regulations*.

98. See paragraph 37.2(2)(k) of the *Regulations*.

99. See tables at Exhibit RR-2018-004-A-04, Vol. 12 (protected) at paras. 45, 48; Exhibit RR-2018-004-A-01, Vol. 11 at 33; Exhibit RR-2018-004-A02, Vol. 12 (protected) at 33 (see table at para. 125).

100. See table at Exhibit RR-2018-004-A-04, Vol. 12 (protected) at para. 69; Exhibit RR-2018-004-A-03, Vol. 11 at para. 69.

101. See tables at Exhibit RR-2018-004-A-04, Vol. 12 (protected) at para. 74-77; Exhibit RR-2018-004-A-03, Vol. 11 at paras. 74-77. Mr. Guest of USW also noted the ending of layoffs since 2008. See Exhibit RR-2018-004-B-01, Vol. 11 at para. 18.

102. The CBSA indicated that only one exporter had specific normal values among several exporters that sold the subject goods to Canada. Exhibit RR-2018-004-03A, Vol. 1, at para. 53.

106. As indicated above, Koolatron estimated that prices would be depressed by at least another \$10.00 per unit on average – but likely by an even larger amount for the higher-volume benchmark products. Accordingly, the Tribunal finds that Koolatron would experience significant negative effects on its production, profits,¹⁰³ market share, capacity utilization and employment. Mr. Guest of USW expressed the view that the rescission of the order would threaten the 45 employees working in the industry.¹⁰⁴ It is also clear that if the order is rescinded, Koolatron's planned investments for 2019 to 2021 and its return on investment will be at risk.¹⁰⁵

107. In summary, the Tribunal finds that the likely negative effects of the dumped and subsidized subject goods on the domestic industry will likely be immediate and material if the order is allowed to expire. The Tribunal has no doubt that the impact of increased volumes of the subject goods, at prices that will likely undercut, depress and suppress those of the like goods, will result in a significant decline in the key performance indicators of the domestic industry.

108. Accordingly, for the above reasons, the Tribunal finds that the resumption of dumping and subsidizing of the subject goods will likely result, in and of themselves, in material injury to the domestic industry.

DETERMINATION

109. Pursuant to paragraph 76.03(12)(b) of *SIMA*, the Tribunal continues its order in respect of the subject goods.

Georges Bujold
Georges Bujold
Presiding Member

Cheryl Beckett
Cheryl Beckett
Member

Susan D. Beaubien
Susan D. Beaubien
Member

103. In assessing the impact of the alleged per-unit price depression claimed by Koolatron, the Tribunal calculated the impact of \$10.00 per-unit price reduction on Koolatron's net income in 2016, 2017 and 2018.

104. See Exhibit RR-2018-004-B-01, Vol. 11 at para. 14.

105. Exhibit RR-2018-004-A-03, Vol. 11 at para. 18; Exhibit RR-2018-004-A-04, Vol. 12 (protected) at para. 18; Exhibit RR-2018-004-06, Table 32 (protected), Vol. 2.1.