MARKET DISRUPTION SAFEGUARD INQUIRY INTO BARBEQUES ORIGINATING IN THE PEOPLE'S REPUBLIC OF CHINA

Safeguard Inquiry No. CS-2005-001

OCTOBER 2005

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DETERMINATION AND REMEDY RECOMMENDATION

The Canadian International Trade Tribunal determines, pursuant to subsection 30.22(6) of the *Canadian International Trade Tribunal Act*, that self-standing barbeques for outdoor use consisting of a metal lid, base and frame, fuelled by either propane or natural gas, with primary cooking space between 200 and 1,500 square inches (1,290 and 9,675 square centimetres), in assembled or knocked-down condition, originating in the People's Republic of China, are being imported in such increased quantities or under such conditions as to be a significant cause of market disruption to domestic producers of like or directly competitive goods.

Pursuant to the Order in Council by the Governor General in Council, issued on August 10, 2005, and in accordance with subsection 30.22(7) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal considers that the most appropriate remedy to remove the market disruption suffered by the domestic producers of like or directly competitive goods is a surtax set at 15 percent for a period of three years to be applied on an *ad valorem* basis, FOB Chinese port of shipment, to the above-mentioned barbeques originating in the People's Republic of China.

The Canadian International Trade Tribunal finds that no exclusions are warranted.

Pierre Gosselin
Pierre Gosselin
Presiding Member

James A. Ogilvy
James A. Ogilvy
Member

Meriel V. M. Bradford
Meriel V. M. Bradford
Member

Hélène Nadeau
Hélène Nadeau
Secretary

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CHAPTER I

INTRODUCTION

BACKGROUND

1. On May 30, 2005, pursuant to subsection 30.22(1) of the *Canadian International Trade Tribunal Act*,[1] Onward Manufacturing Company Limited submitted a complaint requesting that the Canadian International Trade Tribunal (the Tribunal) initiate a safeguard inquiry in respect of the People's Republic of China (China) into whether the importation of self-standing barbeques for outdoor use consisting of a metal lid, base and frame, fuelled by either propane or natural gas, with primary cooking space between 200 and 1,500 square inches (1,290 and 9,675 square centimetres), in assembled or knocked-down condition (barbeques) originating in China was causing or threatening to cause market disruption to the domestic producers of like or directly competitive goods.

2. On July 11, 2005, the Tribunal, following consideration of the complaint and the additional information provided by Onward Manufacturing Company Limited, pursuant to subsection 30.22(2) of the *CITT Act*, determined that the complaint was properly documented.

3. Moreover, the Tribunal was satisfied that the conditions listed in subsection 30.22(3) of the *CITT Act* were satisfied. Therefore, on July 11, 2005, the Tribunal commenced an inquiry into the complaint.

4. This is the first inquiry undertaken pursuant to section 30.22 of the *CITT Act* regarding safeguard measures in respect of imports from China.

REFERRAL ORDER

5. On August 10, 2005, pursuant to subsection 30.22(7) of the *CITT Act*, the Governor General in Council, on the recommendation of the Minister of Finance and the Minister for International Trade, referred to the Tribunal a matter concerning barbeques originating in China, as set out in the Order in Council (the Referral Order) reproduced in Appendix I.

6. The Referral Order directs the Tribunal to recommend, in the event that the Tribunal determines, under subsection 30.22(6) of the *CITT Act*, that the goods that are the subject of the complaint are being imported in such increased quantities or under such conditions that they cause or threaten to cause market disruption to the domestic producers of like or directly competitive goods, the most appropriate remedy to address such market disruption or threat thereof over a period not exceeding three years, in accordance with Canada's rights and obligations under international trade agreements.

7. When the Tribunal commenced the inquiry, it decided to conduct its proceedings with respect to remedy concurrently with its proceedings with respect to market disruption, given that both questions were likely to require similar background information and many of the

1. R.S.C. 1985 (4th Supp.), c. 47 [*CITT Act*].

same witnesses. The Tribunal was also of the opinion that this approach would be less burdensome on the parties.

CONDUCT OF THE SAFEGUARD INQUIRY IN RESPECT OF CHINA

Participation

8. Twenty-two parties filed notices with the Tribunal indicating that they wished to participate in this safeguard inquiry. Participants included domestic and foreign producers, importers, mass merchants and other retailers, domestic and foreign trade associations, and the Government of China. Three parties filed briefs supporting a determination of market disruption and associated remedy, while 14 parties filed submissions opposing any determination of market disruption and associated remedy. Appendix II lists the parties that participated in the safeguard inquiry.

9. The Tribunal received 56 separate requests for exclusions. The domestic producers responded to these requests, and the parties requesting the exclusions were given the opportunity to reply to the domestic producers' response. In light of the time constraints imposed by the legal requirements for this inquiry and the compressed nature of the proceedings, the product exclusion process was conducted on the basis of written submissions.

Hearing

10. The Tribunal held a hearing from September 7 to 9, 2005. Due to the number of parties and the compressed nature of the proceedings, the Tribunal selected, on the basis of the evidence already on the record, the witnesses whom it would hear. In doing so, the Tribunal took into account the matters that it considered required further clarification. The Tribunal heard and questioned witnesses for the domestic and foreign producers, importers, mass merchants and other retailers. Counsel were given the opportunity to cross-examine witnesses and make argument. Also in recognition of the tight time frame and number of counsel, prior to the commencement of the hearing, the Tribunal provided time allocations to counsel for examination and argument.

11. Appendix III lists the witnesses who appeared before the Tribunal at the hearing.

Information Gathered by the Tribunal

12. The Tribunal gathered basic data through a survey of domestic producers, importers and foreign producers. The Tribunal issued questionnaires to 7 domestic producers, 22 importers and 26 foreign producers of barbeques. The Tribunal received 6 replies to its domestic producers' questionnaire, 19 replies to its importers' questionnaire and 13 replies to its foreign producers' questionnaire, including replies from certain companies that had not been sent questionnaires. In addition, the Tribunal received 9 replies to a request for supplementary information directed to retailers that had responded to its importers' questionnaire. The names of the companies that responded to the various Tribunal questionnaires can be found in Appendix IV.

13. Questionnaire respondents were asked to provide information for the period from January 1, 2002, to March 31, 2005, inclusive, as well as certain information for the 2003, 2004 and 2005 selling seasons.[2]

14. On August 23, 2005, the Tribunal issued a pre-hearing staff report for parties to use as a common factual base in addressing the issues in the inquiry.[3]

2. The retail selling season for barbeques generally extends from early spring to early fall of a calendar year.
3. On September 2, 2005, the Tribunal issued revisions to the pre-hearing staff report.

CHAPTER II

BARBEQUES

PRODUCT AND MARKET

Product Description

15. The goods subject to this inquiry are self-standing barbeques for outdoor use, consisting of a metal lid, base and frame, fuelled by either propane or natural gas, with primary cooking space between 200 and 1,500 square inches (1,290 and 9,675 square centimetres), in assembled or knocked-down condition, originating in China.

16. Barbeques are made from a combination of materials, including aluminum, cold-rolled steel, stainless steel, mild steel tubing, brass, steel wire, wood, and plastic and/or resin. There is a wide range of models in different sizes, with different features, which sell at different prices in the market.

Domestic Producers of Barbeques

17. The following provides a brief description of the major domestic producers of barbeques.

18. **Onward Manufacturing Company Limited (Onward),** Waterloo, Ontario, was founded in 1906. The company began production of gas barbeques in 1985. It sells barbeques through several channels of distribution, including independent retailers, mass merchants, grocery stores, hardware co-operatives and furniture retailers. In recent years, an increasing proportion of its sales has been to mass merchants. Its products cover a large part of the market and range in retail price from $99 to $1,200. It produces private-label barbeques for a few of its European customers. Onward is also the Canadian importer of the Weber™ product line.

19. **Fiesta Barbeques™ Limited (Fiesta),** Brampton, Ontario, is a private, family-owned company founded in 1986 that produces barbeques for both the domestic and export markets. The company is vertically integrated, producing barbeques and most of the related input components. Its primary channels of distribution are mass merchants, grocery chains and co-operative retailers. It has positioned itself in the volume segment of the market and generally sells product in the low to upper-middle range of the market. It currently produces private-label barbeques under the Kenmore brand. In recent years, Fiesta imported barbeques from Thailand.

20. **Crown Verity Inc. (Crown)** was incorporated in 1991 and is located in Brantford, Ontario. It started producing stainless steel barbeques in 1995. It retains manufacturers' representatives throughout North America and sells to restaurant equipment dealers and specialty retail dealers. Its stainless steel barbeques are sold in the high end of the market, with retail prices ranging from $2,500 to $12,000. Crown exports to the United States and the Caribbean.

21. **CFM Corporation (CFM),** Mississauga, Ontario, was formed in 1997 and has been manufacturing barbeques since 2001. The majority of the company's domestic production of

barbeques is exported to the United States. It sells mostly to large retailers, but also distributes barbeques through its network of authorized dealers and distributors. CFM has been selling barbeques manufactured in China since 2003.

22. **Napoleon Appliance Corporation (Napoleon),** Barrie, Ontario, was incorporated in 1995 and produces barbeques in various sizes and materials, for both the middle and high end of the market. Its barbeques are sold to specialty dealers that also sell products such as hearths, pools, spas, patio furniture and propane. Napoleon also sells barbeques to hardware chains and co-operatives, such as Home Hardware Stores Limited.

23. **Jackson Grills Inc. (Jackson**), Duncan, British Columbia, was incorporated in 1999 and manufactures high-end, 100 percent stainless steel gas barbeques. Jackson's marketing efforts are focused on specialty hearth, barbeque and pool and spa stores.

Importers

24. Of the 19 responses that the Tribunal received to its importers' questionnaire, only 11 had usable information.[4] These importers of barbeques can be broadly categorized into two groups: importer-retailers that import barbeques directly for sale to consumers and importer-distributors that import and re-sell barbeques to retailers.

Importer-retailers

Canadian Tire Corporation, Limited (CTC), Toronto, Ontario; Costco Wholesale Canada Ltd. (Costco), Ottawa, Ontario; Home Depot of Canada Inc. (Home Depot), Toronto, Ontario; Loblaw Companies Limited (Loblaw), Toronto, Ontario; London Drugs Limited (London Drugs), Richmond, British Columbia; Sears Canada Merchandising Services (Sears), Toronto, Ontario; and Wal-Mart Canada Corp. (Wal-Mart), Mississauga, Ontario.

Importer-distributors

Bismar Inc. (Bismar), Boucherville, Quebec; Char-Broil, A Division of W.C. Bradley Co. (Char-Broil), Columbus, Georgia, United States; S.R. Potten Ltd. (S.R. Potten), Lachine, Quebec; and Sunbeam Corporation (Sunbeam), Mississauga, Ontario.

Foreign Producers

25. The following Chinese producers exported barbeques to Canada during the period of inquiry: Huizhou RST Ind. Co. Ltd. (RST Industrial), Dongguan Qingzi Jinwoniu Industrial Co., Ltd. (Jinwoniu), Yangjiang Xinli Industrial Co., Ltd. (Xinli), Zhu Hai Grand Hall Inc. (Grand Hall), Zhuhai Prokan Relaxation Equipment Co., Ltd. (Prokan) and Winners Products Engineering Ltd. (Winners).

26. Seven other companies that are not Chinese producers of barbeques also responded to the Tribunal's foreign producers' questionnaire. Some of these companies export goods to

4. In addition, the Tribunal received responses from 8 companies that had not imported barbeques during the period of inquiry, that had not been able to respond to the Tribunal or that had provided unusable information.

Canada on behalf of Chinese producers: Lucas Innovation, Inc. (Lucas), CFM, Grand Hall Enterprise Co., Ltd. (Enterprise), BeefEater Sales International (BeefEater), Universal Quality Services Ltd. (Universal), Outdoor Chef International Ltd. (Outdoor Chef) and Char-Broil. The Tribunal did not include the data received from these companies in its consolidated statistics on the Chinese barbeque industry.

Investigations and Measures Regarding Barbeques

27. On February 19, 2004, Fiesta, supported by Onward, filed a complaint with the Canada Border Services Agency (CBSA), alleging injurious dumping and subsidizing in Canada of barbeques[5] originating in or exported from China. As a result, the Tribunal conducted a preliminary injury inquiry (PI-2004-001) and commenced an injury inquiry (NQ-2004-004). On November 19, 2004, the CBSA terminated its investigation and, in its subsequent statement of reasons, issued on December 3, 2004, determined that the margins of dumping and amounts of subsidy were insignificant. Accordingly, on December 23, 2004, the Tribunal terminated its inquiry.

28. There have been no anti-dumping or countervailing duties imposed or safeguard trade actions undertaken by other World Trade Organization (WTO) members against barbeques from any source.

Marketing and Distribution

29. Barbeques are sold in Canada through three major distribution channels: domestic producers that sell goods to retailers and distributors; importer-distributors that import goods for resale to retailers; and importer-retailers that import goods directly.

30. Imports of barbeques from China are highly concentrated, with three importers (two importer-retailers and one importer-distributor) accounting for approximately 75 percent of such imports in 2004.

ANALYSIS

Preliminary Matter: Safeguard Concepts

31. Parties opposing the complaint argued that the Tribunal is required to incorporate certain global safeguard requirements found in the WTO *Agreement on Safeguards*, as well as in Article XIX of the *General Agreement on Tariffs and Trade 1994*,[6] into its determination of market disruption.

32. Parties opposing the complaint submitted that, in addition to the requirements provided in Canadian legislation, the Tribunal is required to find that market disruption is a result of

5. The goods under investigation were self-standing barbeques for outdoor use, consisting of a metal lid, base and frame, fuelled by either propane or natural gas, with primary cooking space between 200 and 550 square inches (approximately 1,290 and 3,549 square centimetres), in assembled or knocked-down condition.
6. Hereinafter *GATT 1994*. This agreement includes notably the provisions in the *General Agreement on Tariffs and Trade 1947*.

". . . unforeseen developments and the effect of the obligations incurred by a contracting party under [the *Agreement on Safeguards*] . . . ." They argued that, by virtue of the fact that the China-specific transitional safeguard mechanism is part of the Protocol on the Accession of China to the WTO (the Protocol), it is subject to the disciplines found in the *Agreement on Safeguards* and Article XIX of *GATT 1994*, which provides for emergency action on imports of particular products. The "unforeseen developments" requirement is taken directly from Article XIX of *GATT 1994*, which reads as follows:

> . . . If, as a result of *unforeseen developments* and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, the contracting party shall be free, in respect of such product, and to the extent and for such time as may be necessary to prevent or remedy such injury, to suspend the obligation in whole or in part or to withdraw or modify the concession.
>
> . . .
>
> [Emphasis added]

33. It was also argued that WTO jurisprudence indicates that the transitional safeguard provisions ought to be interpreted in the context of all WTO agreements, as was found in a WTO panel report[7] that involved the mechanism under Article 6 of the WTO *Agreement on Textiles and Clothing* (the *ATC*).

34. The Tribunal notes that, in contrast to the *Agreement on Safeguards*, in which Article XIX of *GATT 1994* is expressly incorporated, the Protocol makes no reference to either the *Agreement on Safeguards* or Article XIX of *GATT 1994*. In the Tribunal's view, the absence of any reference to Article XIX in the Protocol means that the "unforeseen developments" requirement is not pertinent to a market disruption inquiry.

35. The Tribunal notes that the other WTO agreements, including the *ATC*, were negotiated and concluded as a single undertaking which came into force on January 1, 1994, whereas the Protocol was negotiated separately and came into force on December 11, 2001.[8]

36. Furthermore, the Tribunal notes that the *CITT Act* and the *Canadian International Trade Tribunal Regulations*[9] govern this inquiry and, although international agreements can be used to provide guidance in the case of ambiguity or as a tool for interpretation, the Tribunal is not bound by them. With respect to the market disruption determination, since the provisions of the *CITT Act* and the *Regulations* are unambiguous and free of gaps, it does not need to resort to the international agreements in respect of the issues raised by the parties. This rationale applies not only to the "unforeseen developments" requirement dealt with earlier but also to the

7. *United States—Transitional Safeguard Measure on Combed Cotton Yarn From Pakistan* (2001), WTO Doc. WT/DS192/R (Panel Report).
8. Online: Department of Foreign Affairs and International Trade <http://w01.international.gc.ca/minpub/Publication.asp?publication_id=378987&Language=E>.
9. S.O.R./89-35 [*Regulations*].

other requirements and obligations referred to by counsel that form part of either the *Agreement on Safeguards* or *GATT 1994*.

37. In other words, for its determination with respect to market disruption, the Tribunal has the discretion to rely on the provisions of the Protocol for guidance, if needed, in certain circumstances (e.g. a gap or ambiguity in the Canadian legislation). In contrast, with respect to its remedy recommendation, the Tribunal is bound to consider the provisions of the Protocol, by virtue of the express language found in the Referral Order, which provides that its remedy recommendation must accord with Canada's rights and obligations under international trade agreements.

Statutory Framework

38. The determination that the Tribunal must make is set out in subsection 30.22(6) of the *CITT Act*, which states that it shall, in the inquiry into the complaint:

> . . . determine whether, having regard to any regulations made pursuant to paragraphs 40(*a*) and (*k*.1), the goods originating in the People's Republic of China that are the subject of the complaint are being imported in such increased quantities or under such conditions that they cause or threaten to cause market disruption to domestic producers of like or directly competitive goods.
>
> . . .

39. Section 30.2 of the *CITT Act* provides the following definitions for the phrases "market disruption" and "significant cause":

> "market disruption" means a rapid increase in the importation of goods that are like or directly competitive with goods produced by a domestic industry, in absolute terms or relative to the production of those goods by a domestic industry, so as to be a significant cause of material injury, or threat of material injury, to the domestic industry.
>
> "significant cause" means, in respect of a material injury or threat thereof, an important cause that need not be as important as, or more important than, any other cause of the material injury or threat.

40. Moreover, section 5.1 of the *Regulations* provides that, in determining whether the goods originating in China that are the subject of the complaint are being imported in such increased quantities or under such conditions as to cause or threaten market disruption, the Tribunal shall examine, among other factors:

> . . .
>
> (*a*) the actual volume of the goods originating in the People's Republic of China that are imported into Canada;
>
> (*b*) the effect of the imported goods on prices of like or directly competitive goods in Canada; and
>
> (*c*) the impact of the imported goods on domestic producers of like or directly competitive goods in Canada.
>
> . . .

41. Applying this statutory framework, the Tribunal will first determine whether domestically produced barbeques are like or directly competitive goods to the barbeques imported from China. In doing so, it will also examine the issue of classes of goods. It will then determine which Canadian producers constitute the domestic producers of like or directly competitive goods.

42. Next, the Tribunal will determine whether there has been a rapid increase in the importation of Chinese barbeques, either in absolute terms, or relative to the production of the like or directly competitive goods in Canada. If the Tribunal finds that such an increase has occurred, it will then determine whether domestic producers have suffered material injury.[10] If so, it will then assess whether the imports from China are a significant cause of the material injury, taking into account the prescribed factors, as well as other alleged causes of injury.

43. If the Tribunal makes a determination of market disruption or threat thereof, it will, in accordance with the Referral Order, recommend an appropriate remedy to address such market disruption or threat thereof. It will then make its determination with respect to any product exclusion requests.

44. The Tribunal notes that it took into consideration all the evidence on the record, including the submissions of parties whose witnesses did not appear at the hearing, in its deliberations with respect to market disruption and remedy.

Like or Directly Competitive Goods

45. The definition of "like or directly competitive goods" found at section 3 of the *Regulations* reads as follows:

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

46. In considering the issue of like or directly competitive goods, the Tribunal has, in previous cases, looked at a number of factors, including the physical characteristics of the goods, their method of manufacture, their market characteristics (such as substitutability, pricing and distribution) and whether the goods fulfill the same customer needs.[11]

47. On the basis of the evidence on the record, the Tribunal finds that domestically produced barbeques closely resemble the Chinese barbeques in terms of physical and market characteristics, and fulfilment of customer needs. With respect to methods of manufacture, it

10. The Tribunal will consider threat of material injury only if it determines that the domestic producers have not suffered material injury.
11. *Global Safeguard Inquiry Into the Importation of Bicycles and Finished Painted Bicycle Frames* (September 2005), GS-2004-001 and GS-2004-002 (CITT) at 12; *Safeguard Inquiry Into the Importation of Certain Steel Goods* (August 2002), GC-2001-001 (CITT) at 15.

acknowledges that the cast aluminum fire boxes are manufactured using a different method from the one used to manufacture the stamped-steel fire boxes. However, the Tribunal is of the view that the fact that the goods share the same market characteristics, have similar end uses and fulfill the same customer needs overrides such differences in this case. It also notes that, despite the fact that some barbeques may have a different package of features, such as a side burner, rotisserie, higher BTUs, a larger cooking grill, stainless steel components, shelving or cabinetry, they have the same primary end use. The Tribunal therefore concludes that barbeques produced in Canada are like or directly competitive goods to barbeques imported from China.

Classes of Goods

48. Char-Broil submitted that the Tribunal should consider propane gas barbeques as a separate class of like or directly competitive goods from natural gas barbeques. It argued that natural gas barbeques have a limited market share and command a price premium and that a consumer who does not have access to a natural gas fuel source would not purchase a natural gas barbeque.

49. The Tribunal does not consider that these reasons are sufficient to find that propane and natural gas barbeques form two separate classes of goods. It first notes that propane and natural gas barbeques have the same end uses and generally fulfill the same customer needs. Moreover, a consumer who has access to a natural gas fuel source may well choose to buy a propane barbeque. In addition, both propane and natural gas barbeques are manufactured using the same equipment and, although the characteristics of some components differ, these differences are few and minor in light of the common characteristics that they share.

50. Char-Broil further submitted that combination propane gas and charcoal barbeques should also constitute a separate class of goods. For the same reasons as provided above, the Tribunal is not convinced that the differences between combination propane gas and charcoal barbeques and other types of barbeques are important enough to warrant a separate class of goods.

51. Lucas asserted that custom-made, private-label barbeques are a separate class of goods. It submitted that these barbeques have unlimited design and style possibilities and that they only exist in the market because of a retailer's desire and Lucas's development services' creation of a product unique to that retailer. One of the most significant differences that Lucas noted is the level of cooperation that goes into the development of a private-label line of consumer goods and the joint capital investment made by the original equipment manufacturer and the buyer.

52. Nothing in these arguments convinces the Tribunal that custom-made, private-label barbeques constitute a separate class of goods. These barbeques have the same physical characteristics as national brand-name barbeques, and they undoubtedly fulfill the same customer needs. Whether the development of this type of barbeque involves joint capital and effort is not a relevant factor in determining if such goods constitute a separate class of goods.

53. Lucas further submitted that the Tribunal should treat gas barbeques that are the subject of a Canadian, U.S. or Chinese patent as a separate class of goods. In support of this submission, it argued that the authorities charged with ensuring that patents and/or industrial designs are issued only in respect of unique and inventive goods have already made a determination about the distinctiveness of the products, which should be recognized by the Tribunal. Lucas also submitted that, if a safeguard measure were implemented, it could result in a loss of investment with respect to intellectual property rights.

54. The Tribunal rejects this argument. Safeguard law and patent law constitute two separate and distinct spheres of law, each having its unique concepts and its own jurisdiction. The fact that patented products may be found to be like goods to the subject goods, patented or not, does not mean that they lose their distinct character under patent law, or that such a finding results in patent infringement. In the context of a class of goods analysis, two patented products can certainly be found to share physical characteristics, have the same end uses and fulfill the same customer needs, despite the fact that a patented product may have additional features or physical attributes that make it distinct under patent law. The Tribunal notes that, in this case, nothing about the patented barbeques differentiates them from non-patented barbeques to the extent that it would justify a separate class of goods.

55. Winners argued that, since no evidence of the production, sales or imports of barbeques with a primary cooking surface of over 550 to 1500 square inches has been furnished by domestic producers, such barbeques are not like or directly competitive goods in relation to the barbeques actually produced and sold by Onward and Fiesta.

56. The Tribunal first notes that, according to the evidence, certain domestic producers manufacture barbeques with cooking surfaces ranging up to 1512 square inches.[12] Therefore, the evidence does not support Winners' assumption in this regard. Furthermore, the Tribunal finds that, although these barbeques are larger, the evidence indicates that they share the same physical characteristics and fulfill the same customer needs as those with smaller cooking surfaces and, as such, should not be classified as a separate class of goods.

57. Given the above, the Tribunal finds that the barbeques subject to the inquiry constitute a single class of goods.

Domestic Producers of Like or Directly Competitive Goods

58. Parties opposing the complaint argued that the domestic producers have not met the requirements for standing stipulated under paragraph 30.22(3)(*b*) of the *CITT Act*, since the domestic producers that have indicated support for the complaint would not meet the "major proportion" requirement if the Tribunal were to exclude those domestic producers which are also importers.

12. *Transcript of Public Hearing*, Vol. 1, 7 September 2005, at 196; Tribunal Exhibit CS-2005-001-10.02D (protected), Administrative Record, Vol. 4 at 109.64; Tribunal Exhibit CS-2005-001-10.05 (protected), Administrative Record, Vol. 4A at 290.

59. Paragraph 30.22(3)(*b*) of the *CITT Act* states the following:

> (3) On receipt of a complaint that meets the requirements of subsection (2), the Tribunal shall commence an inquiry into the complaint if it is satisfied
>
> . . .
>
> (*b*) that the complaint is made by or on behalf of domestic producers who produce a major proportion of the domestic production of the like or directly competitive goods.

60. In its decision to commence this inquiry, issued on July 11, 2005, the Tribunal stated the following:

> . . .
>
> 32. Pursuant to paragraph 30.22(3)(*b*) of the *CITT Act*, the Tribunal must be satisfied that the complainant, Onward, together with Fiesta, the supporter of the complaint, account for a major proportion of domestic production of the like or directly competitive goods. Information in the complaint indicates that the volume of domestic production accounted for by Onward and Fiesta is over 50 percent.
>
> 33. On the basis of this information, the Tribunal is satisfied that the complaint is made by or on behalf of producers that produce a major proportion of domestic production of the like or directly competitive goods.
>
> . . .

61. Parties opposing the complaint argued that subsection 4(1) of the *Regulations* mandates that the Tribunal take into account whether a domestic producer is also, *inter alia*, an importer or exporter of like or directly competitive goods. On this basis, they argued that the Tribunal should exclude certain domestic producers in the "domestic industry",[13] which would mean that the "major proportion" requirement could not be met.

62. Subsection 4(1) of the *Regulations* states as follows:

> 4. (1) For the purposes of commencing an inquiry under subsection . . . 30.22(3) . . . of the Act, the Tribunal shall, in order to determine whether paragraph . . . 30.22(3)(*b*) . . . of the Act, . . . has been satisfied, take into account whether a domestic producer is
>
> (*a*) in reality, a domestic producer who produces in Canada like or directly competitive goods;
>
> (*b*) related to an exporter or importer of like or directly competitive goods; and
>
> (*c*) also an importer or exporter of like or directly competitive goods.

13. The Tribunal notes that the *CITT Act* and the *Regulations* repeatedly make reference to the phrase "domestic producers of like or directly competitive goods". It also notes that the definition of "market disruption" in section 30.2 of the *CITT Act* (as well as in subsection 77.1(1) of the *Customs Tariff*) does not use this phrase, but rather uses the phrase "domestic industry". Furthermore, no definition is provided for "domestic industry" in the *CITT Act*, the *Regulations* or the *Customs Tariff*. Therefore, for the purposes of this inquiry, the Tribunal has interpreted "domestic industry" as found in the definition of "market disruption" to mean "domestic producers of like or directly competitive goods", given the context of the provision.

63. The Tribunal is of the view that subsection 4(1) of the *Regulations* may provide[14] it with the discretion to exclude certain domestic producers under the prescribed circumstances; even so, it has considered the factors contained therein and finds that the evidence in this case does not persuade it to do so. It therefore confirms that it is satisfied that the complaint is made by or on behalf of producers that produce a major proportion of domestic production of the like or directly competitive goods, thus satisfying the requirement under paragraph 30.22(3)(*b*) of the *CITT Act*.

64. Therefore, the Tribunal determines that, for the purposes of this inquiry, the domestic producers of like or directly competitive goods are Onward, Fiesta, Crown, CFM, Napoleon and Jackson

Rapid Increase in Imports

65. Parties supporting the complaint submitted that imports of barbeques from China have been escalating rapidly since 2001 and that there had been massive increases in the number of Chinese barbeques entering Canada.

66. Parties opposing the complaint argued that the rate of increase of imported Chinese barbeques levelled off considerably over the period of the Tribunal's inquiry. Further, they submitted that the increase of imports of Chinese barbeques during the period of the Tribunal's inquiry was not at the level contemplated under subsection 30.22(3) of the *CITT Act*.

67. Table 1 shows the imports of Chinese barbeques into Canada and the domestic production of barbeques for the calendar years 2002 to 2004 and the three months ending March 31, 2004, and 2005.

Table 1
Apparent Imports From China and Domestic Production

				Jan. – Mar.	
	2002	**2003**	**2004**	**2004**	**2005**
Imports From China[1] (units)	89,608	218,017	412,053	159,845	174,776
% Change		143	89		9
Total Domestic Production	768,324	702,336	738,639	279,979	308,956
% Change		(9)	5		10
Imports From China Relative to Domestic Production (%)	12	31	56	57	57

1. Includes negligible direct imports by domestic producers.

Source: *Pre-hearing Staff Report*, Tribunal Exhibit CS-2005-001-25, Administrative Record, Vol. 1.1 at 17; *Pre-hearing Staff Report*, revised 2 September 2005, Tribunal Exhibit CS-2005-001-25A, Administrative Record, Vol. 1.1 at 133.

68. Imports of barbeques from China grew substantially in each full year of the period of inquiry, resulting in a net increase of more than 350 percent between 2002 and 2004. The trend of increased imports continued in the first quarter of 2005, as imports from China grew by

14. The Tribunal notes that the discretion to exclude a producer under subsection 2(1) of *SIMA*, in terms of the "domestic industry" definition, is more explicit than any discretion provided under subsection 4(1) of the *Regulations*.

9 percent compared to the first quarter of 2004. Domestic producers did not directly import barbeques from China during the period for which the Tribunal collected data, except for negligible quantities in 2004.[15]

69. The rapidity of the increase in imports of barbeques from China is especially evident in comparison to the decline in domestic production. In 2002, the ratio of imports from China to domestic production was 12 percent. This ratio increased to 31 percent in 2003 and to 56 percent in 2004, where it remained for the first quarter of 2005.

70. In the Tribunal's opinion, there is no doubt that there has been a rapid increase in imports of barbeques from China, both in absolute terms and relative to the production in Canada of like goods.

Material Injury

71. Parties opposing the complaint argued that the threshold for material injury in a market disruption inquiry must be higher than in dumping and subsidizing inquiries. In this regard, the Tribunal notes that the concept of material injury is at the core of both types of inquiry and also notes that neither the *CITT Act* nor *SIMA* defines "material injury".

72. In the Tribunal's view, a reading of the *CITT Act* does not support the interpretation outlined above. Had it been Parliament's intent to adopt a different threshold for material injury in the case of a market disruption inquiry, it would have expressly so stated. For example, the *CITT Act* provides a different threshold, "serious injury", in the context of global safeguard inquiries.

73. Accordingly, in this inquiry, the Tribunal has applied the same injury threshold as it does in dumping and subsidizing inquiries under *SIMA*. In assessing whether domestic producers suffered material injury, it considered those indicators that it considers in a dumping or subsidizing inquiry, including changes in the level of production, employment, sales, market share, profits and losses, productivity, investments, capacity, utilization of capacity and inventories, that are relevant to this inquiry. It considered the price effects of imported goods in its assessment of whether barbeques from China are a significant cause of material injury.

74. Also consistent with its practice under *SIMA*, the Tribunal conducted its injury analysis on an aggregate basis, as opposed to a producer-specific approach. In this regard, it notes that, even if the performances of individual domestic producers vary, it will determine whether barbeques from China have caused injury to the domestic producers as a whole.

75. The domestic producers submitted that they suffered material injury, including lower sales volume, declines in market share, lost revenue, reduced profitability and declines in capacity utilization. In the alternative, domestic producers argued that their current financial situation was such that they were threatened with material injury by the continued presence of imports of Chinese barbeques in the domestic market.

76. Parties opposing the complaint argued that domestic producers had not suffered nor were threatened with material injury. They submitted that, while one producer had lost some sales, others had maintained relatively healthy financial results.

15. *Protected Pre-hearing Staff Report*, revised 2 September 2005, Tribunal Exhibit CS-2005-001-26A (protected), Administrative Record, Vol. 2.1 at 160.

77. Table 2 presents key economic indicators for domestic producers of barbeques.

Table 2
Economic Indicators

2002 = 100
Jan. – Mar. 2004 = 100

				Jan. – Mar.	
	2002	**2003**	**2004**	**2004**	**2005**
Production (units)	768,324	702,336	738,639	279,979	308,956
% Change		(9)	5		10
Sales From Domestic Production (indexed – units)	100	92	83	100	103
% Change		(8)	(10)		3
Exports (indexed – units)	100	122	139	100	143
% Change		22	14		43
Apparent Market (units)	897,353	852,253	1,060,132	404,285	435,406
% Change		(5)	24		8
Sales/Purchases of Imports From China (units)	89,608	214,776	409,995	160,583	169,007
% Change		140	91		5
Sales From Domestic Production - Market Share (indexed – units)	100	97	71	100	96
% Change		(3)	(27)		(4)
Sales/Purchases of Imports From China - Market Share (%)	10	25	39	40	39
% Change		150	56		(3)
Practical Capacity (units)	1,384,850	1,435,100	1,535,300	447,187	447,387
% Change		4	7		0
Capacity Utilization Rate (%)	55	49	48	63	69
% Change		(12)	(2)		10
Inventories (units)	145,672	108,664	121,579	113,089	125,218
% Change		(25)	12		11
Investment (indexed – $000)	100	174	30	58[1]	21[2]
% Change		74	(83)	98	(64)
Direct Employment	677	681	783	666	684
% Change		1	15		3
Total Employment	768	778	885	773	802
% Change		1	14		4
Hours Worked – Total Employment (000)	1,471	1,519	1,749	488	553
% Change		3	15		13
Productivity (units/direct employment hour)	0.59	0.53	0.48	0.64	0.62
% Change		(11)	(10)		(3)

1. Projected investment in 2005.
2. Projected investment in 2006.

Source: *Pre-hearing Staff Report*, Tribunal Exhibit CS-2005-001-25, Administrative Record, Vol. 1.1 at 48-49; *Pre-hearing Staff Report*, revised 2 September 2005, Tribunal Exhibit CS-2005-001-25A, Administrative Record, Vol. 1.1 at 136, 157-58; *Protected Pre-hearing Staff Report*, Tribunal Exhibit CS-2005-001-26 (protected), Administrative Record, Vol. 2.1 at 30, 51; *Protected Pre-hearing Staff Report*, revised 2 September 2005, Tribunal Exhibit CS-2005-001-26A (protected), Administrative Record, Vol. 2.1 at 136, 158.

Production, Sales and Market Share

78. Domestic production of barbeques decreased from 768,000 units in 2002 to 739,000 units in 2004, a decline of 4 percent. In the first quarter of 2005, domestic production of barbeques grew by nearly 29,000 units compared to the first quarter of 2004, an increase of 10 percent.

79. The market for barbeques declined by 5 percent in 2003, but rebounded by 24 percent in 2004, a net increase of more than 160,000 units between 2002 and 2004. The market continued to grow in the first quarter of 2005, increasing by 31,000 units compared to the first quarter of 2004.

80. While the market for barbeques experienced an 18 percent increase between 2002 and 2004, domestic producers did not participate in this growth. The number of domestically made barbeques sold by domestic producers was 17 percent lower in 2004 than in 2002. In the first quarter of 2005, sales were 3 percent higher than in the first quarter of 2004, lagging the 8 percent growth in the market.

81. The domestic producers' share of the market fell by 30 percent between 2002 and 2004. At the same time, the share of the market accounted for by Chinese barbeques increased from 10 to 39 percent. The situation in the first quarter of 2005 was essentially unchanged from the first quarter of 2004.

82. The Tribunal notes that, in 2004 alone, had domestic producers maintained the market share that they held in 2002, they would have sold 40 percent more barbeques than they actually did.

83. The number of barbeques exported by domestic producers grew by 40 percent between 2002 and 2004, as exports accounted for an increasing share of production in the face of falling sales in the domestic market.

Capacity, Capacity Utilization, Inventories and Investment

84. Capacity increased in each full year of the inquiry, rising by 4 percent in 2003 and 7 percent in 2004. Capacity in the first quarter of 2005 remained unchanged compared to the first quarter of 2004. On a full-year basis, the capacity utilization rate for domestic production of barbeques declined from 55 percent in 2002 to 48 percent in 2004. The capacity utilization rate increased in the first quarter of 2005 to 69 percent, up from 63 percent in the first quarter of 2004. The Tribunal notes that, because of the seasonality of the product, capacity utilization tends to be at its highest levels in the first and fourth quarters of the year.

85. The level of inventories held by the domestic producers fluctuated during the period of inquiry, falling by 25 percent in 2003 and rising by 12 percent in 2004. Inventories rose by 11 percent in the first quarter of 2005.

86. Although annual levels of investment varied over the period of inquiry, the Tribunal notes that investment was significantly lower in 2004 than in 2002. Further, projected investments for 2006 are the lowest for any period examined by the Tribunal.

Employment, Hours Worked and Productivity

87. Between 2002 and 2004, direct employment by domestic producers increased by 106 employees, or 16 percent. Total employment and hours worked followed a similar pattern. Productivity declined by 11 and 10 percent, respectively, in 2003 and 2004.

Financial Performance Indicators

88. Table 3 presents financial performance indicators for domestic producers of barbeques.

Table 3
Consolidated Income Statement – Domestic Sales

2002 = 100
Jan. – Mar. 2004 = 100

				Jan. – Mar.	
	2002	**2003**	**2004**	**2004**	**2005**
LEVELS ($000)					
Net Sales	100	93	86	100	98
Costs of Goods Sold	100	96	92	100	103
Gross Margin	**100**	**86**	**66**	**100**	**85**
GS&A Expenses	100	101	106	100	90
Financial Expenses	-	-	-	-	-
Net Income (Loss) Before Taxes	**100**	**55**	**(12)**	**100**	**78**
$/UNIT					
Net Sales	100	101	108	100	95
Costs of Goods Sold	100	103	116	100	99
Gross Margin	**100**	**92**	**83**	**100**	**82**
GS&A Expenses	100	109	133	100	87
Financial Expenses	-	-	-	-	-
Net Income (Loss) Before Taxes	**100**	**59**	**(15)**	**100**	**76**

Notes:
1. Includes only Onward, Fiesta and Crown.
2. Onward's and Crown's fiscal years end December 31. Fiesta's fiscal year ends September 30.
3. Reported financial expenses were negligible.

Source: *Protected Pre-hearing Staff Report*, revised 2 September 2005, Tribunal Exhibit CS-2005-001-26A (protected), Administrative Record, Vol. 2.1 at 153.

89. Net sales revenue from domestic sales of barbeques by domestic producers fell over the period of inquiry and was 14 percent lower in 2004 than in 2002. In the first quarter of 2005, the decline continued, as net sales revenue fell a further 2 percent lower than in the first quarter of 2004.

90. Profits, as expressed by gross margins and pre-tax net income, also saw substantial declines over the period of inquiry. Between 2002 and 2004, gross margins fell by one third, and pre-tax net income fell by more than 100 percent, to the point where domestic producers suffered a net loss in 2004. The situation continued to deteriorate in the first quarter of 2005, as

gross margins and pre-tax net income were, respectively, 15 percent and 22 percent lower than in the first quarter of 2004.

91. The results on a per unit basis also show declining gross margins and pre-tax net income, as increases in net sales revenue were outpaced by increases in the cost of goods sold and other expenses. Domestic producers were unable to increase unit revenues sufficiently to offset increases in material costs, including the cost of aluminum and steel, as well as investments in tools and dies, equipment and brand names. In order for domestic producers to have maintained the same pre-tax net income margin in 2004 as in 2002, unit net sales revenue would have to have been 10 percent higher in 2004 than it was.

92. On the basis of the above, the Tribunal concludes that domestic producers suffered material injury in the form of lower sales volume and market share, as well as lower sales revenues and profits. They were unable to increase prices sufficiently to remain profitable. In the Tribunal's view, the poor financial performance of domestic producers negatively affected their cash flow and their ability to recoup the investments that they had made in their businesses, let alone contemplate future investments. In the Tribunal's view, had it not been for their increased export sales, the domestic producers' results would have been much worse, as production would have fallen even more.

Significant Cause of Injury

93. Given that the Tribunal has found that the domestic producers have suffered material injury, it must now assess whether imports from China are a significant cause of that material injury. As previously noted, section 5.1 of the *Regulations* provides that, in making this determination, the Tribunal must examine the actual volume of imports, the effect of imports on prices and the impact of imports on domestic producers. It will also consider the other alleged causes of injury.

94. As a preliminary matter, the Tribunal notes that the Government of China argued that the causation standard applied in a market disruption inquiry under the *CITT Act* must be higher than the one applied in dumping and subsidizing inquiries under *SIMA*, since the definition of "market disruption" in the *CITT Act* provides that the imports from China must be a "significant cause" of the material injury. The Government of China submitted that the Tribunal needs to focus on the ordinary meaning of the term "significant" in interpreting the causation standard and that this approach would result in a higher threshold.

95. The Tribunal notes that the *CITT Act* provides the following legislative meaning for the phrase "significant cause":

> "significant cause" means, in respect of a material injury or threat thereof, an important cause that need not be as important as, or more important than, any other cause of the material injury or threat.

96. The Tribunal also notes that the legislative meaning prevails over the ordinary meaning of the term.[16] It therefore conducted its causation analysis on the basis of this legislative meaning.

Actual Volume of Imports

97. The number of barbeques imported from China rose from 90,000 units in 2002 to 412,000 units in 2004, more than a fourfold increase. During the same period, the total market increased by only 163,000 units, approximately half the increase that was experienced by imports from China alone. In particular, the Tribunal notes that, in 2003, an additional 128,000 Chinese barbeques were imported into a market that had shrunk by 45,000 units from the previous year. Imports continued to rise in 2005. In the first quarter, there were nearly 15,000 more units imported from China than in the first quarter of 2004.

98. Between 2002 and 2004, the market for barbeques grew by 18 percent, and domestic producers' sales declined by an almost identical percentage. However, imports from China rose by 140 percent in 2003 and by a further 90 percent in 2004, for a total increase of more than 350 percent over the same three years.

99. The share of the market held by imports from China nearly quadrupled over the period of inquiry, rising from 10 percent in 2002 to 39 percent in 2004. This increased share stands in contrast to the 30 percent decline in the domestic producers' share of the market.

100. In the Tribunal's view, the above analysis clearly indicates that the ever-increasing volumes of imports of Chinese barbeques displaced domestic sales. The result was that, rather than being able to take advantage of the robust market growth, domestic producers actually lost sales during a period of market expansion.

101. Parties opposing the complaint argued that Chinese barbeques had replaced imports from other sources and that the vast bulk of growth in imports from China had not been taken from domestic producers. Parties opposing the complaint further submitted that innovative Chinese barbeques had been responsible for the growth in the domestic market by creating new demand.

102. The Tribunal acknowledges that imports from China also displaced sales of barbeques from other countries over the period of the inquiry.[17] However, if Chinese barbeques had simply been substitutes for products from other countries, then the Tribunal would not have

16. In this regard, Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at 51 states the following:

    > . . . When a word is defined by statute, the binding character of the stipulated meaning depends not on shared linguistic convention but on legislative sovereignty. The stipulated meaning may closely resemble the conventional meaning of the defined term (whether ordinary or technical) or it may effect a radical departure (although a radical departure would violate current drafting standards). In either case, interpreters are bound to apply the meaning stipulated by the law-maker, which may or may not incorporate conventional meaning . . . .

17. *Protected Pre-hearing Staff Report*, revised 2 September 2005, Tribunal Exhibit CS-2005-001-26A (protected), Administrative Record, Vol. 2.1 at 136.

expected to see sales of imports from China grow so substantially compared to the loss of sales of imports from other countries.

103. Regardless of whether the nature of Chinese barbeques contributed to the growth in the domestic market, the Tribunal notes that domestic producers did not participate in that growth and lost substantial market share over the period of the inquiry.

104. The Tribunal also recognizes that there was significant intra-industry competition and that, in some years, at some retail accounts, one domestic producer would lose sales to other domestic producers. However, the net result was that domestic producers, as a whole, lost market share to imports of barbeques from China.

Effects on Prices

105. Table 4 presents the average unit values of sales from domestic production and sales/purchases of imports from China.

Table 4
Sales/Purchases of Imports From China and Domestic Production – Unit Value
($/unit)

				Jan. – Mar.	
	2002	**2003**	**2004**	**2004**	**2005**
LEVEL					
Sales From Domestic Production	231	229	254	248	248
Sales/Purchases of Imports From China[1]	128	209	214	198	218
% CHANGE					
Sales From Domestic Production		(1)	11		(0)
Sales/Purchases of Imports From China[1]		63	2		10

1. Includes negligible sales of direct imports by domestic producers.
Source: *Pre-hearing Staff Report*, revised 2 September 2005, Tribunal Exhibit CS-2005-001-25A, Administrative Record, Vol. 1.1 at 142.

106. The average unit selling price for domestic production declined marginally between 2002 and 2003, but increased by more than 10 percent in 2004. It remained unchanged between the first quarter of 2004 and the first quarter of 2005. The average unit value of imports from China increased steadily over the period of inquiry, from $128 in 2002 to $214 in 2004, reaching $218 in the first quarter of 2005. The Tribunal notes that the average unit value of imports from China undercut the average unit selling price of domestic barbeques in every period that it examined by a margin of not less than 9 percent.

107. The effects of Chinese barbeques on prices of domestic barbeques manifested themselves somewhat differently in the different retail price segments of the market.

108. Imported barbeques from China first had a meaningful presence in the Canadian market in 2002 in the lower retail price segments of the market.[18] For example, the witness from CTC testified to purchasing two opening price point (OPP) barbeques for the 2002 season from Winners, rather than from Fiesta.[19] The Tribunal heard testimony that the lower retail price segments represent the "volume" end of the market[20] and that the barbeque models sold here have smaller cooking surfaces and fewer and less elaborate features than models in higher price segments.[21]

109. The Tribunal notes in particular the sizeable degree of price undercutting by imports from China in 2002. Witnesses from several large retailers, including CTC and Wal-Mart, testified that, when Chinese barbeques first appeared in the Canadian market, the lower wholesale prices permitted them to take larger margins, at given retail prices, than did domestic barbeques.[22] In the Tribunal's view, the early competition in the lower retail price segment of the market had more to do with the significantly lower prices of Chinese barbeques than with substantial differences in features. In this regard, Winners acknowledged that the barbeques that it provided to CTC in 2002 had ". . . no additional stainless steel, no additional size advantage, and no additional features that would be considered particularly costly . . . ."[23]

110. The competition from Chinese barbeques was so intense in the lowest retail price segment of the market that, by 2003, domestic producers had essentially abandoned this segment and turned to imports to round out their product offerings.[24] This turn of events explains in part the increase in the average selling price of domestic barbeques over the period of inquiry.

111. In subsequent years, the nature of the competition from Chinese barbeques changed in several ways.

112. First, looking at the market on average, the relative degree of price undercutting by Chinese barbeques lessened somewhat, even as the gap increased in absolute value between 2003 and the first quarter of 2005. In the Tribunal's view, underlying this change was the fact that the undercutting was expressing itself more in the form of additional features rather than just a pure price advantage. The prices of Chinese barbeques increased somewhat, but provided increasingly attractive value to retailers.[25] For example, Wal-Mart submitted that, for the 2004 season, it was able to purchase a Chinese-made OPP model that had a range of features that domestic producers were not able to offer at that price level.[26]

18. *Protected Pre-hearing Staff Report*, Inquiry No. NQ-2004-004, revised 16 November 2004, Tribunal Exhibit CS-2005-001-18.01A (protected), Administrative Record, Vol. 2.3 at 141, 143, 145, 147, 149, 151.
19. Importer's Exhibit E-01, para. 22, Administrative Record, Vol. 9; Tribunal Exhibit CS-2005-001-09.03, Administrative Record, Vol. 3 at 89.
20. *Transcript of Public Hearing*, Vol. 1, 7 September 2005, at 94-95.
21. Tribunal Exhibit CS-2005-001-01, Administrative Record, Vol. 1 at 140.
22. *Transcript of Public Hearing*, Vol. 2, 8 September 2005, at 231-32, 235-37, 316-17.
23. Importer's Exhibit L-03, para. 70, Administrative Record, Vol. 9A.
24. *Transcript of Public Hearing*, Vol. 1, 7 September 2005, at 116-17.
25. *Ibid.* at 29-30, 110; *Transcript of Public Hearing*, Vol. 2, 8 September 2005, at 209-10, 272, 314, 320.
26. *Transcript of Public Hearing*, Vol. 2, 8 September 2005, at 317-18.

113. In addition, the Tribunal heard testimony that increased transportation costs accounted for a portion of the narrowing gap between Chinese and domestic barbeques.[27]

114. Second, beginning in 2003, and while still holding the low end of the market, an increasing number of Chinese barbeques were sold in the middle and upper retail price segments of the market, which contributed to the overall increase shown in the average unit value of imports.[28] The Tribunal considers that, in these segments of the market, competition is less of a battle for the lowest price than it is for the barbeque with the most "bells and whistles". In fact, when the Tribunal examined barbeques that sell in various retail price ranges between $300 and $599, it found that, on average, for the 2003 to 2005 seasons, Chinese barbeques generally had higher unit values than domestic barbeques.[29]

115. The Tribunal notes that, because Chinese barbeques still controlled the low end of the market (i.e. below $200 retail), and therefore accounted for a large portion of the market, the average unit value for all Chinese barbeques remained consistently below that for domestic barbeques throughout the period of inquiry.

116. Even though, in certain instances, retailers were willing to pay more to acquire Chinese barbeques in the middle and upper retail price segments of the market, they were nonetheless able to achieve similar margins on these products. Further, the Chinese barbeques were perceived as having a "wow factor" to attract customers and increase "top-line" revenues.[30]

117. There was general agreement, even among domestic producers, that Chinese-made barbeques provide a greater range of features, especially in stainless steel, particularly in the middle to upper retail price segments of the market.[31] Winners submitted that it adopted key features and design elements previously found only on high-end barbeques and incorporated them into barbeques at lower price points, such as the Centro™ line sold by CTC.[32] Similarly, Onward testified that its customers were able to purchase Chinese barbeques with a whole different feature set.[33]

118. The Tribunal takes note of the phenomenon of "feature creep", whereby additional features and more elaborate styling are added year after year to barbeques selling at the same retail price. For example, the witness from CTC acknowledged that the 2005 version of a Chinese-made barbeque that retailed for $449 was a larger, more powerful product with more features and with more stainless steel accents than the 2003 version of the same $449 model.[34]

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27. *Ibid.* at 231, 420; *Transcript of In Camera Hearing*, Vol. 3, 9 September 2005, at 204-205, 420.
28. *Protected Pre-hearing Staff Report*, Tribunal Exhibit CS-2005-001-26 (protected), Administrative Record, Vol. 2.1 at 77; *Protected Pre-hearing Staff Report*, revised 2 September 2005, Tribunal Exhibit CS-2005-001-26A (protected), Administrative Record, Vol. 2.1 at 170, 172-73, 175, 177, 179.
29. *Protected Pre-hearing Staff Report*, revised 2 September 2005, Tribunal Exhibit CS-2005-001-26A (protected), Administrative Record, Vol. 2.1 at 149-52.
30. *Transcript of Public Hearing*, Vol. 2, 8 September 2005, at 227-28, 258-59.
31. *Transcript of Public Hearing*, Vol. 1, 7 September 2005, at 29-30, 110, 204, 209-10; *Transcript of In Camera Hearing*, Vol. 3, 8 September 2005, at 181-83.
32. Importer's Exhibit L-03, paras. 16, 26, Administrative Record, Vol. 9A.
33. *Transcript of Public Hearing*, Vol. 1, 7 September 2005, at 29-30.
34. *Transcript of Public Hearing*, Vol. 2, 8 September 2005, at 248-53.

119. Domestic producers, as noted above, were unable to raise prices sufficiently to recover their increases in costs, including those relating to adding more features and stainless steel accents. Accordingly, they were unable to keep up with competition from Chinese barbeques in the feature race. The witness from Wal-Mart acknowledged that the cost advantages enjoyed by Chinese producers vis-à-vis domestic producers enabled them to offer barbeques with more features at comparable price points.[35]

120. As to the highest price segment of the market, the Tribunal notes that, in 2003, fully stainless steel barbeques from China entered the Canadian market at retail prices less than $1,000.[36] Although some domestic producers had been making fully stainless steel barbeques prior to this time, they generally sold at significantly higher retail prices.[37] For example, Crown has specialized in large, fully stainless steel barbeques since 1995, with retail prices beginning at $2,500 and going as high as $12,000. The Tribunal heard testimony that even a niche producer like Crown is facing increased competition from large, fully stainless steel Chinese barbeques being sold in "big box" stores at prices that are approximately half those for its fully stainless steel models.[38]

121. Onward submitted that it designed a fully stainless steel barbeque for the 2004 season, but did not tool up for production because it could not produce the barbeque at a low enough cost to be competitive with imports from China. Fiesta also developed a fully stainless steel barbeque in 2004, but did not go forward with production for the same reasons.[39] Similarly, the witness from Char-Broil testified that it would not be cost-efficient to make the investment in tooling and equipment to produce a stainless steel barbeque at its U.S. facility.[40]

122. The retail prices of fully stainless steel Chinese barbeques continued to decline and, by the 2005 season, they were available to consumers for less that $600.[41]

123. In sum, the Tribunal considers that the negative effects of imports of Chinese barbeques on prices of domestic barbeques were different at the lower and the middle to upper price segments of the market. In the lower segment, it was a question of head-to-head competition largely based on price, while in the middle to upper segments, it was an issue of more or different features at the same retail price.

Impact on Domestic Producers

124. As described above, domestic producers were unable to compete with imports from China of barbeques that either undercut their prices or offered more or different features at comparable or higher prices.

35. *Ibid.* at 316-17.
36. Importer's Exhibit K-03, para. 22, Administrative Record, Vol. 9A.
37. Manufacturer's Exhibit B-02, para. 5, Administrative Record, Vol. 11.
38. *Transcript of Public Hearing*, Vol. 1, 7 September 2005, at 186-89.
39. Manufacturer's Exhibit C-01, paras. 71-72, Administrative Record, Vol. 11.
40. *Transcript of Public Hearing*, Vol. 2, 8 September 2005, at 355-56.
41. Importer's Exhibit K-03, para. 25, Administrative Record, Vol. 9A; Importer's Exhibit L-03, para. 39, Administrative Record, Vol. 9A.

125. The impact of the domestic producers' inability to compete is seen clearly in the nearly 20 percent decline in their volume of sales between 2002 and 2004. In this regard, the Tribunal examined the purchases of barbeques by certain major retailers and found that, between 2002 and 2004, their reliance on imports from China more than doubled.[42]

126. The decline in sales for domestic producers in the midst of the burgeoning Canadian market meant that imports of barbeques from China were able to capture an ever-increasing share of the domestic market, swelling from 10 percent to nearly 40 percent in just three years.

127. The modest increase in domestic producers' average unit selling prices over the period of inquiry was insufficient to offset the substantial reduction in the number of units sold, and the result was a marked deterioration in their financial health, culminating in a net loss in 2004. As domestic producers struggled to meet the competition from imports from China with respect to margins and features, they either cut their own margins and lost profit or tried to hold their prices and lost sales, which also resulted in lost profit.

Other Factors

128. The failure of domestic producers to offer innovative designs and features was cited as a major impetus for retailers to source barbeques from China. In particular, parties opposing the complaint pointed to the slowness of domestic producers to incorporate stainless steel into their barbeques, despite the growing consumer demand.

129. The Tribunal notes that domestic producers did try to respond to the stainless steel trend, albeit somewhat belatedly. Besides the attempts by Onward and Fiesta to develop fully stainless steel models, they have also added more stainless steel features to their cast aluminum models in recent years.[43] However, domestic producers were constrained in their ability to keep up in the features race because of the cost advantages enjoyed by Chinese producers.

130. In any event, as noted earlier, the Tribunal is of the view that features are more of an issue in the higher retail price segment of the market, while, for the retailer, the price at which it can buy barbeques is an equally, if not more, important factor in the lower segment of the market. Therefore, the Tribunal does not accept the argument that a lack of features can explain the domestic producers' substantial loss of market share. In this regard, it notes that, even in the 2005 season, more than 40 percent of all barbeques sold in the domestic market still had retail prices below $200.[44]

42. Protected importers' replies to requests for additional information sent on July 15, 2005, and filed under Tribunal Exhibits CS-2005-001-13.01 (protected), 13.04 (protected), 13.08B (protected), 13.09B (protected), 13.10 (protected), 13.12D (protected), 13.14E (protected), 13.15D (protected) and 13.20C (protected), Administrative Record, Vol. 6.
43. Manufacturer's Exhibit C-01, paras. 71-72, Administrative Record, Vol. 11; *Transcript of Public Hearing*, Vol. 1, 7 September 2005, at 42-43.
44. *Protected Pre-hearing Staff Report*, Tribunal Exhibit CS-2005-001-26 (protected), Administrative Record, Vol. 2.1 at 77; *Protected Pre-hearing Staff Report*, revised 2 September 2005, Tribunal Exhibit CS-2005-001-26A (protected), Administrative Record, Vol. 2.1 at 170, 172-73, 175, 177, 179.

131. The Tribunal also heard arguments that domestic producers' decisions with respect to brand and channel management contributed to any injury that they experienced because mass retailers were forced to turn to Chinese barbeques to meet their needs for differentiated products. Product differentiation is an important component of the marketing strategies of many retailers and allows them to compete on more than just price.[45] Both Fiesta and Onward said that they recognized the importance of branding, channel management and product differentiation and submitted that they attempt to differentiate their products in various ways.[46] Onward sold Sunbeam and Weber barbeques to CTC to meet that retailer's desire for brand exclusivity. Despite being well known brand names, neither one performed up to CTC's expectations.

132. As to the issue of private-label barbeques, the Tribunal notes the increasing presence of such products in the market over the period of inquiry. Loblaw, for example, now sells only private-label barbeques. As to the claims that domestic producers were unable or unwilling to provide private-label products, the Tribunal notes that Fiesta and Onward offer a limited range of private-label barbeques,[47] although both were cautious about such programs, citing the need to have an effective inventory management system in place in order to avoid surpluses or sellouts before the season ends.[48]

133. Parties opposing the complaint also argued that domestic producers were responsible for any injury that they suffered because of their poor customer relations and business decisions, including a failure to aggressively sell to the mass merchant market, late deliveries and unreliable quality.

134. The Tribunal accepts that there were instances where domestic producers made tactical mistakes or provided less than satisfactory service. However, it does not consider that there is evidence that any of these factors was pervasive or of such magnitude as to explain the loss of market share.

Conclusion on Significant Cause

135. Parties opposing the complaint submitted that causes other than the imports from China were responsible for any material injury experienced by the domestic producers. On this basis, they argued that the Tribunal should not find that the imports from China are a significant cause of material injury.

136. Having assessed, pursuant to subsection 5.1 of the *Regulations*, the actual volume of imports, the effect of such imports on prices and their impact on domestic producers, and having considered other potential causes of injury, the Tribunal finds that imports of barbeques from China are indeed a significant cause of the material injury experienced by domestic producers because they are an important cause of that injury (i.e. a cause ". . . that need not be as important as, or more important than, any other cause.").

45. *Transcript of Public Hearing*, Vol. 2, 8 September 2005, at 230, 242, 288, 297.
46. *Transcript of Public Hearing*, Vol. 1, 7 September 2005, at 41, 103.
47. *Ibid.* at 24, 102, 163.
48. *Ibid.* at 44-45, 103.

137. Although the Tribunal acknowledges that the other causes that it considered could also be important causes of the injury, this does not alter its finding that the imports from China are a significant cause of the material injury.[49] The Tribunal is of the view that the legislative definition of "significant cause" allows for several important causes of injury to be present in the market simultaneously, as long as imports from China are one of those important causes.

138. In light of the foregoing, the Tribunal concludes that imports of barbeques from China are a significant cause of the material injury suffered by domestic producers of like or directly competitive goods.

CONCLUSION ON MARKET DISRUPTION

139. The Tribunal determines that barbeques from China are being imported in such increased quantities or under such conditions as to be a significant cause of market disruption to domestic producers of like or directly competitive goods.

49. In contrast, the Tribunal notes that, in a global safeguard inquiry, the imports have to be a "principal cause" of the injury.

CHAPTER III

REMEDY RECOMMENDATION

INTRODUCTION

140. As noted in Chapter I, the Tribunal's authority to address remedy in this market disruption inquiry is found in the Referral Order, made on August 10, 2005, by the Governor General in Council, on the recommendation of the Minister of Finance and the Minister for International Trade, pursuant to subsection 30.22(7) of the *CITT Act.* Specifically, the Referral Order refers to the Tribunal the matter of recommending to the Government the most appropriate remedy to address any market disruption or threat thereof that may be found in this case ". . . over a period not exceeding three years, in accordance with Canada's rights and obligations under international trade agreements."[50]

141. On July 11, 2005, the Tribunal published a notice of decision to commence a safeguard inquiry in respect of China, in which it advised parties and interested persons that it was conducting its market disruption and remedy proceedings concurrently.[51] Parties were invited to make submissions on remedy at the same time as their submissions on market disruption. Further to the notice, the Tribunal received one joint submission on remedy from parties supporting the complaint, namely, Onward, Fiesta and Crown.[52] In their written submissions, parties opposing the complaint generally addressed procedural issues relating to the remedy process rather than the nature and magnitude of any remedy. However, the Tribunal did receive three submissions from parties opposing the complaint that suggested an appropriate remedy. In addition, in closing argument at the hearing, parties opposing the complaint made specific submissions on remedy methodology and calculation.

142. The Tribunal, in making its recommendation, is guided by the Referral Order, the Protocol and the relevant provisions of the *Customs Tariff*.

CHOICE OF REMEDY

143. The Tribunal notes that there is nothing in the Referral Order, the Protocol or the *Customs Tariff* that provides direction or guidance on what type of remedy to apply in a market

50. Consistent with its conclusion that additional WTO requirements (e.g. those from the *Agreement on Safeguards*) do not apply to its market disruption determination, the Tribunal has only considered the provisions of Article 16 of the Protocol for its remedy recommendation. The Tribunal notes that this interpretation is permitted by virtue of subsection 33(2) of the *Interpretation Act,* which provides that "[w]ords in the singular include the plural, and words in the plural include the singular" and that the *Interpretation Act* applies to the Referral Order by virtue of the legislative definition given to the term "regulation" under subsection 2(1).
51. The notice anticipated the eventual receipt of the Referral Order on remedy.
52. Fiesta disagreed with Onward and Crown on one aspect of the remedy (i.e. Fiesta requested that the scope of any remedy be limited to barbeques retailing for under $600). As a result, Fiesta filed a supplementary submission on remedy, and Onward and Crown also filed a joint supplementary submission. The point of disagreement and the Tribunal's view of it are discussed at the end of this chapter.

disruption inquiry in the event of an affirmative determination.[53] Accordingly, the Tribunal is of the view that the types of measures that should be considered in a market disruption inquiry are the same as those that are generally considered in a global safeguard inquiry, namely: (1) simple tariffs or surtaxes; (2) tariff-rate quotas (TRQs), which impose different tariff rates below and above a predetermined import volume threshold; and (3) quotas, which establish an upper limit on the absolute volume of imports that can enter the market within a given period of time.

144. The Tribunal notes that, in their joint submission on remedy, Onward, Fiesta and Crown indicated that their preferred approach to remedy was a surtax.[54] As previously noted, although most submissions from parties opposing the complaint were silent on remedy, there were three that expressed a preference for the type of remedy that should be applied if market disruption were found; of these, two were in favour of a surtax and the other, a TRQ. Generally speaking, those that supported a surtax indicated that they did so because they felt that it was fairer, less trade-disruptive and easier to enforce than any other type of remedy.

145. In considering the choice of remedy, the Tribunal notes that Chinese barbeque producers have a significant cost advantage over domestic producers, that is, the cost of manufacturing in China, before taking into account the costs of bringing Chinese barbeques to Canada, is lower than the cost of manufacturing in Canada. In this market disruption inquiry, this advantage was referred to as a "first-cost" advantage. The witness from Onward testified that this Chinese first-cost advantage stemmed not only from the well-known low labour costs in China but also from factors such as lower land and building costs, lower costs of capital, lower taxes and a less stringent regulatory environment.[55]

146. Parties opposing the complaint did not dispute that Chinese producers had a first-cost advantage. In fact, the nature of this advantage was discussed in Char-Broil's submissions and in other submissions filed on behalf of parties opposing the complaint.[56] However, while parties opposing the complaint agreed that a first-cost advantage existed, they argued that any remedy arising from this advantage had to take into account the costs associated with importing Chinese barbeques into Canada, including duty, ocean and inland freight, brokerage and insurance.

147. The Tribunal agrees that, from a remedy standpoint, in considering the nature and extent of any first-cost advantage that imports of barbeques from China have over domestic production, the relevant point of comparison is the cost in Canada of imports from China. In other words, as argued by parties opposing the complaint, the cost of importation should be added to the cost of manufacturing barbeques in China, and the total of these costs should be compared to the Canadian manufacturing cost. The Tribunal has made this comparison, as will

53. However, the Tribunal notes that both the Protocol (Article 16:3) and the *Customs Tariff* (subsection 77.1(3)) provide that any corrective measures should be applied only to the extent necessary to prevent or remedy market disruption.
54. In the alternative to a surtax, Onward, Fiesta and Crown made submissions pertaining to a TRQ.
55. *Transcript of Public Hearing*, Vol. 1, 7 September 2005, at 31-37.
56. Importer's Exhibit G-07, paras. 24-26, 46-49, Administrative Record, Vol. 9; Importer's Exhibit L-03, paras. 53-57, 59, Administrative Record, Vol. 9A; Importer's Exhibit L-04 (protected), para. 58, Administrative Record, Vol. 10B; Importer's Exhibit M-03, paras. 80-86, Administrative Record, Vol. 9A.

be described in the following section, and found that, over the period of inquiry, imports of barbeques from China did, indeed, have a cost advantage over Canadian production (hereinafter referred to as a "net-cost" advantage).

148. The Tribunal finds that the Chinese net-cost advantage has manifested itself in the barbeque market in different ways. In the low end of the barbeque market (i.e. below $200 retail), Chinese barbeques took sales from domestic producers by undercutting domestic prices by significant margins.[57] In the middle to upper segments of the market, Chinese barbeques often incorporated more expensive materials, such as stainless steel, and more or different features than domestic barbeques selling at comparable retail price points.[58] Although the wholesale costs and retail prices of Chinese barbeques in the middle to upper segments of the market may have been similar to or somewhat higher than those of domestic models, they nonetheless offered a better value proposition to retailers and consumers and, thereby, took sales from domestic producers. As the witness from Fiesta stated, the domestic producers were faced with a situation where ". . . Mercedes Benz were suddenly available at Chevrolet prices . . . ."[59]

149. The Chinese net-cost advantage is also evident in the margins realized by retailers on sales of domestic and Chinese barbeques. More particularly, witnesses from two major retailers testified that, over the period of inquiry, their margins were better on their sales of Chinese barbeques than on those of domestic barbeques, but that these were getting closer.[60] In the Tribunal's opinion, higher margins resulting from lower costs or better value on imports are clearly an important incentive for retailers to source abroad.

150. The Tribunal notes that the Referral Order directs the Tribunal to recommend the most appropriate remedy. As already noted, the Protocol and the *Customs Tariff* provide that any corrective measures should be applied only to the extent necessary to prevent or remedy market disruption. Having regard to the foregoing and the evidence on the record, the Tribunal is of the view that the simplest, fairest, most effective way to remedy market disruption in this instance is to apply a surtax designed to raise the costs of imports of barbeques from China and, thereby, offset the Chinese net-cost advantage.

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57. *Protected Pre-hearing Staff Report*, Tribunal Exhibit CS-2005-001-26 (protected), Administrative Record, Vol. 2.1 at 36; *Protected Pre-hearing Staff Report*, revised 2 September 2005, Tribunal Exhibit CS-2005-001-26A (protected), Administrative Record, Vol. 2.1 at 147.
58. Public domestic producers' replies to question 9 of the domestic producers' questionnaire sent on July 11, 2005, and filed under collective Tribunal Exhibit CS-2005-001-09, Administrative Record, Vol. 3 at 45-279; protected domestic producers' replies to Schedule VII of the domestic producers' questionnaire sent on July 11, 2005, and filed under collective Tribunal Exhibit CS-2005-001-10 (protected), Administrative Record, Vol. 4 at 1-316, Vol. 4A at 1-350; public importers' replies to question 8 of the importers' questionnaire sent on July 11, 2005, and filed under collective Tribunal Exhibit CS-2005-001-12, Administrative Record, Vol. 5 at 75-241, Vol. 5A at 242-388, Vol. 5B at 1-347; protected importers' replies to Schedule V of the importers' questionnaire sent on July 11, 2005, and filed under collective Tribunal Exhibit CS-2005-001-13 (protected), Administrative Record, Vol. 6 at 1-320; *Transcript of Public Hearing*, Vol. 1, 7 September 2005, at 29-30, 209-10.
59. Manufacturer's Exhibit C-01, para. 26, Administrative Record, Vol. 11.
60. *Transcript of Public Hearing*, Vol. 2, 8 September 2005, at 231-32, 235-37, 316; *Transcript of In Camera Hearing*, Vol. 2, 8 September 2005, at 117-18, 122-23, 179-80, 187-88.

DETAILS OF THE REMEDY PROPOSED

151. The Tribunal notes that determining an appropriate remedy is more a matter of judgement than an exercise in mathematical precision. There are numerous complexities in the marketplace that are difficult to quantify. For example, for barbeques, it is difficult to make specific "apples-to-apples" comparisons because, while Chinese and domestic barbeques are substitutable "like goods", Chinese barbeques generally are of different construction and materials, and have more or sometimes different features than domestic barbeques.

152. With the foregoing in mind, the Tribunal notes that the starting point for an analysis of the net-cost advantage in Canada of imports of barbeques from China over domestic barbeques is to estimate the first-cost advantage of manufacturing barbeques in China. During the market disruption inquiry, the Tribunal was presented with a range of values regarding the Chinese first-cost advantage. The Tribunal's evaluation of this evidence follows.

153. At the low end of the range, there was the evidence of the U.S.-based company Char-Broil, described by one witness as the largest producer of barbeques in the world, and also a major exporter of barbeques to Canada.[61] In August 2004, Char-Broil announced that it intended to close all its manufacturing facilities in the United States and move its manufacturing operations to China by 2007. The announcement cited a 25 percent cost advantage in China as one of the factors considered in making the move.[62]

154. During the hearing, the witness from Char-Broil elaborated on the reasons for his company's decision. According to the witness, the 25 percent Chinese cost advantage represented a first-cost advantage, not a net-cost advantage, for comparable barbeques.[63] He asserted that the costs and risks of importation were also factors that had to be taken into account in the decision to relocate manufacturing to China. Moreover, there were several other important non-cost factors that had an important bearing on the company's decision.[64]

155. In considering the above evidence, the Tribunal notes that Char-Broil's U.S. manufacturing facilities are much larger than those of any Canadian producers.[65] As such, Char-Broil benefits from economies of scale and other efficiencies that are not available to the Canadian producers. Given the smaller size of Canadian producers, it is reasonable to suppose that the first-cost advantage for Chinese producers is greater against domestic producers than against Char-Broil. In other words, the evidence suggests to the Tribunal that the Chinese first-cost advantage in Canada is higher than 25 percent.

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61. *Transcript of Public Hearing*, Vol. 1, 7 September 2005, at 124; *Protected Pre-hearing Staff Report*, revised 2 September 2005, Tribunal Exhibit CS-2005-001-26A (protected), Administrative Record, Vol. 2.1 at 133; Tribunal Exhibit CS-2005-001-13.11B (protected), Administrative Record, Vol. 6 at 77.18; Tribunal Exhibit CS-2005-001-16.08A (protected), Administrative Record, Vol. 6.1 at 53.3.
62. Manufacturer's Exhibit A-07A, Attachment 2, Administrative Record, Vol. 11.
63. *Transcript of In Camera Hearing*, Vol. 2, 8 September 2005, at 156-57, 165-67.
64. *Ibid.* at 150-54.
65. *Pre-hearing Staff Report*, Tribunal Exhibit CS-2005-001-25, Administrative Record, Vol. 1.1 at 50; Tribunal Exhibit CS-2005-001-16.08A (protected), Administrative Record, Vol. 6.1 at 53.3.

156. The Tribunal further notes that the major Canadian retailers have accounted for the large majority of imports of barbeques from China over the period of inquiry.[66] In the Tribunal's opinion, retailers would not have imported in such volumes unless imports had a clear cost or value advantage over domestic goods, after accounting for all costs of importation. As already noted, the higher average margins that retailers could achieve on imports from China attest to such a cost or value advantage. Indeed, according to the evidence, at times over the period of inquiry, some of the large retailers were achieving margins that were, on average, more than 30 percent higher on Chinese imports than on domestically produced barbeques. In the Tribunal's estimation, this evidence also necessarily implies a significant Chinese first-cost advantage.

157. Two of the major domestic barbeque producers, Onward and Fiesta, also provided their estimates of the Chinese first-cost advantage. According to the evidence, each of these companies has explored the possibility of sourcing certain barbeque models from China because of its inability to compete against imports from China.[67] In fact, Fiesta indicated that it intends to import certain models from China for the 2006 barbeque season.[68] Its studies showed that Chinese barbeques could be produced at costs that are about 40 percent below its own costs of manufacturing.[69]

158. The witness from Onward stated that Chinese barbeques were available in Canada at a price equivalent to his company's cost of raw materials.[70] Based on the operational data reported by Onward, as well as other relevant statistical data on the record regarding costs of importation, the Tribunal estimates that this is tantamount to a first-cost advantage for Chinese barbeques of a similar order of magnitude to that claimed by Fiesta.[71]

159. The Tribunal finds that Fiesta's and Onward's estimates of the Chinese first-cost advantage were reasonable. Accordingly, the Tribunal takes 40 percent as the relevant order of magnitude for the calculation of the estimated gap in Canada between the cost of imports of barbeques from China and that of domestic production.

160. Briefly stated, the methodology used by the Tribunal in making the calculation[72] involves deriving the first-cost advantage for Chinese producers by multiplying the domestic producers' reported average unit cost of manufacturing by the 40 percent differential noted

66. Protected retailer's replies to Schedule I of the importers' questionnaire sent on July 11, 2005, and filed under collective Tribunal Exhibit CS-2005-001-13 (protected), Administrative Record, Vol. 6 at 1-320; *Protected Pre-hearing Staff Report*, revised 2 September 2005, Tribunal Exhibit CS-2005-001-26A (protected), Administrative Record, Vol. 2.1 at 133.
67. *Transcript of Public Hearing*, Vol. 1, 7 September 2005, at 31-33, 37-38, 114-19.
68. *Ibid.* at 104-105.
69. *Ibid.* at 105-106.
70. *Ibid.* at 38-39.
71. *Protected Pre-hearing Staff Report*, revised 2 September 2005, Tribunal Exhibit CS-2005-001-26A (protected), Administrative Record, Vol. 2.1 at 182; Tribunal Exhibit CS-2005-001-10.04H (protected), Administrative Record, Vol. 4A at 266.28-266.29; protected importers' replies to Schedule I of the importers' questionnaire sent on July 11, 2005, and filed under collective Tribunal Exhibit CS-2005-001-13 (protected), Administrative Record, Vol. 6 at 1-320.
72. The Tribunal's methodology is similar to that proposed by parties opposing the complaint in closing argument.

above.[73] The number so derived is then reduced by the average unit cost of importation.[74] The difference between the two numbers is the estimated Chinese net-cost advantage after accounting for the cost of importation into Canada. The calculation shows that when imports of barbeques from China had fully penetrated the Canadian market at all retail segments by 2004,[75] they were below domestic costs by about 15 to 20 percent, expressed as a percentage of Chinese FOB values at port of shipment.[76]

161. The Tribunal notes that the actual Chinese net-cost advantage in Canada, at any given time, is subject to the fluctuation of factors such as the cost of ocean and inland freight and exchange rate movements. As freight rates rise, as they have in recent periods, the Chinese net-cost advantage is reduced. As the Canadian dollar appreciates, as it has in recent periods, the Chinese net-cost advantage increases. According to the evidence, rising freight rates have been an important factor in recent quarters.[77] Having regard to all the foregoing considerations, the Tribunal is of the view that a surtax of 15 percent is the appropriate remedy, applied on an *ad valorem* basis, FOB Chinese port of shipment.[78]

162. In terms of the duration of the remedy, the Tribunal notes that the Referral Order allows the Tribunal to recommend a remedy for a period ". . . not exceeding three years . . . ." Article 16:6 of the Protocol also provides for a remedy of up to three years provided there has been an ". . . absolute increase . . ." in imports from China, which the Tribunal has found to be the case in this market disruption inquiry. Given the injury suffered by the domestic producers and the time that it could take to regain their position in the market, the Tribunal recommends

73. *Protected Pre-hearing Staff Report*, revised 2 September 2005, Tribunal Exhibit CS-2005-001-26A (protected), Administrative Record, Vol. 2A at 153.
74. *Pre-hearing Staff Report*, revised 2 September 2005, Tribunal Exhibit CS-2005-001-25A, Administrative Record, Vol. 1.1 at 135; protected importers' replies to Schedule I of the importers' questionnaire sent on July 11, 2005, and filed under collective Tribunal Exhibit CS-2005-001-13 (protected), Administrative Record, Vol. 6 at 1-320.
75. *Pre-hearing Staff Report*, revised 2 September 2005, Tribunal Exhibit CS-2005-001-25A, Administrative Record, Vol. 1.1 at 142; *Protected Pre-hearing Staff Report*, Tribunal Exhibit CS-2005-001-26 (protected), Administrative Record, Vol. 2.1 at 77; *Protected Pre-hearing Staff Report*, revised 2 September 2005, Tribunal Exhibit CS-2005-001-26A (protected), Administrative Record, Vol. 2.1 at 170, 172-73, 175, 177, 179. As already noted, Chinese barbeques entered the market, in large volumes, initially in the low segment of the market in 2002 before expanding into the middle and upper segments in the 2003 and 2004 barbeque seasons.
76. Although some pricing data are available for the 2005 barbeque selling season, 2004 is the most recent period for which comprehensive annual statistical data on imports and costs are available. The 2004 barbeque selling season is also a representative year for the participation of imports from China in all market segments. Accordingly, the Tribunal has given 2004 the most weight for the purpose of its remedy calculation.
77. *Transcript of Public Hearing*, Vol. 2, 8 September 2005, at 231, 420; *Transcript of In Camera Hearing*, Vol. 3, 9 September 2005, at 204-205.
78. The Tribunal notes that, in their submissions, Onward, Fiesta and Crown requested a surtax of between 40 and 67 percent. They supported their request for such a surtax based, among other things, on the "undervaluation" of the Chinese yuan. The Tribunal does not consider economic hypotheses on the international trading value of the yuan to be helpful to its analysis. Onward, Fiesta and Crown also referred to Chinese cost advantages in support of their requested remedy. As discussed above, this latter rationale has been accepted by the Tribunal, but the order of magnitude requested by Onward, Fiesta and Crown is not supported by the evidence on the record.

that the proposed remedy be applied for the full three-year period to remove the market disruption.

163. Further, the Tribunal recommends that this surtax be applied to Chinese barbeques selling at all retail price points and finds Fiesta's request to limit the scope of the remedy to barbeques retailing for under $600 to be without merit. In fact, the Tribunal notes that, over the period of inquiry, Fiesta's domestic competitors have had substantial sales from domestic production above $600 retail, contrary to Fiesta's assertions.[79]

REMEDY RECOMMENDATION

164. The Tribunal considers that the most appropriate remedy to remove the market disruption suffered by the domestic producers is a surtax set at 15 percent for a period of three years. It recommends that the surtax be applied on an *ad valorem* basis, FOB Chinese port of shipment, to barbeques originating in China.

165. The Tribunal notes that some buying programs have already been finalized for the 2006 barbeque selling season.[80] Therefore, early implementation of the remedy is required if it is to have a meaningful effect for the upcoming 2006 barbeque selling season.

79. *Protected Pre-hearing Staff Report*, revised 2 September 2005, Tribunal Exhibit CS-2005-001-26A (protected), Administrative Record, Vol. 2.1 at 179.
80. *Transcript of Public Hearing*, Vol. 1, 7 September 2005, at 207; *Transcript of Public Hearing*, Vol. 2, 8 September 2005, at 229; *Transcript of In Camera Hearing*, Vol. 2, 8 September 2005, at 99-100; Manufacturer's Exhibit A-07, para. 17, Administrative Record, Vol. 11; Importer's Exhibit J-03, para. 65, Administrative Record, Vol. 9A.

CHAPTER IV

RECOMMENDATIONS ON REQUESTS FOR PRODUCT EXCLUSIONS

PRODUCT EXCLUSIONS

Introduction

166. In its notice issued July 11, 2005, the Tribunal outlined the exclusion request process for this safeguard inquiry regarding imports from China. Further, in its letter dated August 22, 2005, it indicated that, with respect to the product exclusion process, it would proceed by way of written submissions and that it would not hear testimony or argument in this regard at its hearing.

167. The Tribunal received 56 separate exclusion requests for barbeques. Char-Broil filed 38 requests in respect of goods manufactured in the United States. The remaining requests were filed by Winners, Loblaw, Costco, Lucas and Outdoor Chef; they generally dealt with requests for barbeques made entirely of stainless steel, "control-label" barbeques, "round gas kettle" barbeques and barbeques with a primary cooking area greater than 550 square inches.

168. The Tribunal recommends product exclusions only where it is of the view that such exclusions will not cause injury to the domestic producers. This approach is consistent with that adopted by the Tribunal in cases decided under *SIMA*. For example, in *Stainless Steel Wire*,[81] the Tribunal stated the following:

> . . . The fundamental principle is that the Tribunal will grant product exclusions only when it is of the view that such exclusions will not cause injury to the domestic industry. The Tribunal has granted product exclusions for particular products in circumstances when, for instance, the domestic industry does not produce those particular products. The Tribunal also considers factors such as whether there is any domestic production of substitutable or competing goods, whether the domestic industry is an "active supplier" of the product or whether it normally produces the product or whether the domestic industry has the capability of producing the product.
>
> . . .
>
> [Footnotes omitted]

169. First, the domestic producers argued that the goods produced in the United States are not subject to this inquiry and that the Tribunal did not have jurisdiction to make a ruling on these goods, given that this is an inquiry regarding imports from China. In reply to the domestic producers' submissions, Char-Broil argued that the Tribunal does have the jurisdiction, since it has facts before it that Char-Broil intends to produce all its barbeques offshore by 2007 and that the goods could then become subject goods. Furthermore, it submitted that this issue must be dealt with at this time, since the legal framework for safeguard measures in respect of imports from China does not provide for an interim review, as found in the dumping and subsidizing proceedings under *SIMA*.

81. (July 30, 2004), NQ-2004-001 (CITT), para. 96.

170. The Tribunal is of the view that its discretion to grant product exclusions is limited to goods that are subject to its inquiry. The fact that the Referral Order directed the Tribunal to recommend the most appropriate remedy does not provide the Tribunal with limitless discretion in this regard. The Tribunal must employ its discretion in a reasonable manner. On this basis, it finds that it does not have jurisdiction to grant product exclusions for these goods, since they are not produced in China and are therefore outside the scope of this inquiry. Furthermore, to grant a product exclusion for goods that may be produced in China in the future would be premature.

171. With respect to the remaining exclusion requests regarding barbeques made entirely of stainless steel, "control-label" barbeques, "round gas kettle" barbeques and barbeques with a primary cooking area greater than 550 square inches, the Tribunal has carefully reviewed all the requests and has determined that none of them should be granted. It finds that the barbeques described in these requests would compete with the domestic producers' barbeques and would therefore contribute to injury already caused to the domestic producers. Furthermore, the evidence is clear that there is domestic production of barbeques made entirely of stainless steel, that the domestic producers already produce private-label or "control-label" barbeques and that certain domestic producers manufacture barbeques with a primary cooking surface of 550 to 1,500 square inches. Lastly, with respect to the "round gas kettle" barbeques, the Tribunal finds that these barbeques are substitutable with those produced by the domestic producers, in that they all satisfy the same end use and meet the same consumer needs.

172. The Tribunal notes that Char-Broil has argued, in the alternative, for a company exclusion. In this regard, the Tribunal sees no reason to grant a company exclusion and notes that it grants company-specific exclusions only in very exceptional circumstances.

173. Table 5 lists the Tribunal's recommendations on product exclusion requests.

Table 5
Recommendations Concerning Requests for Product Exclusions

Vol. No. and Exhibit No.	Requester	Product	Tribunal's Recommendation
Vol. 1.4, Exhibit 19.01	Outdoor Chef	• 57 cm diameter propane gas kettle barbeque • 48 cm diameter propane gas kettle barbeque	Deny the exclusion requests
Vol. 1.4, Exhibit 19.02	Costco	• 100% stainless steel barbeque with full stainless construction	Deny the exclusion request
Vol. 1.4, Exhibit 19.03	Winners	• Centro Multi Function Grilling Centre • Centro 6000 4 burner stainless steel gas grill • Centro 4000 3 burner stainless steel gas grill • Centro 3000 3 burner stainless steel gas grill • Centro 2000 3 burner stainless steel gas grill • Gas grills with a primary cooking surface area greater than 550 square inches	Deny the exclusion requests

Table 5 (cont'd)
Recommendations Concerning Requests for Product Exclusions

Vol. No. and Exhibit No.	Requester	Product	Tribunal's Recommendation
Vol. 10, Exhibit G-02	Loblaw	• Life@Home portable barbeque • Life@Home 280 square-inch propane barbeque, model GPC2700J • Life@Home 465 square-inch propane barbeque, model GPC2619J • Life@Home 412 square-inch propane barbeque, model GSF2616J • Life@Home 432 square-inch propane barbeque, model GSC2418J • Life@Home 432 square-inch natural gas barbeque, model GSC2418JN • Life@Home 576 square-inch propane barbeque, model GSC3218J • Life@Home 576 square-inch natural gas barbeque, model GSC3218JN	Deny the exclusion requests
Vol. 10B, Exhibit T-02	Lucas	• Custom-designed outdoor barbeques	Deny the exclusion request
Vol. 1.4, Exhibit 19.04	Char-Broil	• Thermos Bistro Set LP Traditional 7000, model 4627161 • Thermos Gourmet Set LP Traditional 7000, model 4627163 • Thermos QuickSet NG QS-T 8000, model 462845404 • Thermos QuickSet LP QS-X 6000, model 462636203 • Thermos QuickSet LP QS-X 6000, model 462636204 • Thermos QuickSet LP QS-X 6000, model 462636205 • Thermos QuickSet LP QS-T 8000, model 462835204 • Thermos QuickSet LP/CC QS-T 8000, model 462836203 • Thermos QuickSet LP QS-T 8000, model 462845304 • Char-Broil QuickSet Tank LP QS-T 7000, model 46675705 • Char-Broil QuickSet LP QS-X 7000, model 466734903 • Char-Broil QuickSet LP QS-T 7000, model 466734803 • Char-Broil Professional Series LP BTO 360, model 466351805 • LP Traditional 8000, model 4668161 • Char-Broil QuickSet LP Traditional 7000, model 4667274	Deny the exclusion requests

Table 5 (cont'd)
Recommendations Concerning Requests for Product Exclusions

Vol. No. and Exhibit No.	Requester	Product	Tribunal's Recommendation
		• Char-Broil Professional Series LP BTO 360, model 466453605 • Char-Broil Professional Series LP BTO 480, model 466454405 • Char-Broil QuickSet LP QS-X 7000, model 466750705 • LP Traditional 8000, model 4668138 • Char-Broil Professional Series LP BTO 480, model 466454705 • LP Big Easy 8000, model 4668249 • Char-Broil/Big Easy LP Big Easy 8000, model 4668270 • Thermos QuickSet Traditional Series LP QS-T 8000, model 462835203 • Thermos QuickSet LP Traditional 7000, model 4627249 • Char-Broil Commercial Series LP Stainless Steel, model 466231203 • Char-Broil Wide Body LP QS Widebody 8000, model 466838903 • Char-Broil Wide Body LP QS Widebody 8000, model 466838703 • Thermos QuickSet, model 462835205 • Char-Broil Traditional LP Traditional 9000, model 4669282 • Char-Broil QuickSet LP QS-X 8000, model 466834803 • Char-Broil Commercial Series LP Stainless Steel, model 466231103 • Char-Broil Wide Body LP QS Widebody 8000, model 466840804 • Char-Broil/Big Easy LP Big Easy 8000, model 4668271 • Char-Broil/Big Easy LP Big Easy 8000, model 4668272 • Char-Broil/Big Easy LP Big Easy 8000, model 4668273 • Char-Broil/Big Easy LP Big Easy 8000, model 4668274 • Char-Broil Wide Body LP QS Widebody 8000, model 466838803 • Char-Broil Big Easy LP Big Easy 9000, model 466940804	

CHAPTER V

CONCLUSION

174. The Tribunal determines, pursuant to subsection 30.22(6) of the *CITT Act*, that barbeques from China are being imported in such increased quantities or under such conditions as to be a significant cause of market disruption to domestic producers of like or directly competitive goods.

175. Pursuant to the Order in Council by the Governor General in Council, issued on August 10, 2005, and in accordance with subsection 30.22(7) of the *CITT Act*, the Tribunal considers that the most appropriate remedy to remove the market disruption suffered by the domestic producers of like or directly competitive goods is a surtax set at 15 percent for a period of three years to be applied on an *ad valorem* basis, FOB Chinese port of shipment, to barbeques originating in China.

176. The Tribunal finds that no exclusions are warranted.

Pierre Gosselin
Pierre Gosselin
Presiding Member

James A. Ogilvy
James A. Ogilvy
Member

Meriel V. M. Bradford
Meriel V. M. Bradford
Member

APPENDIX I

ORDER IN COUNCIL

P.C. 2005-1368
August 10, 2005

Her Excellency the Governor General in Council, on the recommendation of the Minister of Finance and the Minister for International Trade, pursuant to subsection 30.22(7) of the *Canadian International Trade Tribunal Act* (the Act), hereby refers to the Canadian International Trade Tribunal the following matter in relation to the complaint into which an inquiry was commenced by the Tribunal under subsection 30.22(3) of the Act on July 11, 2005, and which concerns the importation of certain self-standing barbeques for outdoor use originating in the People's Republic of China:

> Recommending, in the event that the Tribunal determines, under subsection 30.22(6) of the Act, that the goods that are the subject of the complaint are being imported in such increased quantities or under such conditions that they cause or threaten to cause market disruption to domestic producers of like or directly competitive goods, the most appropriate remedies to address such market disruption or threat of market disruption over a period not exceeding three years, in accordance with Canada's rights and obligations under international trade agreements.

APPENDIX II

PARTICIPANTS

	Counsel/Representative
Onward Manufacturing Company Limited Crown Verity Inc. Fiesta Barbeques™ Limited	Geoffrey C. Kubrick Keith Cameron
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Canadian Tire Corporation, Limited	Riyaz Dattu
S.R. Potten Ltd.	Milos Barutciski Luis Sarabia Julie A. Soloway
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The Coleman Company, Inc. Sunbeam Corporation	Gerry H. Stobo Dina Logan Jack Hughes
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Costco Wholesale Canada Ltd. Winners Products Engineering Ltd.	Gregory O. Somers Paul D. Conlin Benjamin P. Bedard Jason P.T. McKenzie
Char-Broil, A Division of W.C. Bradley Co.	Paul Lalonde Cyndee Todgham Cherniak Rajeev Sharma
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Nexgrill Industries, Inc.	Kaye Baldwin
Outdoor Chef International Ltd.	Jerry Sonnenberg

APPENDIX III

WITNESSES AT THE HEARING

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Onward Manufacturing Company Limited

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President
Crown Verity Inc.

Shawn Spenler
Category Manager
BBQs & Pools
Canadian Tire Corporation, Limited

Bill McQueen
Buyer
Wal-Mart Canada Corp.

Michael E. Butler
President and Chief Operating Officer
Char-Broil, A Division of W.C. Bradley Co.

James S.T. Hou
Director
Winners Products Engineering Ltd.

Patrick Minshall
President
Fiesta Barbeques™ Limited

Kerry House
Purchasing
Home Hardware Stores Limited

Greg Seelman
Category Manager
Leisure
Loblaw Companies Limited

Mike Stevenson
Buyer
Sam's Club, a division of Wal-Mart Canada Corp.

Steve Potten
President and CEO
S.R. Potten Ltd.

APPENDIX IV

COMPANIES THAT RESPONDED TO THE VARIOUS TRIBUNAL QUESTIONNAIRES

COMPANIES THAT RESPONDED TO THE DOMESTIC PRODUCERS' QUESTIONNAIRE

CFM Corporation
Crown Verity Inc.
Fiesta Barbeques™ Limited
Jackson Grills Inc.
Onward Manufacturing Company Limited
Wolf Steel Limited (Napoleon)

COMPANIES THAT RESPONDED TO THE IMPORTERS' QUESTIONNAIRE

Importer-retailers

Alliance Ro-Na Home Inc.
Canadian Tire Corporation, Limited
Costco Wholesale Canada Ltd.
Echelon Home Products
Home Depot of Canada Inc.
Home Hardware Stores Limited
Loblaw Companies Limited
London Drugs Limited
Réno Dépot Inc.
Sears Canada Merchandising Services
Tradex Supply Ltd.
Wal-Mart Canada Corp.
Zellers Inc.

Importer-distributors

Bismar Inc.
Char-Broil, A Division of W.C. Bradley Co.
Ducane Gas Grills of Canada
S.R. Potten Ltd.
Sunbeam Corporation
Thane Direct Canada Inc.

COMPANIES THAT RESPONDED TO THE FOREIGN PRODUCERS' QUESTIONNAIRE

BeefEater Sales International
CFM Corporation
Char-Broil, A Division of W.C. Bradley Co.
Dongguan Qingxi Jinwoniu Industrial Co., Ltd.
Grand Hall Enterprise Co., Ltd.
Huizhou RST Ind. Co., Ltd.
Lucas Innovation, Inc.
Outdoor Chef International Ltd.
Universal Quality Services Ltd.
Winners Products Engineering Ltd.
Yangjiang Xinli Industrial Co., Ltd.
Zhu Hai Grand Hall Inc.
Zhuhai Prokan Relaxation Equipment Co., Ltd.

COMPANIES THAT RESPONDED TO THE SUPPLEMENTARY REQUEST FOR INFORMATION

Alliance Ro-Na Home Inc.
Canadian Tire Corporation, Limited
Costco Wholesale Canada Ltd.
Home Depot of Canada Inc.
Loblaw Companies Limited
London Drugs Limited
Sears Canada Merchandising Services
Wal-Mart Canada Corp.
Zellers Inc.

APPENDIX V

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