



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Dumping and Subsidizing

FINDING AND REASONS

Inquiry No. NQ-2009-001

Waterproof Footwear

*Finding issued
Friday, September 25, 2009*

*Reasons issued
Tuesday, October 13, 2009*

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

**THE DUMPING OF WATERPROOF FOOTWEAR AND WATERPROOF
FOOTWEAR IN NEARLY FINISHED FORM, ORIGINATING IN OR
EXPORTED FROM THE PEOPLE'S REPUBLIC OF CHINA AND THE
SOCIALIST REPUBLIC OF VIETNAM**

FINDING

The Canadian International Trade Tribunal, under the provisions of section 42 of the *Special Import Measures Act*, has conducted an inquiry to determine whether the dumping of waterproof footwear and waterproof footwear in nearly finished form, constructed wholly or in part of rubber and/or thermoplastic rubber (TPR), originating in or exported from the People's Republic of China and waterproof footwear and waterproof footwear in nearly finished form, constructed wholly or in part of rubber, TPR and/or plastic, originating in or exported from the Socialist Republic of Vietnam has caused injury or retardation or is threatening to cause injury.

Further to the issuance by the President of the Canada Border Services Agency of a final determination dated August 26, 2009, that the aforementioned goods have been dumped, and pursuant to subsection 43(1) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby finds that the dumping of the aforementioned goods has not caused injury or retardation and is not threatening to cause injury.

Pasquale Michael Saroli

Pasquale Michael Saroli

Presiding Member

Serge Fréchette

Serge Fréchette

Member

André F. Scott

André F. Scott

Member

Hélène Nadeau

Hélène Nadeau

Secretary

The statement of reasons will be issued within 15 days.

Place of Hearing:	Ottawa, Ontario
Dates of Hearing:	August 24 to 28, 2009
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Sears Canada Inc.

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STATEMENT OF REASONS

1. The Canadian International Trade Tribunal (the Tribunal), pursuant to section 42 of the *Special Import Measures Act*,¹ has conducted an inquiry to determine whether the dumping of waterproof footwear and waterproof footwear in nearly finished form, constructed wholly or in part of rubber and/or thermoplastic rubber (TPR), originating in or exported from the People's Republic of China (China) (the subject footwear from China) and waterproof footwear and waterproof footwear in nearly finished form, constructed wholly or in part of rubber, TPR and/or plastic, originating in or exported from the Socialist Republic of Vietnam (Vietnam) (the subject footwear from Vietnam) (collectively the subject goods) has caused injury or retardation or is threatening to cause injury.
2. On February 27, 2009, the President of the Canada Border Services Agency (CBSA), following a complaint filed by the Shoe Manufacturers' Association of Canada (SMAC) of Baie d'Urfé, Quebec, initiated an investigation into whether the subject goods had been dumped. According to the complaint, SMAC is an association that consists of, amongst others, six known domestic producers of waterproof footwear. These producers are Genfoot Inc. (Genfoot), Rallye Footwear Inc. (Rallye), Hichaud Inc. (Hichaud), AirBoss-Defense (AirBoss), Baffin Inc. (Baffin) and Chaussures Yeti Inc. (Yeti).
3. On March 2, 2009, pursuant to subsection 34(2) of *SIMA*, the Tribunal issued a notice advising interested parties that it had initiated a preliminary injury inquiry to determine whether the evidence disclosed a reasonable indication that the dumping of the subject goods had caused injury or retardation or was threatening to cause injury. On April 28, 2009, the Tribunal made a preliminary determination that there was a reasonable indication that the dumping of the subject goods had caused injury.
4. On May 28, 2009, the CBSA issued a preliminary determination that the subject goods had been dumped, that the margin of dumping was not insignificant and that the volume of dumped goods was not negligible.
5. On May 29, 2009, the Tribunal issued a notice of commencement of inquiry.² The Tribunal's period of inquiry (POI) covers three full years, from January 1, 2006, to December 31, 2008, and an interim period from January 1 to March 31, 2009. As part of its inquiry, the Tribunal sent questionnaires to the 6 known domestic producers, 57 importers and 16 foreign producers of waterproof footwear. The Tribunal also sent questionnaires on market characteristics to purchasers. From the replies to the questionnaires and other information on the record, the Tribunal's staff prepared both public and protected versions of the staff report.
6. In its notice of commencement of inquiry, the Tribunal invited parties to file submissions in order to come to a definitive decision on the issue of whether there were two classes of goods in this inquiry. The Tribunal received submissions from nine parties on June 12, 2009, and reply submissions from SMAC and one other party on June 19, 2009.
7. On July 2, 2009, the Tribunal informed the parties that it had determined that waterproof footwear in finished form and waterproof footwear in nearly finished form constitute a single class of goods and that, therefore, it would conduct its injury analysis on that basis.

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

2. C. Gaz. 2009.I.1633.

8. On August 26, 2009, the CBSA issued a final determination of dumping.

9. A hearing, with public and *in camera* testimony, was held in Ottawa, Ontario, from August 24 to 28, 2009. SMAC³ filed submissions, provided evidence, presented witnesses and made arguments in support of an injury finding. Parties opposed, i.e. Columbia Sportswear Canada LP, Loblaw Companies Limited (Loblaw), Regence Footwear Inc. (Regence) and Sears Canada Inc., filed submissions, provided evidence, presented witnesses and made arguments opposing a finding of injury. Other parties opposed, i.e. Canadian Tire Corporation, Limited and Mark's Work Wearhouse Ltd., filed submissions, provided evidence and made arguments opposing a finding of injury.⁴

10. Twelve⁵ parties filed 45 requests for product exclusions within the time frame established by the Tribunal.

11. The record of this inquiry consists of all Tribunal exhibits, including the record of the preliminary injury inquiry (PI-2008-003), replies to questionnaires, requests for information and replies thereto, all documents with respect to the product exclusion process, witness statements, all other exhibits filed by parties and the Tribunal throughout the inquiry, and the transcript of the hearing. All public exhibits were made available to the parties. Protected exhibits were made available only to counsel who had filed a declaration and confidentiality undertaking with the Tribunal in respect of confidential information.

12. The Tribunal issued its finding on September 25, 2009.

RESULTS OF THE CBSA'S INVESTIGATION

13. On August 26, 2009, the CBSA determined that 93.9 percent of the subject footwear from China released into Canada from October 1, 2007, to September 30, 2008, was dumped at a weighted average margin of dumping of 36.6 percent, when expressed as a percentage of the export price.⁶ The CBSA also determined that 63.4 percent of the subject footwear from Vietnam released into Canada from October 1, 2007, to September 30, 2008, was dumped at a weighted average margin of dumping of 12.0 percent, expressed as a percentage of the export price.⁷ The CBSA concluded that the overall margins of dumping were not insignificant.⁸

3. SMAC is an association that includes Genfoot, Rallye, Hichaud, AirBoss, Baffin and Yeti as known domestic producers of waterproof footwear.

4. In-Sport Fashions Inc. filed submissions and provided evidence opposing a finding of injury, but did not appear at the hearing. Hatley Little Blue House, Norcross Safety Products L.L.C. doing business as (d.b.a.) Honeywell Safety Products, Se Ce Apparel Ltd. were also parties to the inquiry, but did not file submissions on injury or appear at the hearing.

5. A.M. Footwear Inc., Columbia Sportswear Canada LP, Hatley Little Blue House, Helly Hansen Leisure Canada Inc., In-Sport Fashions Inc., Loblaw Inc., Man Made Sales Inc., Mark's Work Wearhouse Ltd., Norcross Safety Products L.L.C. d.b.a. Honeywell Safety Products, Regence Footwear Inc., Se Ce Apparel Ltd. and Sunbeam Corporation (Canada) Limited.

6. Tribunal Exhibit NQ-2009-001-04A, Administrative Record, Vol. 1 at 133.32.

7. *Ibid.* at 133.36.

8. *Ibid.* at 133.39.

PRODUCT

Product Description

14. The subject goods are defined as follows:⁹

“Waterproof footwear and waterproof footwear in nearly finished form, constructed wholly or in part of rubber and/or thermoplastic rubber (TPR), originating in or exported from the People’s Republic of China.”

The distinctive feature of waterproof footwear is that both the sole portion and a portion of the upper, sufficient to give waterproof protection to the foot, are incorporated in a waterproof component which may be made of rubber or TPR. The goods subject to this investigation include waterproof footwear worn over the foot constructed to various heights, and waterproof footwear made of waterproof footwear bottoms combined with tops made of textiles or other materials. They may be constructed with or without liners, linings, fasteners or safety features.

Excluded from the definition of subject goods are ski boots; skating boots; and goods covered in the current CITT order number RR-2004-008, namely, snowmobile boots, rubber-bottom leather-top boots, all-rubber riding boots for equestrian purposes; and rubber “safety footwear” defined as footwear that meets safety standards established by the Canadian Standards Association.

...

“Waterproof footwear and waterproof footwear in nearly finished form, constructed wholly or in part of rubber, thermoplastic rubber (TPR) and/or plastic, originating in or exported from Vietnam.”

The distinctive feature of waterproof footwear is that both the sole portion and a portion of the upper, sufficient to give waterproof protection to the foot, are incorporated in a waterproof component which may be made of rubber, TPR and/or plastic. The goods subject to this investigation include waterproof footwear worn over the foot constructed to various heights, and waterproof footwear made of waterproof footwear bottoms combined with tops made of leather, textiles or other materials. They may be constructed with or without liners, linings, fasteners or safety features.

Excluded from the definition of subject goods are ski-boots and skating boots.

Additional Product Information

15. Waterproof footwear described as “waterproof rubber footwear” is constructed, wholly or in part, of natural rubber and/or synthetic rubber, by vulcanization, injection moulding, cementing or other processes. The term synthetic rubber includes TPR.

16. Waterproof footwear described as “waterproof plastic footwear” is constructed, wholly or in part, of plastic. It is made from plastic resins by injection moulding or other processes. The term “plastic” includes polyvinyl chloride (PVC), polyurethane (PU), ethylene vinyl acetate (EVA) and other plastics. PVC is the plastic most commonly used to date in this class of footwear.

17. Waterproof bottoms are boat-like components intended for incorporation in finished waterproof footwear. Waterproof bottoms are normally produced through the vulcanization, injection moulding and/or cementing processes.

9. *Ibid.* at 133.23-133.24.

18. For greater clarity, the waterproof bottom can consist of rubber, TPR, plastic or any combination of these materials. When more than one of these materials is used in the waterproof bottom, the material with the greatest surface area will be considered as the defining material of the waterproof bottom.
19. A “top” refers to the component which is attached to a waterproof bottom by stitching or other means.
20. “Waterproof footwear in nearly finished form” includes footwear that can be rendered waterproof by the insertion of a plug, flap, etc., in or near the sole.
21. In addition, footwear that incorporates decorative stitching near the sole in the moulded or vulcanized boat-like component of the footwear is considered to be subject goods.
22. Waterproof footwear includes footwear worn over the foot, with or without liners, linings, fasteners or safety features. These include red sole rubber boots, rain boots, hunting and fishing boots. In certain styles, such as duck shoes or winter boots, a boat-like (or shell-like) waterproof bottom may have trimmings, attachments, liners, collars or tops of synthetic or natural fabric, leather or imitation leather, or other materials.
23. The product range of the subject goods includes footwear manufactured for men, women, youth and children. Over-the-shoe rubbers or overshoes are not considered to be subject goods.
24. “Waterproof” is defined as follows: “If the exterior of the bottom is partially submerged in water for a period of 24 hours, and water is not detected in the inside surface of the footwear, the sample is considered waterproof.”¹⁰

Production Process¹¹

25. Waterproof rubber footwear or a waterproof bottom may be produced by injection moulding or by the traditional method of cutting sheets of rubber and assembling them either by cementing, vulcanizing or a combination of these processes. Waterproof footwear may also be produced in combination with the stitched-product process. The combined stitched-product process would produce, for example, a rubber-bottom, nylon-top, or other synthetic fabric top, or leather-top winter boot.
26. With the injection moulding process, a granulated chemical compound of TPR or plastic is heated and injected into steel moulds installed in moulding machines. Each mould dictates the size, style and number of colours of a moulded item. The compound is fed from a hopper into a heated barrel and a screw inside the barrel then injects the molten compound into a mould. The resulting product consists of an unfinished waterproof bottom or a waterproof boot. The moulded items are then cooled, extracted and trimmed. Components and markings are then added before the finished footwear is packed for shipping.
27. The stitched-product process consists of cutting and sewing uppers of various materials, both natural and synthetic, including leather and imitation leather, boot collars, liners and various other components. These pieces are assembled and affixed, as required, to the injected bottoms described earlier.

10. *Ibid.* at 133.25.

11. *Ibid.* at 133.25-133.26.

28. The vulcanization or lay-up process requires the preparation of a rubber compound that is calendered into sheeting. Footwear parts are then cut from the sheets of rubber, laid up on forms and secured with rubber cement. The laid-up footwear is then vulcanized in an oven so that the rubber is irreversibly cured.

29. Waterproof rubber footwear or a waterproof bottom produced in a combined process would include such processes as cementing a vulcanized sole to a moulded component to form the waterproof footwear or waterproof bottom.

30. The way in which production operations are arranged varies from company to company, from typical assembly-line operations, where each worker performs a specific task, to work modules consisting of a small team working together on a particular product from start to finish.

DOMESTIC PRODUCERS

31. There are currently six Canadian producers of waterproof footwear. Genfoot, Rallye, Hichaud and AirBoss submitted replies to the producers' questionnaire. The replies from Genfoot, Rallye and Hichaud were used in the Tribunal's staff reports.¹² Yeti and Baffin did not reply to the producers' questionnaire.

Genfoot

32. Genfoot has its headquarters in Montréal, Quebec, with plants located in Montréal and New Hamburg, Ontario. Firms associated with Genfoot include Genfoot America Inc., a manufacturer located in the United States, and Genfoot International GmbH, an importer located in Germany.

33. Genfoot's plant in Montréal has an injection moulding manufacturing operation and produces a variety of waterproof footwear and bottoms for men, women and children. The plant in New Hamburg manufactures felt liners and felt insoles. Genfoot also imports the subject goods and exports goods manufactured in Canada.

Rallye

34. Rallye is a manufacturer of waterproof footwear located in Ville d'Anjou, Quebec. It also imports the subject goods.

35. Rallye is a custom manufacturer that produces private label products for its customers. Rallye began production of waterproof footwear in 1991, initially only for children. It has now expanded its products to cover waterproof footwear for men and women.

36. Rallye manufactures, among other things, TPR waterproof footwear, red sole boots for the whole family, CSA-approved waterproof safety footwear and EVA waterproof footwear.

Hichaud

37. Hichaud is a not-for-profit private enterprise that manufactures winter boots for adults and children, and waterproof footwear for children. It manufactures its own TPR bottoms and uppers that are made of nylon or leather. Most of its products are sold in Quebec. Hichaud does not import the subject goods.

12. The data for AirBoss were not included in the staff report, as they could not be reconciled by Tribunal staff.

IMPORTERS

38. The Tribunal sent importers' questionnaires to 57 potential importers of waterproof footwear and received 34 replies, including 3 unsolicited replies¹³ and 3 from firms¹⁴ that reported that they did not import waterproof footwear from any country between January 1, 2006, and March 31, 2009. The Tribunal could not use the data provided by two other companies, as they were not specific to waterproof footwear.

39. Of the 29 replies to the importers' questionnaire that could be used, 19 replies¹⁵ were received from master distributors and wholesalers/distributors. The remaining 10 replies were received from mass merchandisers and other retailers. These include Aldo Group Inc. (Aldo division), Canadian Tire Corporation, Limited, Giant Tiger Stores Limited, La Senza Corporation, Loblaw's Inc., London Drugs Limited, Mark's Work Wearhouse Ltd., Sears Canada Inc., Sterling Shoes L.P. and Wal-Mart Canada Corp. (Wal-Mart).

PURCHASERS

40. The Tribunal also sent purchasers' questionnaires on market characteristics to 29 companies identified as potential purchasers of waterproof footwear. It received 13 replies, including 1 unsolicited, from the following companies: Aldo Group Inc. (Globo and Feet First divisions), Aldo Group Inc. (Aldo division), Canadian Tire Corporation, Limited, Choko Design (CDI Inc.), Costco Wholesale Canada Ltd., Côté-Réco Inc., Kodiak Group Holdings Co., La Coop Fédérée, Loblaw's Inc., Sears Canada Inc., Town Shoes Ltd., Mark's Work Wearhouse Ltd. and Wal-Mart.

FOREIGN PRODUCERS

41. The Tribunal also sent foreign producers' questionnaires to 16 potential producers/exporters of waterproof footwear. It received completed replies from 5 companies in China, namely, Jeeshen International Co., Ltd. (Jeffer Enterprise),¹⁶ Jiangsu Palm International Co., Ltd.,¹⁷ Tianjin Shitong Rubber Products Factory Co., Wuhu Fengxue Rubber Co., Ltd. and Wuhu Hwasong Footwear Co., Ltd., and from 4 companies in Vietnam, namely, Fulgent Sun Footwear Co., Ltd.,¹⁸ Pouyuen Vietnam Company Ltd.,¹⁹ Shiny East Limited²⁰ and Stateway Enterprises Ltd.²¹

13. The Tribunal received a reply to the importers' questionnaire from Aldo Group Inc. (Aldo division) and Tai Lung (Canada) Ltd., although only Aldo Group Inc. (Globo and Feet First divisions) and Tai Lung Manufacturing Limited were sent importers' questionnaires. Chaussures GTX International Inc. was initially sent a purchasers' questionnaire, but replied only to the importers' questionnaire.

14. Aldo Group Inc. (Globo and Feet First divisions), Tribunal Exhibit NQ-2009-001-14.28, Administrative Record, Vol. 5A at 202-203; Brown Shoe Company of Canada Ltd., Tribunal Exhibit NQ-2009-001-14.03, Administrative Record, Vol. 5 at 74; and Hudson's Bay Company (The Bay), Tribunal Exhibit NQ-2009-001-14.01, Administrative Record, Vol. 5 at 54.

15. Include the replies to the importers' questionnaire received from Alliance Mercantile Inc. (identified as an importer/manufacturer) and Tai Lung Manufacturing Limited (identified as a manufacturer).

16. Includes Chu-Shun Shoe Factory in China.

17. Includes Jiangsu Feilong Shoes Factory in China.

18. Includes Fulgent Sun Enterprises Ltd. located in Taiwan, Capital Bright International Trading Services Ltd., in Taiwan and Fujian Sunshine Footwear Co., Ltd. in China.

19. Includes Sky High Trading Ltd. in the British Virgin Islands.

20. This company is the vendor located in China, but it includes Vinh Long Footwear Co, Ltd., the manufacturing plant in Vietnam.

21. This company is the vendor located in Hong Kong, but it includes Cong Ty TNHH Giay Stateway Vietnam, the manufacturing plant in Vietnam.

DISTRIBUTION CHANNELS

42. Finished waterproof footwear is sold to end users through major national retail chains, retail shoe chains and independent shoe stores. A portion of the market is also served through wholesalers and distributors.

43. There are two selling seasons for the subject goods, namely, spring and fall/winter. The following represents the typical timetable for each season:

Spring selling season

- June 15 to 30: the products are presented by the suppliers to the retailers. The retailers select from the products presented. The suppliers then submit quotes regarding size, price, range, carton size/carton weight, etc., to the retailers for their consideration.
- July 15 to 30: the retailers inform the suppliers about the styles that they have chosen.
- August 1 to 15: the retailers send purchase orders to the suppliers.
- Delivery of the styles begins in January of the following year, with the bulk of the spring merchandise being shipped at the end of March.

Fall/winter selling season

- December 15 to 30: the products are presented by the suppliers to the retailers. The retailers select from the products presented. The suppliers then submit quotes regarding size, price, range, carton size/carton weight, etc., to the retailers for their consideration.
- January 15 to 30: the retailers inform the suppliers about the styles that they have chosen.
- February 1 to 15: the retailers send purchase orders to the suppliers.
- Delivery of the styles begins in late August, with the bulk of the fall/winter merchandise being shipped from September to December.

ANALYSIS

44. The Tribunal is required by subsection 42(1) of *SIMA* to inquire as to whether the dumping of the subject goods has caused injury or retardation or is threatening to cause injury, with “injury” being defined, in subsection 2(1), as “... material injury to a domestic industry”. In this regard, “domestic industry” is defined in subsection 2(1) by reference to the domestic production of “like goods”.

45. Accordingly, the Tribunal must first determine what constitutes “like goods”. It can then determine what constitutes the “domestic industry” for purposes of its injury analysis. In conducting such an analysis, the Tribunal must also determine whether the circumstances require an assessment of the cumulative effect of the dumping of the subject goods from both China and Vietnam.

46. Finally, the Tribunal will determine whether the dumping of the subject goods has caused injury to the domestic industry. Should the Tribunal arrive at a finding of no injury, it will then determine whether there exists a threat of injury.²² Because a domestic industry is already established, the Tribunal will not consider the question of retardation.²³

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

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

Like Goods and Classes of Goods

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

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

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

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

49. When goods are not identical in all respects to other goods, the Tribunal typically considers a number of factors to determine “likeness”, including the physical characteristics of the goods (such as composition and appearance), their market characteristics (such as substitutability, pricing, distribution channels and end uses) and whether the goods fulfill the same customer needs.²⁴

50. On the issue of “like goods” and “classes of goods”, the Tribunal, in its statement of reasons in Preliminary Injury Inquiry No. PI-2008-003,²⁵ stated as follows:

18. For the purposes of determining whether there is evidence of a reasonable indication of injury in the context of this preliminary injury inquiry, the Tribunal will treat the subject goods as “like goods” in relation to one another and, therefore, as comprising only one class of goods. The Tribunal finds, in the context of this preliminary injury inquiry, that the waterproof footwear manufactured in Canada are like goods to the subject goods.

...

20. However, the Tribunal is of the view that there is evidence on the record which indicates that there may be more than one class of goods, namely, waterproof footwear in finished form and waterproof footwear in nearly finished form. The question of whether these constitute two distinct classes of goods is an issue that will need to be fully addressed during an inquiry under section 42 of *SIMA*, should the CBSA conclude, in its preliminary determination, that the subject goods have been dumped. Accordingly, the Tribunal will collect data on those two potential classes of goods and will invite submissions from parties on this question.

51. On July 2, 2009, after having considered the evidence on the record and received submissions on the issue of classes of goods, the Tribunal informed the parties of its finding that waterproof footwear in finished form and waterproof footwear in nearly finished form, constructed wholly or in part of rubber, TPR and/or plastic, constituted a single class of goods. In this regard, the Tribunal finds that there exist no distinguishing factors that detract from the “likeness” of the goods, which all serve to protect the feet from the elements.

24. See, for example, *Oil and Gas Well Casing* (10 March 2008), NQ-2007-001 (CITT) at 7; *Carbon Steel Welded Pipe* (20 August 2008), NQ-2008-001 (CITT) at 6; *Thermoelectric Containers* (11 December 2008), NQ-2008-002 (CITT) at 5.

25. *Waterproof Footwear* (28 April 2009) (CITT).

Domestic Industry

52. Subsection 2(1) of *SIMA* defines “domestic industry” as follows:

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

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

54. The Tribunal finds that Genfoot, Rallye and Hichaud represent a major proportion of domestic production of like goods and that they therefore constitute the domestic industry for the purposes of the injury analysis.

Cumulation

55. Pursuant to subsection 42(3) of *SIMA*, the Tribunal shall, when conducting an inquiry under subsection 42(1), make an assessment of the cumulative effect of the dumping of the goods that are imported into Canada from more than one country if it is satisfied that the following conditions are met:

(a) the margin of dumping or the amount of subsidy in relation to the goods from each of those countries is not insignificant and the volume of the goods from each of those countries is not negligible; and

(b) an assessment of the cumulative effect would be appropriate taking into account the conditions of competition between goods to which the preliminary determination applies that are imported into Canada from any of those countries and

(i) goods to which the preliminary determination applies that are imported into Canada from any other of those countries, or

(ii) like goods of domestic producers.

56. Based on the CBSA’s final determination of dumping, the Tribunal finds that the margins of dumping in relation to the imports from each of the subject countries are not insignificant.²⁶ In addition, based on data on the record, the Tribunal finds that the volume of dumped goods from each of the subject countries is not negligible.²⁷ Therefore, the first and second criteria under paragraph 42(3)(a) of *SIMA* have been met. Finally, based on the factors typically considered with respect to conditions of competition under

26. Subsection 2(1) of *SIMA* defines the term “insignificant” as follows: “. . . in relation to a margin of dumping, a margin of dumping that is less than two per cent of the export price of the goods . . .”.

27. Subsection 2(1) of *SIMA* defines the term “negligible” as follows: “. . . in respect of the volume of dumped goods of a country, (a) less than three per cent of the total volume of goods that are released into Canada from all countries and that are of the same description as the dumped goods . . .”. For the purposes of the negligibility percentage calculation, the Tribunal relied on country-specific import data from the CBSA for the numerator and on data gathered through its inquiry for the total volume of imports into Canada from the subject and non-subject countries for the denominator.

paragraph 42(3)(b),²⁸ the Tribunal finds no distinguishing conditions of competition. Accordingly, the Tribunal must make an assessment of the cumulative effect of the dumping from both China and Vietnam.

57. The Tribunal notes that, as the conditions set out in subsection 42(3) of *SIMA* have been met, it is statutorily bound to cumulate in this manner, notwithstanding the acknowledgement by the domestic industry in closing arguments that the domestic industry's case against Vietnam "may not be very strong" in light of the value and unit values of imports from Vietnam compared to those from China.²⁹

INJURY

Background

58. Subsection 37.1(1) of the *Special Import Measures Regulations*³⁰ prescribes that, in determining whether the dumping of the subject goods has caused injury to the domestic industry, the Tribunal consider the volume of the dumped goods, the effect of the dumped goods on the price of like goods and their resulting impact on the state of the domestic industry. Subsection 37.1(3) also directs the Tribunal to consider factors other than the dumping to ensure that any injury or threat of injury caused by those other factors is not attributed to the effect of the dumped imports.

59. In conducting this inquiry, the Tribunal was confronted with certain challenges relating to the quality and reliability of some of the evidence before it. Specifically, the Tribunal found that there were certain deficiencies in the information provided by the domestic industry. For example, one domestic producer claimed to be unable to segregate financial results for sales of domestically produced waterproof footwear. Furthermore, no domestic producer provided information for the periods between January and March 2008 and January and March 2009, as requested by the Tribunal. Finally, data were only provided by the domestic producers by fiscal year and not by calendar year, as was requested by the Tribunal.

60. On a related note, it became evident over the course of the hearing that the data provided by Genfoot in Schedule III of its producers' questionnaire might be unreliable due to the apparent inclusion of non-subject goods in its import data and sales from imports data for the subject goods. It also became apparent during cross-examination that the capacity utilization reported by Genfoot in its questionnaire reply was grossly understated. In this regard, oral testimony from Genfoot confirmed that the data in its questionnaire reply "did not make sense" and that its capacity utilization rate was much higher than reported. This conclusion was reached during the oral testimony of a representative from Genfoot despite

28. In considering the conditions of competition between goods, the Tribunal typically considers the following factors: the degree to which the subject goods from each subject country are interchangeable with goods from the other subject countries; the presence or absence of sales or offers to sell in the same geographical markets of imports from different subject countries and of the like goods; the existence of common or similar channels of distribution; and differences in the timing of the arrival of imports from a subject country and of those from the other subject countries, and of the availability of like goods supplied by the domestic industry. As the Tribunal has previously stated, it recognizes that there may be other factors that it could consider in deciding whether the exports of a particular country should be cumulated and that no single factor may be determinative. See, for example, *Flat Hot-rolled Carbon and Alloy Steel Sheet and Strip* (17 August 2001), NQ-2001-001 (CITT) at 16.

29. The domestic industry stated that, while it would be for the Tribunal to ultimately decide, it could not definitively say that the imports from Vietnam were a cause of injury to the domestic industry over the POI or that imports from Vietnam posed a threat of injury to the domestic industry in the near future. *Transcript of Public Argument*, Vol. 1, 28 August 2009, at 48.

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

the fact that Genfoot had confirmed its reported capacity utilization after its reported data had been questioned by one of the opposing parties in a Request for Information (RFI).³¹

Volume of Imports of Dumped Goods

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

62. SMAC argued that, over the POI, there was a significant increase in the volume of imports by non-producers both in absolute terms and relative to the production and consumption of the like goods. It submitted that the increase in imports was attributable to the removal of the anti-dumping duties on certain waterproof footwear from China pursuant to the expiry of the Tribunal's order in *Certain Waterproof Rubber Footwear*³² in October 2007.³³

63. While acknowledging that the Tribunal's decision, in *Waterproof Rubber Footwear*, not to initiate an expiry review and the consequent removal of the anti-dumping duties introduced new products into the Canadian market which had previously been uncompetitive, parties opposed submitted that the increase in imports in 2008 was largely due to growing consumer demand for vulcanized rubber footwear, which is not produced in Canada. Parties opposed also noted that the domestic producers were themselves responsible for large volumes of imports during the POI, including during the period when they were benefitting from anti-dumping duty protection, much of which was attributable to imports of nearly finished³⁴ waterproof footwear by Rallye.

64. Several parties, both supporting and opposing a finding of injury, argued that the Tribunal should only consider imports of the subject goods by non-producers. In this regard, the domestic industry noted that it decreased its imports, while imports by non-producers increased. Parties opposed argued that imports by

31. *Transcript of In Camera Hearing*, Vol. 1, 24 August 2009, at 34-45, 108-112, 148, Tribunal Exhibit NQ-2009-001-RI-01, Administrative Record, Vol. 9 at 3. This issue was revealed during cross-examination of a witness for Genfoot. Genfoot requested the opportunity to file further evidence to remedy this perceived defect and to have witnesses for Genfoot re-appear before the Tribunal at a later date. After hearing from the parties, the Tribunal denied Genfoot's request because to have done otherwise would have caused serious prejudice to the parties opposed and would therefore have been contrary to procedural fairness. The Tribunal recalls that it had given prior notice that no further documents would be accepted into the record as of the start of its hearing, save in exceptional circumstances, which was not the case here. The Tribunal notes that Schedule III was clearly titled "Finished Waterproof Footwear . . . Category I" and that the footwear was described as "Rubber/TPR waterproof footwear in finished form *excluding* . . .". Genfoot submitted revisions to Schedule III on July 7 and 10, 2009 (Tribunal Exhibits NQ-2009-001-12.02B and NQ-2009-001-12.02C respectively). Genfoot bore the burden of providing accurate information in a timely manner, in particular because of the tight time frames provided in *SIMA* for the Tribunal to complete its inquiry. Genfoot, having appeared before the Tribunal on various occasions in the past, is well acquainted with these requirements. In any event, the Tribunal's finding in this matter did not turn on the evidence contained in Schedule III.

32. (18 October 2002), RR-2001-005 (CITT) [*Certain Waterproof Rubber Footwear*].

33. See *Waterproof Rubber Footwear* (31 January 2007), LE-2006-001 (CITT) [*Waterproof Rubber Footwear*].

34. "Waterproof footwear in nearly finished form" was defined by the CBSA as including footwear that can be rendered waterproof by the insertion of a plug, flap, etc., in or near the sole. This includes footwear that has been manufactured with a hole in the sole, thereby rendering it non-waterproof. By importing these goods and rendering them waterproof subsequent to their importation into Canada, liability for the payment of anti-dumping duties was avoided on what would have otherwise been subject goods.

the domestic producers should be excluded from the Tribunal's analysis because the domestic industry could not be injured by its own import activity. The *Regulations* require that the Tribunal first examine the absolute volume of imports, regardless of the importer. The issue of whether the domestic industry was injured by its own import activity and, if applicable, the extent to which it was injured, will only be examined following a finding of injury, as part of the causality assessment.

65. The Tribunal begins by observing that the absolute volume of imports of the subject goods increased over the POI, by 12 percent in 2007 over 2006 and by 33 percent in 2008 over 2007.³⁵ The Tribunal notes however that the increase in imports in 2008 coincided with a significant growth in the Canadian market for waterproof footwear. In this regard, the Tribunal heard that there is growing demand in the Canadian market for vulcanized rubber rain boots, which are not manufactured in Canada, and is of the view that this led to an increase in imports of vulcanized rubber footwear in 2008.

66. The parties opposed also argued that the strengthening of the Canadian dollar over the POI resulted in a decrease in the price paid for imports of subject goods, which are generally denominated in U.S. funds. In particular, they contended that any injury attributable to the effects of exchange rate fluctuations is not caused by the effects of dumping. In this regard, the Tribunal notes that the average annual value of the Canadian dollar relative to the U.S. dollar increased 7 percent from 2006 to 2008.³⁶ The Tribunal is of the view that the appreciation of the Canadian dollar also likely contributed to the increase in the absolute volume of subject imports over the POI and that the trade effects of currency fluctuations cannot be attributed to dumping.

67. The Tribunal also notes that the domestic industry increased its sales in 2008 and did not experience any erosion of its domestic market share. The Tribunal is of the view that this growth in sales from domestic production and sales from imports of the subject goods was largely attributable to the significant growth in the apparent domestic market in 2008 as well as to the capture of market share from imports of non-subject goods, which declined in 2008. In this context, the Tribunal finds that, although the increase in the volume of imports may have been significant over the POI, the evidence does not disclose that said increase had a negative effect on sales of domestically produced like goods.³⁷

68. The *Regulations* also require the Tribunal to consider whether the volume of imports of the subject goods increased relative to the domestic production of the like goods or the consumption of the like goods, i.e. the volume of domestic sales of like goods. The ratio of imports of the subject goods to domestic production of the like goods did in fact increase over the POI by 15 percentage points from 2006 to 2007 and by 9 percentage points from 2007 to 2008.³⁸ The Tribunal therefore finds that there was a significant increase in the volume of imports of the subject goods relative to production of the like goods over the POI. However, based on the evidence on the record, the Tribunal considers that this is due, in significant part, to the growing popularity of vulcanized rubber footwear, which is uncontested, particularly rain boots that are not manufactured in Canada.³⁹

35. *Pre-hearing Staff Report*, revised 19 August 2009, Tribunal Exhibit NQ-2009-001-06A, Administrative Record, Vol. 1.1A at 60.

36. *Ibid.* at 122.

37. *Ibid.* at 69.

38. *Pre-hearing Staff Report* (protected), revised 19 August 2009, Tribunal Exhibit NQ-2009-001-07A (protected), Administrative Record, Vol. 2.1A at 55.

39. Importer's Exhibit C-11 at para. 6, Administrative Record, Vol. 13; Importer's Exhibit C-07 at paras. 17, 20, Administrative Record, Vol. 13; Importer's Exhibit F-03 at paras. 42-44, Administrative Record, Vol. 13; *Transcript of Public Hearing*, Vol. 1, 24 August 2009, at 115; *Transcript of Public Hearing*, Vol. 2, 25 August 2009, at 279.

69. Turning to the ratio of imports of the subject goods to consumption or domestic sales of the like goods, the Tribunal notes that the volume of imports of the subject goods was less than the volume of domestic sales from domestic production in 2006, but exceeded sales from domestic production in 2007 and 2008, with the ratio of imports of the subject goods to sales from domestic production increasing by 27 percentage points from 2006 to 2007. However, the Tribunal notes that, while there was a 33 percent increase in the volume of imports of the subject goods from 2007 to 2008, the ratio of imports of the subject goods to sales from domestic production only increased by 2 percent, as sales from domestic production also grew significantly from 2007 to 2008. The Tribunal therefore finds that, while there was a significant increase in the ratio of imports of the subject goods to sales from domestic production from 2006 to 2007, the increase from 2007 to 2008 was not significant. Viewing these data in a broader context, the Tribunal notes that the growth in sales from both domestic production and imports of the subject goods in 2008 occurred at rates that exceeded the overall growth rate of the apparent market, while the rate of decline in sales of non-subject imports was significant.

Effects of Dumped Imports on Prices

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

71. SMAC claimed that imports of the subject goods undercut the selling prices of domestically produced goods and resulted in price depression and price suppression.

72. Parties opposed argued that imports of the subject goods did not undercut the prices of domestically produced goods and did not result in price depression or price suppression.

Price Undercutting

73. SMAC submitted that the selling prices of the subject goods undercut the prices of domestically produced goods, resulting in price depression at major retail accounts. It submitted that the Tribunal should be guided by its decision in *Carbon Steel Welded Pipe* where it stated that, because differences in product mix may mask true price differences between comparable products, recourse should be had to benchmark product data, which may provide the most reliable basis on which to make pricing comparisons.⁴⁰

74. Parties opposed argued that the evidence showed that the selling prices of the subject goods did not undercut the prices of domestically produced goods during the POI.

75. The Tribunal first examined the overall average unit selling values for both sales from domestic production and sales from imports during the POI.⁴¹ In general, the average unit selling values for sales from imports of the subject and of non-subject goods were significantly higher than those of the domestically produced like goods. In this regard, the magnitude of the spread between these values would appear to be incompatible with the domestic industry’s allegations of adverse price effects.

40. *Carbon Steel Welded Pipe* at paras. 69-70.

41. *Pre-hearing Staff Report* (protected), revised 19 August 2009, Tribunal Exhibit NQ-2009-001-07A (protected), Administrative Record, Vol. 2.1A at 74.

76. The Tribunal recognizes however that the difference in the selling prices of domestically produced waterproof footwear and those of the subject goods may be due in part to the fact that imports of the subject goods include waterproof vulcanized rubber footwear which, according to the evidence, is not produced in Canada and generally sells at a higher price than the waterproof injection-moulded TPR or PVC footwear that is produced in Canada.⁴²

77. As different product mixes could conceivably mask true price differences between comparable products, the Tribunal conducted benchmark product price comparisons, as it did in *Carbon Steel Welded Pipe*, in an effort to better assess allegations of price undercutting.

78. In this regard, the Tribunal believes that the benchmark products are representative of the total Canadian market, with the volume of benchmark products sold during 2008 representing approximately 65 percent of the total Canadian apparent⁴³ market. Despite some minor discrepancies in the data, the Tribunal is satisfied that the benchmark products represent the major types of like goods sold by the domestic industry and the majority of the sales from imports of the subject goods.

79. While the Tribunal collected data for eight benchmark products, there was competition between domestically produced goods and the subject goods imported by parties other than the domestic producers for only three of the benchmark products.⁴⁴ It is therefore on these three benchmark products that the Tribunal will focus its analysis.

80. With respect to these 3 benchmark products, there were 14 instances of competition in a given quarter that could be examined for price undercutting. In only 5 of those instances were the selling prices of the subject goods lower than those of the domestically produced goods.⁴⁵ However, even in these few instances of apparent price undercutting, sales of the domestically produced benchmark goods in 2008 exceeded sales of the subject benchmark goods by non-producers.⁴⁶ The Tribunal also notes that the domestic producers had sales from imports of the subject goods and that the domestic producers' own prices for these sales generally undercut both their prices for sales from domestic production and the other importers' prices for sales from imports of the subject goods.

42. *Transcript of Public Hearing*, Vol. 2, 25 August 2009, at 263, 283-84; *Transcript of Public Hearing*, Vol. 4, 27 August 2009, at 515-16; Importer's Exhibit C-03 at paras. 10-13, Administrative Record, Vol. 13; Importer's Exhibit C-11 at para. 7, Administrative Record, Vol. 13.

43. *Pre-hearing Staff Report* (protected), revised 19 August 2009, Tribunal Exhibit NQ-2009-001-07A (protected), Administrative Record, Vol. 2.1A at 68, 148, 150, 152, 154; *Pre-hearing Staff Report* (protected), revised 24 August 2009, Tribunal Exhibit NQ-2009-001-07B (protected), Administrative Record, Vol. 2.1A at 217, 219; *Pre-hearing Staff Report* (protected), revised 24 August 2009, Tribunal Exhibit NQ-2009-001-07C (protected), Administrative Record, Vol. 2.1A at 224, 226.

44. References to benchmark product data in this document refer to the collective data for all eight benchmark products. Where the Tribunal has focused on select benchmark products as referred to throughout the text, the products have not been identified on the public record, as they would reveal confidential information.

45. *Pre-hearing Staff Report* (protected), revised 19 August 2009, Tribunal Exhibit NQ-2009-001-07A (protected), Administrative Record, Vol. 2.1A at 89-92; *Pre-hearing Staff Report* (protected), revised 24 August 2009, Tribunal Exhibit NQ-2009-001-07B (protected), Administrative Record, Vol. 2.1A at 215-16; *Pre-hearing Staff Report* (protected), revised 24 August 2009, Tribunal Exhibit NQ-2009-001-07C (protected), Administrative Record, Vol. 2.1A at 222-23; Tribunal Exhibit NQ-2009-001-15.23B (protected), Administrative Record, Vol. 6C at 371.6-371.7.

46. *Pre-hearing Staff Report* (protected), revised 19 August 2009, Tribunal Exhibit NQ-2009-001-07A (protected), Administrative Record, Vol. 2.1A at 148, 150, 152, 154; *Pre-hearing Staff Report* (protected), revised 24 August 2009, Tribunal Exhibit NQ-2009-001-07B (protected), Administrative Record, Vol. 2.1A at 217, 219; *Pre-hearing Staff Report* (protected), revised 24 August 2009, Tribunal Exhibit NQ-2009-001-07C (protected), Administrative Record, Vol. 2.1A at 224, 226.

81. The Tribunal notes that, for the remaining benchmark products, there was virtually no competition between domestically produced goods and imports of the subject goods by non-producers and, therefore, no evidence of price undercutting by imports of the subject goods.

82. Based on the foregoing analysis, the Tribunal does not consider that the dumped subject goods significantly undercut the prices of the like goods over the POI. To the extent that domestic prices were undercut, the evidence seems to indicate that most of that price undercutting can be attributed to the imports of the subject goods by the domestic producers themselves.

Price Depression

83. The witness for Genfoot stated that, in 2008, after the anti-dumping duties were removed on imports of the majority of the subject goods from China, its sales volume increased modestly, but its sales value was flat. Genfoot submitted that it was forced to lower the price of hunting boots sold to one retailer in response to competition from the cheaper imports from China.⁴⁷

84. Rallye submitted that its selling prices to its major retail accounts remained flat in both the fall of 2007 and the fall of 2008.⁴⁸

85. Parties opposed argued that the domestic producers did not suffer any price erosion over the POI, but instead were able to raise their prices.

86. The Tribunal first examined the overall market prices for domestically produced goods over the POI. The average unit selling value for sales from domestic production increased by 9 percent from 2006 to 2007 and then decreased by 3 percent from 2007 to 2008. This translates into an overall increase in average unit selling value of 7 percent from 2006 to 2008.⁴⁹

87. Although the price decrease in 2008 could be indicative of price depression, the Tribunal notes that, over the POI, there was a consistent gap between the average unit selling values for sales from domestic production and sales from imports of the subject goods. In general, the average unit selling value for imports of the subject and non-subject goods was significantly higher than that for the domestically produced goods. In the Tribunal's view, a market situation in which there exists the opportunity to "price up" to the level of higher-priced imports is not indicative of price depression.

88. Given the seasonality of sales of waterproof footwear and of retailer buying patterns, the Tribunal again resorted to the benchmark product data to overcome any seasonality-related distortions. In reviewing the benchmark product data, the Tribunal considered that a year-to-year comparison of the same quarters would yield the most probative results (e.g. third quarter of 2007 compared with third quarter of 2008).

47. Manufacturer's Exhibit A-06 (protected) at paras. 19, 31, Administrative Record, Vol. 12. Genfoot also alleged that it experienced price erosion on the women's Celebrate boot model. It was submitted by the witness for Regence that the Celebrate model was an imported boot. Genfoot did not contest this point, nor did it mention the Celebrate boot model after the point was raised by the witness for Regence.

48. Manufacturer's Exhibit A-03 at para. 44, Administrative Record, Vol. 11.

49. *Pre-hearing Staff Report*, revised 19 August 2009, Tribunal Exhibit NQ-2009-001-06A, Administrative Record, Vol. 1.1A at 75.

89. The Tribunal noted that there are only two benchmark products where both the domestic producers and non-producer importers of the subject goods had sales in the third and fourth quarters of 2007 and 2008.⁵⁰ For one of these products, the selling price of the domestic like goods increased in both the third and fourth quarters of 2008 when compared to the same quarters in 2007. For the other, the selling prices of the domestic like goods were lower in the third and fourth quarters of 2008 when compared to the same quarters in 2007, although the prices of the subject goods increased. The Tribunal cannot therefore conclude that the price decrease experienced by the domestic industry for this second product can be attributed to the subject goods.

90. The Tribunal also considered allegations made by Genfoot in respect of its sales of hunting boots to a specific retailer. The Tribunal is unable to conclude that Genfoot's lowering of its prices for the hunting boots was related to the price of the subject goods, with the evidence being inconclusive in that respect. In particular, although Genfoot alleged that it had been informed by the retailer that it was considering sourcing hunting boots from China, Genfoot did not tender any evidence to indicate that price, as opposed to non-price considerations, was the reason that motivated the retailer to consider importing the subject goods. Indeed, the evidence suggests a number of other reasons, unrelated to price, for turning to China as a source of supply.⁵¹ In the absence of concrete evidence in support of Genfoot's allegation, the Tribunal is not persuaded that Genfoot suffered price depression in its sales of hunting boots as a result of the price effects of the subject goods.

91. Following its examination of the evidence relating to the total apparent market, the benchmark product data and the specific injury allegations brought forward by Genfoot, the Tribunal concludes that, while there might have been limited price erosion in 2008 for one of the benchmark products that competed directly with sales from imports of the subject goods, overall, the dumped goods did not significantly depress the prices of the like goods over the POI.

Price Suppression

92. With respect to price suppression, the domestic producers submitted that the cost of TPR, a major material component in the production of the like goods, increased over the POI, as a result of an increase in the price of crude oil, and that they were unable to achieve price increases to offset this increase in the cost of TPR.

93. On the other hand, the Tribunal heard testimony from the domestic producers that the price of TPR did not exhibit a steady increase, but rather, fluctuated over the POI with the cost of oil.

50. *Pre-hearing Staff Report* (protected), revised 19 August 2009, Tribunal Exhibit NQ-2009-001-07A (protected), Administrative Record, Vol. 2.1A at 89-92; *Pre-hearing Staff Report* (protected), revised 24 August 2009, Tribunal Exhibit NQ-2009-001-07B (protected), Administrative Record, Vol. 2.1A at 215-16; *Pre-hearing Staff Report* (protected), revised 24 August 2009, Tribunal Exhibit NQ-2009-001-07C (protected), Administrative Record, Vol. 2.1A at 222-23; Tribunal Exhibit NQ-2009-001-15.23B (protected), Administrative Record, Vol. 6C at 371.6-371.7.

51. *Pre-hearing Staff Report*, revised 19 August 2009, Tribunal Exhibit NQ-2009-001-06A, Administrative Record, Vol. 1.1A at 41; Importer's Exhibit B-03 at paras. 27-36, Administrative Record, Vol. 13; Importer's Exhibit B-04 at paras. 37-50, Administrative Record, Vol. 14; Importer's Exhibit E-04 at paras. 17-28, 65-67, Administrative Record, Vol. 13; Importer's Exhibit F-03 at paras. 40-44, Administrative Record, Vol. 13.

94. The Tribunal notes that there is little in the way of positive evidence on the record of this inquiry concerning price suppression, except for claims that prices were flat on a number of products.⁵²

95. As discussed above, the Tribunal finds that the data on the record show that, except for isolated examples, selling prices for the like goods increased over the POI. In addition, based on the testimony of witnesses for Genfoot and Rallye, the Tribunal is of the view that the domestic producers were generally able to recover the costs of TPR and pass on price increases to retailers.⁵³

96. Finally, it is the Tribunal's view that the significant spread between the average unit selling value of the subject goods and the average unit selling value of the like goods, with the former being significantly higher than the latter, is inconsistent with allegations that the subject goods caused significant price suppression over the POI.

Conclusion

97. In summary, the Tribunal concludes that the dumped subject goods have not significantly undercut, depressed or suppressed the prices of the like goods.

98. Inasmuch as "dumping" is, by definition, a commercial practice that manifests itself in the price of imports,⁵⁴ it would appear to logically follow that, in the absence of a finding of adverse price effects (i.e. the significant undercutting, depression or suppression of the prices of like goods by the prices of imports), any deterioration in domestic industry performance indicators could not be described as injury caused by dumping. However, before making definitive findings on the issues before it, the Tribunal will consider the other relevant factors, as prescribed by the *Regulations*.

Impact of the Dumped Imports on the Domestic Industry

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

100. SMAC submitted that sales of the dumped subject goods imported by non-producers resulted in a decline in production, sales, market share, capacity utilization and employment for the domestic industry.

101. All parties opposed submitted that imports of the dumped subject goods had not caused injury to the domestic producers.

Production, Capacity and Capacity Utilization

102. The evidence shows that domestic production of the like goods decreased by 14 percent in 2007 compared to 2006 and then increased by 16 percent in 2008 compared to 2007, putting production in 2008 slightly above 2006 levels.⁵⁵ This increase in 2008 occurred despite the increase in imports of the subject goods subsequent to the expiry, in October 2007, of Tribunal's order in *Certain Waterproof Rubber Footwear*.

52. *Transcript of In Camera Hearing*, Vol. 1, 24 August 2009, at 134-35; Manufacturer's Exhibit A-03 at para. 44, Administrative Record, Vol. 11; Manufacturer's Exhibit A-05 at para. 34, Administrative Record, Vol. 11.

53. *Transcript of In Camera Hearing*, Vol. 2, 25 August 2009, at 217-18; *Pre-hearing Staff Report* (protected), revised 19 August 2009, Tribunal Exhibit NQ-2009-001-07A (protected), Administrative Record, Vol. 2.1A at 74.

54. *Wood Slats* (15 July 2009), RR-2008-003 (CITT) at 10.

55. *Pre-hearing Staff Report* (protected), revised 19 August 2009, Tribunal Exhibit NQ-2009-001-07A (protected), Administrative Record, Vol. 2.1A at 57.

103. SMAC argued that, although the decrease in the domestic industry's capacity utilization was only modest over the POI, its utilization rate had already been unacceptably low. It submitted that the growth in the market was captured by the subject goods, which prevented the domestic industry from any increase in production and sales, thereby quashing any hopes of raising its utilization rates above its low levels.

104. Parties opposed submitted that the capacity utilization information reported by Genfoot was unrealistically low and therefore unreliable, pointing to the fact that the other domestic producers had experienced better capacity utilization than Genfoot over the POI.

105. A witness for Genfoot confirmed that the company's capacity utilization was in fact much higher than had been reported in its questionnaire reply. The Tribunal notes that the low capacity utilization rate originally reported by Genfoot appeared to be inconsistent with its purchase of new machinery. Further, the Tribunal observes that the capacity utilization rate of Rallye, the other major producer of the like goods, was relatively stable over the POI.⁵⁶

106. Finally, the Tribunal notes that none of the parties reduced their capacity over the POI.

107. In light of the above, the Tribunal finds that domestic production, its capacity and its capacity utilization have not been materially injured by the dumped subject goods.

Sales from Domestic Production and Market Share

108. Genfoot and Rallye claimed lost sales with respect to certain accounts due to the dumped subject goods.

109. The parties against whom these allegations were directed responded that they had not purchased the dumped subject goods because of price and that, in many cases, the cost of the subject goods was higher than that of the competing domestically produced goods.

110. The Tribunal, therefore, will first look at the overall performance of the domestic industry and then turn to the specific allegations made by the domestic industry.

111. Although sales from domestic production were down by 16 percent in 2007 from 2006 levels, they increased by 31 percent in 2008. The volume of goods sold from domestic production in 2008 was 10 percent higher than the volume of goods sold in 2006. In fact, all three domestic producers whose data were included in the consolidated results improved performance in 2008 over 2007.⁵⁷

112. The total value of sales from domestic production increased significantly over the POI. Although the total value of domestic sales of the like goods declined by 8 percent from 2006 to 2007, it increased by 27 percent from 2007 to 2008, with all domestic producers showing improvement in 2008 over 2007.⁵⁸

113. The market share held by domestic producers' sales from domestic production remained relatively stable over the POI. From 2006 to 2008, the domestic producers' market share from sales from domestic production decreased by 4 percentage points.

56. *Ibid.* at 195; *Transcript of In Camera Hearing*, Vol. 1, 24 August 2009, at 108-112, 148.

57. *Pre-hearing Staff Report* (protected), revised 19 August 2009, Tribunal Exhibit NQ-2009-001-07A (protected), Administrative Record, Vol. 2.1A at 69.

58. *Ibid.* at 71; *Pre-hearing Staff Report*, revised 19 August 2009, Tribunal Exhibit NQ-2009-001-06A, Administrative Record, Vol. 1.1A at 72.

114. Over the POI, the market share held by sales from imports of the subject goods increased by 11 percentage points. However, the evidence does not disclose that this occurred primarily at the expense of the domestic producers' market share.⁵⁹

115. Instead, the Tribunal found that the increase in market share held by the subject goods was primarily offset by a decline in the market share held by sales of non-subject waterproof footwear from countries such as China, the United States and Malaysia.⁶⁰ Over the POI, the market share held by these non-subject goods decreased by 7 percentage points. In fact, while the absolute volume of imports of the subject goods increased significantly from 2007 to 2008, as discussed above, the market share gained by the sales of these imports was more than offset by the decline in market share held by sales of non-subject goods and was actually accompanied by an increase in the market share held by sales from domestic production.

116. The Tribunal also notes that the domestic industry itself accounted for a large share of imports of the subject goods and sales from imports of the subject goods during the POI.⁶¹ This was the result of a practice allegedly aimed at circumventing the Tribunal's order in *Certain Waterproof Rubber Footwear* that SMAC had previously sought. Indeed, the record clearly indicates that this practice consisted of the importation of so-called nearly finished waterproof footwear, which was manufactured with a hole in the sole and rendered waterproof subsequent to its importation by the insertion of a plug or a flap. The Tribunal believes that such imports by the domestic industry over the POI do not appear to be motivated by defensive considerations, but rather by profit.⁶² In fact, the Tribunal heard that, even though the perceived threat from stitched footwear did not materialize,⁶³ Rallye chose to continue to import nearly finished footwear instead of producing like goods in Canada.⁶⁴

117. The Tribunal notes that, although total imports of the subject goods increased in 2008 compared to 2007, imports of the subject goods by domestic producers declined. The stability of market share of sales from domestic production in 2008, and the coincidental decline in the domestic producers' own imports and increase in imports of the subject footwear from China by non-producers in particular, suggest that Canadian retailers had not abandoned Canadian producers, but had merely decided to cut out the middleman that the Canadian producers had become and to import directly themselves.

118. As indicated above, prior to the expiry of Tribunal's order in *Certain Waterproof Rubber Footwear* in October 2007, the domestic industry engaged in the importation of large quantities of the subject goods for which anti-dumping duties were not assessed because they were in nearly finished form. As a result of this novel strategy, Rallye had become a major provider of imported waterproof footwear and likely enjoyed a price advantage over other importers that would have been paying anti-dumping duties on imports of the essentially equivalent finished goods. The Tribunal is of the view that, once the order expired and the anti-dumping duties were lifted, purchasers were themselves again able to import the subject goods. This is substantiated by the fact that, although the domestic producers' sales from domestic production grew in 2008, their sales from imports decreased dramatically that year.⁶⁵

59. *Pre-hearing Staff Report* (protected), revised 19 August 2009, Tribunal Exhibit NQ-2009-001-07A (protected), Administrative Record, Vol. 2.1A at 70.

60. *Ibid.*

61. *Ibid.* at 126.

62. *Transcript of Public Hearing*, Vol. 2, 25 August 2009, at 190-96.

63. *Ibid.* at 190.

64. *Pre-hearing Staff Report* (protected), revised 19 August 2009, Tribunal Exhibit NQ-2009-001-07A (protected), Administrative Record, Vol. 2.1A at 59.

65. *Ibid.* at 132-33.

119. The Tribunal also examined the data for the seven benchmark products⁶⁶ for which the domestic producers had sales in the third and fourth quarters of 2007 and 2008 to see the change in sales volume of the like goods between 2007 and 2008. Comparing the third quarter of 2007 to the third quarter of 2008, sales volumes for four of the products increased, while sales volumes for three of the products decreased. The Tribunal notes however that, for the benchmark products that experienced a decrease, there was no competition from the imported subject benchmark goods by non-producers. For the fourth quarter, however, the domestic sales volumes of six of the benchmark products examined increased in 2008 compared to 2007, while sales of the seventh benchmark product remained flat.

120. With respect to the domestic industry's lost sales allegations against a number of purchasers of waterproof footwear, including several large retailers, the Tribunal heard from those purchasers and comes to the following conclusions. First, the replacement of domestically produced waterproof footwear with the subject goods was due to the domestic industry's acknowledged inability to produce vulcanized rubber footwear, to respond to the product quality specifications, or to satisfy the custom design requirements of its customers. Second, one major purchaser chose to move away from domestic industry offerings in reaction to domestic industry decisions to enter into direct competition with certain of its customers' private label goods. Third, the domestic industry declined or failed to seriously pursue sales opportunities with at least one large retailer of waterproof footwear.⁶⁷

121. During the inquiry, the domestic industry confirmed that it did not produce vulcanized rubber rain or winter boots, which are demanded by many consumers. After considering the evidence adduced by the parties on the issue of whether or not vulcanized rubber footwear was distinguishable from TPR or PVC waterproof footwear, the Tribunal has concluded that, while the goods are comparable in some respects (e.g. as to winter boot warmth ratings), they are distinguishable and demanded by consumers on the basis of style and performance-related features, which, in the Tribunal's understanding, has nothing to do with price.⁶⁸ Indeed, the Tribunal heard in oral testimony that, in extreme weather conditions, TPR and natural vulcanized rubbers respond differently in terms of flexibility, slip resistance and abrasion resistance.⁶⁹ The Tribunal also heard oral testimony on fashion-based demand for natural vulcanized rubber rain boots and consumer recognition of Sorel brand natural vulcanized rubber winter boots.⁷⁰ The Tribunal also notes that several witnesses testified that imported vulcanized rubber footwear sells, on average, at a higher price than injection-moulded footwear.⁷¹

66. *Pre-hearing Staff Report* (protected), revised 19 August 2009, Tribunal Exhibit NQ-2009-001-07A (protected), Administrative Record, Vol. 2.1A at 148, 150, 152, 154; *Pre-hearing Staff Report* (protected), revised 24 August 2009, Tribunal Exhibit NQ-2009-001-07B (protected), Administrative Record, Vol. 2.1A at 217, 219; *Pre-hearing Staff Report* (protected), revised 24 August 2009, Tribunal Exhibit NQ-2009-001-07C (protected), Administrative Record, Vol. 2.1A at 224, 226.

67. Importer's Exhibit C-09 at paras. 12-13, Administrative Record, Vol. 13; Importer's Exhibit C-07 at para. 41, Administrative Record, Vol. 13.

68. *Transcript of Public Hearing*, Vol. 2, 25 August 2009, at 231-35, 278-79; *Transcript of Public Hearing*, Vol. 3, 26 August 2009, at 345, 353-54, 370-71, 373-75; *Transcript of Public Hearing*, Vol. 4, 27 August 2009, at 426.

69. *Transcript of Public Hearing*, Vol. 2, 25 August 2009, at 220, 234-35, 237-38, 240-42.

70. *Transcript of Public Hearing*, Vol. 1, 24 August 2009, at 114-15; *Transcript of Public Hearing*, Vol. 2, 25 August 2009, at 233; *Transcript of Public Hearing*, Vol. 3, 26 August 2009, at 319-20, 338-39; *Transcript of Public Hearing*, Vol. 4, 27 August 2009, at 455.

71. *Transcript of Public Hearing*, Vol. 2, 25 August 2009, at 263, 283-84; *Transcript of Public Hearing*, Vol. 4, 27 August 2009, at 515-16; Importer's Exhibit C-03 at paras. 10-13, Administrative Record, Vol. 13; Importer's Exhibit C-11 at para. 7, Administrative Record, Vol. 13.

122. Rallye alleged that it lost sales of licensed goods when its licence was revoked and given to an importer, which it attributes to the price effects of the dumping of the subject goods. The evidence, however, indicates that this occurred because the licensor was dissatisfied with Rallye's failure to adequately distinguish the licensed product from its own private label product and because it considered certain licensed footwear produced by Rallye to be inappropriate for the intended target market. In particular, the evidence shows that Disney considered the "Hannah Montana" rain boots designed by Rallye "totally inappropriate" for the young "tween" segment of the market. Disney was also concerned that Rallye was not keeping up with footwear trends, but was merely engaged in the practice of "label slapping" on items that did not respond to the particular demands of this consumer demographic. In addition, Rallye used identical bottoms for its private label winter boots as it did for its Disney "Princess", "Cars" and "Winnie the Pooh" branded boots. Finally, it was also submitted that Rallye's private label rain boots were virtually identical to its Disney branded rain boots.⁷²

123. Having examined the licensed Disney products filed as physical exhibits, the Tribunal is of the view that the domestically produced boot was physically inferior to the imported winter boot in terms of sharpness of pattern design and colour vibrancy. Additionally, domestically produced licensed winter boots were only distinguished from private label goods by stickers or heat transfers, while the imported goods had all-over screen printing and 3-D artwork applications.⁷³ Finally, the Tribunal notes that the imported winter boots were winter boots of cement construction, which are non-subject goods. Therefore, any lost sales attributable to these goods cannot be attributed to the dumped subject goods. The Tribunal considers that the loss of the Disney licence is likely due to the difference in appearance between domestically produced and imported waterproof footwear. Further, there is no evidence that the loss of the Disney licence was due to the price of the dumped subject goods. In fact, when questioned by the Tribunal, the witness for Rallye testified that there was no proof that any of the lost sales allegations were due to the dumped imports.⁷⁴

124. Rallye also alleged that it lost sales to Kodiak as a result of the dumped subject goods. The Tribunal finds that these lost sales occurred as a result of Rallye's decision to compete directly with Kodiak (its own private-label customer) by selling similar products to retailers that were purchasing Rallye-manufactured Kodiak footwear. In this regard, the witness for Kodiak submitted that, as a result of Rallye's direct competition, it was decided that it was no longer tenable for Kodiak to continue to share its development work and programs with Rallye. Further, it was uncontested that a large portion of the subject goods sold to Kodiak by Rallye was not manufactured in Canada, but rather produced from imports of nearly finished waterproof footwear.⁷⁵

125. Genfoot claimed that it lost sales at Loblaw due to the dumped subject goods. The witness for Loblaw confirmed that it purchased domestically produced waterproof footwear from Genfoot in 2007, but did not do so in 2008.

126. The Tribunal heard that Loblaw's purchases from Genfoot occurred before Loblaw decided to launch waterproof footwear under its "Joe Fresh Style" banner. After consulting with domestic producers, Loblaw determined that these producers could not make waterproof footwear to Loblaw's design specification and production volume requirements. Specifically, Loblaw was concerned with the matching of colours on waterproof footwear with other co-ordinated accessories in the "Joe Fresh Style" product line,

72. Importer's Exhibit C-13 at paras. 18-25, Administrative Record, Vol. 13.

73. Importer's Physical Exhibits C-28, C-03, C-32, C-31.

74. *Transcript of Public Hearing*, Vol. 2, 25 August 2009, at 227.

75. Importer's Exhibit C-09 at paras. 8, 11-13, Administrative Record, Vol. 13.

concluding that this could best be accomplished by using vulcanized rubber.⁷⁶ The witness for Loblaw also testified that, because Loblaw includes a number of colour and style permutations for each product that it introduces into the “Joe Fresh Style” line, the ability to respond to specific volume minimum order requirements is important when choosing a supplier.

127. The Tribunal examined the two samples of camouflage-patterned rain boots submitted as physical exhibits by Loblaw. One was presented to Loblaw by Genfoot, while the other was produced in China. Having physically examined the goods, the Tribunal is of the view that the domestically produced PVC rain boot is visually inferior to the imported vulcanized rubber rain boot in terms of colour vibrancy and reproduction of the camouflage pattern.⁷⁷ The Tribunal considers that, when the key distinguishing feature of the boot is the pattern, it becomes reasonable to expect that the quality of the reproduction of the pattern would become a primary concern for the purchaser.

128. In the case of Loblaw, the Tribunal is of the view that the domestic industry lost sales due to its inability to manufacture product to Loblaw’s design specifications concerning colour vibrancy and reproduction of patterns developed by the “Joe Fresh Style” design team to be accessorized with co-ordinated separates. The Tribunal also considers that the domestic industry may have lost sales to Loblaw due to the combined effects of Loblaw’s desire to obtain a particular product in several permutations and the domestic industry’s need to recover the fixed costs of producing each individual permutation of such footwear. The Tribunal does not however consider that any sales lost as a result of this issue can be attributed to the subject goods.

129. Genfoot claimed that it lost sales to Wal-Mart, but Wal-Mart claimed that Genfoot was not interested in selling it winter footwear. The witness for Wal-Mart described a meeting with a representative from Genfoot where he was told that rain boots are a “small part” of Genfoot’s business and that Genfoot could not supply Wal-Mart with its winter boot needs. Additionally, Genfoot refused to sell its Kamik branded winter boots to Wal-Mart.⁷⁸ While the Tribunal does not dispute a manufacturer’s right to choose its customers, or in what retail outlet it wants to place its product, the uncontested evidence is that Genfoot either did not want, or was not able to provide Wal-Mart with the products that it required, which ultimately resulted in a loss of sales to Wal-Mart.

130. The Tribunal also notes that, in response to questions from the Tribunal, the witness for Rallye testified that there was no proof that any of its alleged lost sales were attributable to the price of the subject goods.⁷⁹ Another witness indicated having been informed by a representative for Genfoot that sales were up in both 2008 and 2009, a statement that was not contested by Genfoot in its written or oral testimony.⁸⁰

131. In light of the above, the Tribunal observes that, while the domestic producers may have experienced some lost sales as a result of factors other than the dumping of the subject goods, overall sales from domestic production were relatively stable over the POI and increased in 2008 despite an increase in imports of the subject goods. The Tribunal does not therefore consider that the domestic producers lost sales or market share over the POI as a result of the price of imports of the subject goods.

76. *Transcript of In Camera Hearing*, Vol. 3, 27 August 2009, at 354-57; *Transcript of Public Hearing*, Vol. 4, 27 August 2009, at 490-91, 495-97; Importer’s Exhibit B-04 (protected) at paras. 39-41, Administrative Record, Vol. 14.

77. Importer’s Physical Exhibits B-10, B-11.

78. Importer’s Exhibit C-07 at paras. 37, 41, Administrative Record, Vol. 13.

79. *Transcript of Public Hearing*, Vol. 2, 25 August 2009, at 227.

80. Importer’s Exhibit C-07 at para. 7, Administrative Record, Vol. 13.

Financial Results

132. As a result of Rallye's inability to provide financial data for its sales of waterproof footwear,⁸¹ the Tribunal was left without a representative picture of the domestic industry's financial performance with respect to the domestic sales of the like goods. In the absence of this information, the Tribunal turned its analysis to the income statements for sales of domestic production provided by Genfoot and Hichaud.⁸²

133. The financial statement for domestic sales from domestic production provided by Genfoot indicates that its domestic sales of the like goods outperformed its total company sales, and the data indicate that domestic sales were profitable over the POI. During oral testimony, however, the witness for Genfoot stated that the information filed was inaccurate and that more of Genfoot's costs should have been allocated to domestic sales.⁸³ Therefore, it is difficult for the Tribunal to assess the profitability of Genfoot's sales from domestic production. However, in light of the fact that Genfoot was unable to provide an accurate statement for these sales and the absence of any other evidence from Genfoot that it was experiencing a decline in profits on its domestic sales of domestically produced goods, the Tribunal cannot conclude that Genfoot's financial performance has been injured by the dumped subject goods.

134. With regard to Hichaud, the Tribunal notes that it is a not-for-profit organization and that its financial results do not indicate that its financial performance was injured by imports of the dumped subject goods over the POI.

135. As a result of Rallye not providing the requested information on financial performance, the Tribunal finds that there is no evidence on the record to indicate that Rallye's financial performance has been injured as a result of the dumped subject goods.

136. In light of the above, the Tribunal concludes that the evidence on the record does not indicate that the financial performance of the domestic industry over the POI was injured by the dumped subject goods.

Other Factors

137. The Tribunal notes that paragraph 37.1(1)(c) of the *Regulations* prescribes that the Tribunal consider certain other factors, in addition to those discussed above, in its assessment of the impact of the dumped goods on the domestic industry. These factors include actual or potential decline in productivity or return on investment, or negative effects on cash flow, inventories, employment, wages, growth or the ability to raise capital, and the magnitude of the margin of dumping in respect of the dumped goods.

138. There is little to no evidence on these other factors, other than the information collected for the staff report. This information indicates that direct employment declined by 1 percent from 2006 to 2007 and by 8 percent from 2007 to 2008. Although employment decreased from 2007 to 2008, there was an increase in production, which suggests productivity gains for the domestic industry. Investment decreased by 15 percent from 2006 to 2007, but increased by 33 percent from 2007 to 2008 and by 25 percent from 2008 to 2009. In the Tribunal's view, this is not indicative of injury.⁸⁴

81. Tribunal Exhibit NQ-2009-001-RI-01C (protected), Administrative Record, Vol. 10 in response to Tribunal RFI No. 3.

82. *Pre-hearing Staff Report* (protected), revised 19 August 2009, Tribunal Exhibit NQ-2009-001-07A (protected), Administrative Record, Vol. 2.1A at 172-73.

83. *Transcript of In Camera Hearing*, Vol. 1, 24 August 2009, at 121.

84. *Pre-hearing Staff Report* (protected), revised 19 August 2009, Tribunal Exhibit NQ-2009-001-07A (protected), Administrative Record, Vol. 2.1A at 110; *Pre-hearing Staff Report*, revised 19 August 2009, Tribunal Exhibit NQ-2009-001-06A, Administrative Record, Vol. 1.1A at 109, 112.

139. SMAC submitted that the margin of dumping is significant, especially in view of the price-sensitive nature of the goods. However, the Tribunal notes that, although the CBSA found weighted average margins of dumping of 36.6 percent and 12.0 percent for imports of the subject goods from China and Vietnam, respectively, the data collected by the Tribunal, as well as oral testimony,⁸⁵ indicate that the prices of the dumped subjects goods exceeded the prices of the like goods and that the margin of dumping would not therefore contribute to price undercutting, price depression or price suppression resulting in injury to the domestic industry.

Conclusion

140. The Tribunal is of the view that, despite an increase in imports of the subject goods from 2007 to 2008, the domestic industry was able to increase its production, sales and market share despite the removal, in 2007, of anti-dumping duties on a large portion of the subject goods.

141. Based on its analysis of the prescribed factors, as outlined above, the Tribunal concludes that the dumping of the subject goods has not caused material injury to the domestic industry.⁸⁶

THREAT OF INJURY

142. Having found that the subject goods have not caused injury, the Tribunal must now consider whether they are threatening to cause injury. The Tribunal is guided in its consideration of this question by subsection 37.1(2) of the *Regulations*, which prescribes factors to be taken into consideration for the purposes of determining threat of injury.⁸⁷ Further, the Tribunal notes that subsection 2(1.5) of *SIMA* indicates that a threat of injury finding cannot be made unless the circumstances in which the dumping of the goods would cause injury are clearly foreseen and imminent.

85. *Transcript of Public Hearing*, Vol. 2, 25 August 2009, at 263, 283-84; *Transcript of Public Hearing*, Vol. 4, 27 August 2009, at 515-16; Importer's Exhibit C-03 at paras. 10-13, Administrative Record, Vol. 13; Importer's Exhibit C-11 at para. 7, Administrative Record, Vol. 13.

86. Additionally, it is noted that, in final argument, the domestic industry stated that, while not abandoning its injury case, it would be fair to state that the case for injury was not strong, but that it was being used to underpin the domestic industry's concerns of a threat of injury.

87. Subsection 37.1(2) of the *Regulations* reads as follows: "For the purposes of determining whether the dumping or subsidizing of any goods is threatening to cause injury, the following factors are prescribed: (a) the nature of the subsidy in question and the effects it is likely to have on trade; (b) whether there has been a significant rate of increase of dumped or subsidized goods imported into Canada, which rate of increase indicates a likelihood of substantially increased imports into Canada of the dumped or subsidized goods; (c) whether there is sufficient freely disposable capacity, or an imminent, substantial increase in the capacity of an exporter, that indicates a likelihood of a substantial increase of dumped or subsidized goods, taking into account the availability of other export markets to absorb any increase; (d) the potential for product shifting where production facilities that can be used to produce the goods are currently being used to produce other goods; (e) whether the goods are entering the domestic market at prices that are likely to have a significant depressing or suppressing effect on the price of like goods and are likely to increase demand for further imports of the goods; (f) inventories of the goods; (g) the actual and potential negative effects on existing development and production efforts, including efforts to produce a derivative or more advanced version of like goods; (g.1) the magnitude of the margin of dumping or amount of subsidy in respect of the dumped or subsidized goods; (g.2) evidence of the imposition of anti-dumping or countervailing measures by the authorities of a country other than Canada in respect of goods of the same description or in respect of similar goods; and (h) any other factors that are relevant in the circumstances."

143. In conducting its threat of injury analysis, the Tribunal typically considers a time frame of 18 to 24 months beyond the date of its finding with respect to injury. Although not necessarily bound by this time frame, as each case is unique, in the present case, the Tribunal will focus on the period covering the balance of 2009 to the fall of 2011, depending on the quantity and the quality of the information on the record.

144. In argument, SMAC indicated that the domestic industry was primarily concerned with the threat of injury from the subject goods.⁸⁸ SMAC argued that the injury factors set out in its complaint would continue to have an impact on the domestic industry if the dumping continues. It submitted that the effect of the dumping on the future of plant operations and local employment is clearly foreseeable and imminent. In addition, SMAC submitted that China and Vietnam possess a large excess capacity to produce the subject goods and that producers in China and Vietnam are highly dependent on exports. SMAC added that producers in China have also developed relationships with a number of mass merchandisers that purchase products directly from them.

145. Regence submitted that no other jurisdiction has any significant trade remedy findings in place against the subject goods and that the findings in the European Union are for leather footwear only. Regence added that there is no proof that China and Vietnam could increase their exports to Canada without major investment.

146. Sears submitted that the subject goods are not threatening the domestic industry. Sears indicated that it anticipates a steady demand for waterproof footwear, including for domestic industry offerings. According to Sears, it has increased the catalogue space available to the Genfoot Kamik branded product for the coming season.

147. Loblaw submitted that SMAC failed to provide evidence of foreseeable or imminent change of circumstances that would give rise to injury to the domestic producers. Loblaw noted that, when the Tribunal order in *Certain Waterproof Rubber Footwear* expired, the Tribunal indicated that the domestic industry had not met the onus of establishing a link between any continued or resumed dumping and any alleged injury that it suffered or anticipated.

148. The Tribunal notes that very little evidence on the record squarely addresses the domestic industry's perceived threat of injury. Nevertheless, the Tribunal analyzed the prescribed factors in turn and was thereby able to draw the following outlook for the domestic industry for the next 18 to 24 months.

149. There was an increase in the absolute volume of imports of the subject goods and the volume of imports of the subject goods compared to domestic production during the POI. In addition, there was a significant increase in the ratio of imports of the subject goods to sales from domestic production from 2006 to 2007, but the increase from 2007 to 2008 was not significant.⁸⁹ Accordingly, demand for waterproof footwear from both domestic and foreign sources appears stable. Sales from domestic production increased by 31 percent in terms of volume and by 27 percent in terms of value from 2007 to 2008. The volume and values of sales from domestic production in 2008 increased at a faster rate than the overall apparent market.⁹⁰ Additionally, the market share of volume and value of domestic production remained relatively

88. *Transcript of Public Argument*, Vol. 1, 28 August 2009, at 48-50.

89. *Pre-hearing Staff Report* (protected), revised 19 August 2009, Tribunal Exhibit NQ-2009-001-07A (protected), Administrative Record, Vol. 2.1A at 57, 59, 68.

90. *Pre-hearing Staff Report*, revised 19 August 2009, Tribunal Exhibit NQ-2009-001-06A, Administrative Record, Vol. 1.1A at 69, 72.

stable between 2006 and 2008.⁹¹ The Tribunal was not provided with any evidence that could lead it to believe that this situation would change, in any significant or detrimental manner, in the next 18 to 24 months.

150. The Tribunal is of the view that imports of the subject goods will continue to command a presence in the Canadian market and may even increase. Indeed, the current fashion trend for higher-priced natural vulcanized rubber footwear shows no sign of abating and, since this product is not made in Canada, the subject goods will continue to fill the void. Indeed, Genfoot and Rallye were themselves importers of the subject goods. As importers of the subject goods themselves, Genfoot and Rallye are aware of this opportunity. However, the Tribunal was not provided with any evidence that the subject goods displace demand for the TPR or PVC waterproof footwear on the basis of price. The Tribunal believes that the domestic industry will continue to serve a certain segment of the market in the near future, just as it did during the POI.

151. Accordingly, over the course of the next 18 to 24 months, the Tribunal does not foresee an increase in dumped imports into Canada that would threaten injury to the domestic industry.

152. Despite allegations by SMAC of a large excess capacity in China and Vietnam, which conflicted with the claims of domestic retailers, there was little in the way of positive evidence on the record to support these claims of excess capacity that could be used for, or shifted to, the production of waterproof footwear destined for the Canadian market.

153. Consequently, the Tribunal does not believe that excess foreign capacity, if any, will play any significant role in modifying the competitive landscape of the Canadian waterproof footwear market in the next 18 to 24 months.

154. The Tribunal recalls that the average unit price of domestically produced like goods rose between 2006 and 2008 while remaining consistently and significantly lower than the average unit price of the subject goods.⁹²

155. In the Tribunal's view, the evidence fails to show that the subject goods will undercut, depress or suppress significantly the prices of the like goods in Canada in the foreseeable future. Accordingly, the Tribunal has no basis upon which to conclude that the subject goods will cause adverse price effects in the next 18 to 24 months.

156. The Tribunal notes that the evidence on the record indicates that the inventories of domestic producers decreased over the POI, both in terms of volume and values.⁹³

157. Moreover, there was no positive evidence on the record that indicated excess or growing foreign inventories.⁹⁴ To the contrary, due to the OEM aspect of the suppliers in both China and Vietnam, where production is made to orders from their Canadian clients, very low inventories were held, if any, at those foreign manufacturers or, for that matter, in Canada. This, in the Tribunal's view, will probably continue in the foreseeable future.

91. *Pre-hearing Staff Report* (protected), revised 19 August 2009, Tribunal Exhibit NQ-2009-001-07A (protected), Administrative Record, Vol. 2.1A at 70, 73.

92. *Ibid.* at 74.

93. *Ibid.* at 113.

94. Foreign producers' questionnaire replies found under collective Tribunal Exhibit NQ-2009-001-18 (protected), Administrative Record, Vol. 6.1.

158. The Tribunal observed that investments were 15 percent lower in 2007 over 2006, but then increased by 33 percent in 2008 over 2007, and by 25 percent in 2009 over 2008.⁹⁵ These important investments were made after the expiry of the Tribunal's order in *Certain Waterproof Rubber Footwear*, and, in the Tribunal's view, are indicative of a market optimism unhindered by the presence of the subject goods.

159. The Tribunal acknowledges the projected decline in investments for 2010 and 2011, by 11 percent and 54 percent respectively. However, projected investment information was not provided by one domestic producer for the 2009 to 2011 period.⁹⁶ The Tribunal also notes testimony to the effect that one of the domestic producers is examining changes to its operations that would reposition it in the Canadian marketplace.⁹⁷

160. In sum, the Tribunal believes that the subject goods have not hindered the domestic industry's investment plans, nor will they in the near future.

161. The Tribunal examined both the average and individual margins of dumping, noting that average margins were lower for Vietnam than China, and that the three lowest individual margins for Vietnamese producers were lower than the three lowest individual margins of dumping for Chinese producers.⁹⁸ In addition, two producers, one in each of the subject countries, did not engage in dumping during the CBSA's period of investigation.⁹⁹

162. As was examined in the injury analysis above, the Tribunal similarly believes that, in this instance, the magnitude of the margin of dumping is of little importance with respect to the issue of threat of injury. Since the prices of the dumped subject goods generally exceeded the prices of the like goods, margins of dumping would not constitute a threat factor.

163. There is no evidence on the record of anti-dumping measures in other jurisdictions in respect of goods of the very same description as the subject goods, nor of any pending investigations.¹⁰⁰ Consequently, the Tribunal did not receive any evidence that could lead it to believe that there exists any such measure that could give rise to diversion of the subject goods towards the Canadian market in the foreseeable future.

164. The Tribunal noted that some retailers that disputed allegations by the domestic industry of lost sales stated that they in fact increased such purchases over the POI and would continue to do so for

95. *Pre-hearing Staff Report*, revised 19 August 2009, Tribunal Exhibit NQ-2009-001-06A, Administrative Record, Vol. 1.1A at 112.

96. *Ibid.*; *Pre-hearing Staff Report* (protected), revised 19 August 2009, Tribunal Exhibit NQ-2009-001-07A (protected), Administrative Record, Vol. 2.1A at 112.

97. *Transcript of In Camera Hearing*, Vol. 2, 25 August 2009, at 188-89, 191-93.

98. Tribunal Exhibit NQ-2009-001-04, Administrative Record, Vol. 1 at 133.12.

99. *Ibid.*

100. *Pre-hearing Staff Report*, revised 19 August 2009, Tribunal Exhibit NQ-2009-001-06A, Administrative Record, Vol. 1.1A at 18; *Transcript of Public Hearing*, Vol. 1, 24 August 2009, at 120-21.

upcoming purchasing seasons. Some also stated that they would continue to purchase imported waterproof footwear that the domestic industry does not produce.¹⁰¹

165. The Tribunal acknowledges that imported waterproof vulcanized rubber footwear will understandably continue to fill the void created by consumer demand, which the domestic industry is unable to fill.

166. Accordingly, the Tribunal observes that the next 18 to 24 months will continue to see the co-existence of complementary imported and domestically produced waterproof footwear offerings largely responding to different market needs. The Tribunal believes that this is consonant with retailers' desire to offer a wide range of products and price points to their customers.¹⁰² This does not constitute a threat of injury.

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

CONCLUSION

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

Pasquale Michaele Saroli
Pasquale Michaele Saroli
Presiding Member

Serge Fréchette
Serge Fréchette
Member

André F. Scott
André F. Scott
Member

101. *Transcript of In Camera Hearing*, Vol. 2, 25 August 2009, at 282-83; *Transcript of In Camera Hearing*, Vol. 3, 27 August 2009, at 288-92, 294, 299-300; *Transcript of Public Hearing*, Vol. 2, 25 August 2009, at 280-89; Importer's Exhibit C-07 at paras. 5, 23, 24, 31, 37, 39, 40, Administrative Record, Vol. 13; Importer's Exhibit F-03 at paras. 27, 28, Administrative Record, Vol. 13.

102. *Transcript of Public Hearing*, Vol. 3, 26 August 2009, at 331-37; *Transcript of Public Hearing*, Vol. 4, 27 August 2009, at 434-35, 472-73, 476-77.