CANADIAN INTERNATIONAL TRADE TRIBUNAL
TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

Ottawa, Thursday, May 8, 2003

Appeal No. AP-2001-070

IN THE MATTER OF an appeal heard on April 3, 2002, under section 61 of the *Special Import Measures Act*, R.S.C. 1985, c. S-15;

AND IN THE MATTER OF eight redeterminations by the Commissioner of the Canada Customs and Revenue Agency dated August 31, 2001, pursuant to section 59 of the *Special Import Measures Act*.

BETWEEN

M & M FOOTWEAR INC. **Appellant**

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND REVENUE AGENCY **Respondent**

DECISION OF THE TRIBUNAL

The appeal is allowed.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Zdenek Kvarda
Zdenek Kvarda
Member

Michel P. Granger
Michel P. Granger
Secretary

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TRIBUNAL CANADIEN DU COMMERCE EXTÉRIEUR

UNOFFICIAL SUMMARY

Appeal No. AP-2001-070

M & M FOOTWEAR INC. **Appellant**

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND REVENUE AGENCY **Respondent**

This is an appeal under section 61 of the *Special Import Measures Act* from eight redeterminations dated August 31, 2001, made by the Commissioner of the Canada Customs and Revenue Agency (the Commissioner) pursuant to section 59 of the *Special Import Measures Act*. In these redeterminations, the Commissioner confirmed that the goods in issue, women's waterproof boots imported by M & M Footwear Inc. from the People's Republic of China, were goods of the same description as the goods to which the Tribunal's findings in Inquiry No. NQ-89-003 apply and are therefore subject to anti-dumping duties. In particular, the Commissioner found that the goods in issue did not meet the definition of excluded waterproof plastic footwear, as described in the Tribunal's statement of reasons. M & M Footwear Inc. submitted that, as waterproof plastic footwear, the goods in issue were excluded from the findings.

HELD: The appeal is allowed. The Tribunal finds that the goods in issue meet the extended definition of waterproof plastic footwear set out in its statement of reasons in Inquiry No. NQ-89-003 and, consequently, are excluded from the findings. Accordingly, they are not goods of the same description as those to which the Tribunal's findings apply.

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	April 3, 2002
Date of Decision:	May 8, 2003
Tribunal Members:	James A. Ogilvy, Presiding Member Pierre Gosselin, Member Zdenek Kvarda, Member
Counsel for the Tribunal:	Dominique Laporte
Clerk of the Tribunal:	Anne Turcotte
Appearances:	Greg Kanargelidis and Glenn F. Leslie, for the appellant Louis Sébastien, for the respondent

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Appeal No. AP-2001-070

M & M FOOTWEAR INC. **Appellant**

AND

THE COMMISSIONER OF THE CANADA CUSTOMS AND REVENUE AGENCY **Respondent**

TRIBUNAL: JAMES A. OGILVY, Presiding Member
PIERRE GOSSELIN, Member
ZDENEK KVARDA, Member

REASONS FOR DECISION

This is an appeal under section 61 of the *Special Import Measures Act*[1] from eight redeterminations dated August 31, 2001, made by the Commissioner of the Canada Customs and Revenue Agency (the Commissioner) pursuant to section 59 of *SIMA*. In these redeterminations, the Commissioner confirmed that the goods in issue, women's waterproof boots imported by M & M Footwear Inc. (M & M) from the People's Republic of China, were goods of the same description as the goods to which the Tribunal's findings in Inquiry No. NQ-89-003[2] apply and are therefore subject to anti-dumping duties. In particular, the Commissioner found that the goods in issue did not meet the definition of excluded waterproof plastic footwear, as described in the Tribunal's statement of reasons. The goods in issue were all released from Customs between September 1 and November 30, 2000.

The Tribunal's findings in Inquiry No. NQ-89-003 state, in part, the following:

> Pursuant to subsection 43(1) of the *Special Import Measures Act*, the Canadian International Trade Tribunal hereby finds:
>
> (1) that the dumping in Canada of women's leather boots originating in or exported from Brazil, Poland, Romania and Yugoslavia and of women's leather and non-leather boots originating or exported from the People's Republic of China and Taiwan, and the subsidizing of women's leather boots from Brazil have caused, are causing and are likely to cause material injury to the production in Canada of like goods.
>
> The aforementioned findings do not include sandals, slippers, sports footwear, waterproof rubber footwear, **waterproof plastic footwear**, safety footwear incorporating protective metal toe caps, orthopedic footwear, wooden shoes, disposable footwear, bowling shoes, curling shoes, moto-cross racing boots and canvas footwear. [Emphasis added]

The statement of reasons in Inquiry No. NQ-89-003 describes the subject goods as follows:

> The product which was the subject of the inquiry was described in the preliminary determination of dumping and subsidizing as women's shoes and boots with uppers made of leather and non-leather materials and manufactured in sizes 4 and up (European equivalent: 34 and up).

1. R.S.C. 1985, c. S-15 [*SIMA*].
2. *Women's Boots and Shoes* (3 May 1990) (CITT). The findings were continued, with amendments, in Review No. RR-94-003 (2 May 1995) (CITT) and Review No. RR-99-003 (1 May 2000) (CITT).

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> Specifically excluded from the class of goods under inquiry were sandals, slippers, sports footwear, waterproof rubber footwear, **waterproof plastic footwear**, safety footwear incorporating protective metal toe caps, orthopedic footwear, wooden shoes and canvas footwear.
>
> Waterproof rubber footwear and waterproof plastic footwear were defined as footwear with outer soles and uppers made of rubber or plastic, the uppers of which were neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes. The term "outer sole" meant that part of the footwear (other than an attached heel) which, when in use, was in contact with the ground. The "upper" was the part of the shoe or boot above the sole. Where a single piece of material was used to form the sole and either the whole or part of the upper, the upper was generally defined as that portion of the shoe which covered the sides and top of the foot. For further clarity, plastic or rubber footwear with tops assembled by stitching was excluded from the inquiry if the upper was moulded to a height in the near vicinity of the ankle and was free of stitching or fastenings below that level. For example, footwear commonly known as "duck boots" or "bean boots" were not subject to this inquiry. [Emphasis added]

The matter before the Tribunal is whether the goods in issue are goods of the same description as the goods to which the findings apply.

EVIDENCE

Mr. Claude Potvin, Vice-President of M & M Footwear Inc., appeared as a witness. He briefly explained that M & M was both a manufacturer and an importer of footwear. He stated that M & M started importing women's waterproof footwear in 1998 and that the waterproof nylon boots in issue were introduced in the fall of 2000. He indicated that, given that the manufacturing process of the goods in issue is very labour intensive, there was no manufacturer in Canada.

Regarding the manufacturing process, Mr. Potvin stated that the upper was made of an exterior nylon that covered a main polyvinyl chloride (PVC) layer and that there was a polyester fibre backing. The outsole is made of polyurethane that is injected into the upper using the injection moulding process. He noted that the PVC layer was the biggest part of the upper. The nylon outer layer and the PVC layer found behind the nylon are cemented together. He stated that a PVC backing was applied to the nylon to cover its entire surface and that the backing was then cemented on top of the PVC layer in order to form three layers. The resulting material is cut into pieces which are stitched together to make an upper in the shape of a boot. Waterproof glue is subsequently applied on the seam from inside the upper, a lining is stitched together with the upper, and the outsole is injection moulded to the upper. Finally, an insole is added. When asked whether the stitching was only cosmetic, as stated in M & M's brief, Mr. Potvin explained that it was cosmetic because the waterproof effect was not created by the stitching and that it later becomes irrelevant, as the upper is held together by the PVC backing . He added that, at the time of the Tribunal's initial findings, the goods in issue were not manufactured in Canada and that the findings were put in place to protect the boots assembled by stitching the upper to the bottom, which were made in Canada.

Dr. James Guillet, Professor Emeritus in the Chemistry Department of the University of Toronto, appeared on M & M's behalf. Dr. Guillet was qualified by the Tribunal as an expert in polymer science, with particular expertise in synthetic fibres, coatings and plastics. He testified that the PVC component of the upper and the nylon exterior covering were plastics. He stated that the fact that the nylon has been made in the form of a fibre, to be woven into a textile, was without importance for its qualification as a plastic. He also indicated that nylon, in its primary form, is a polyamide. He indicated that, in his view, the term "primary form" means particles or pellets of plastic before they are formed into the fibre.

The Commissioner called Mr. Paul B. Loo, a chemist with the Textile and Polymer Products Section of the Laboratory and Scientific Services Directorate of the Canada Customs and Revenue Agency, as a witness. Mr. Loo was qualified as an expert in synthetic fibres of nylon and of polyester. He stated that the complete upper of the goods in issue was made of an exterior layer of a woven nylon fabric which has been laminated to a cellular PVC layer that is reinforced with another textile backing. He agreed with Dr. Guillet's position that nylon, as a fibre or in woven form, remains a plastic or, more precisely, a polymer. Nevertheless, as the nylon is manufactured in textile form, it is considered a textile product. In his view, the nylon used in the goods in issue meets the definition of "man-made fibres" in the notes to Chapter 54 of the *Customs Tariff*.[3] Regarding the purpose of the stitching, Mr. Loo indicated that it gives the form required to have a boot shape and also provides some cosmetic features. Also, Mr. Loo indicated that the goods in issue were waterproof.

ARGUMENT

It was M & M's position that the goods in issue are "waterproof plastic footwear" and, therefore, not subject to the findings. M & M cited a Tribunal decision[4] in support of its position that the starting point in the analysis is whether the term "waterproof plastic footwear", as used in the findings, is ambiguous. If there is no ambiguity and the goods in issue qualify as "waterproof plastic footwear", the findings are determinative, and the Tribunal must not refer, in the present appeal, to its detailed statement of reasons. M & M argued that the Tribunal did not need to look further than the terms of its findings in Inquiry No. NQ-89-003 in order to decide whether the goods in issue are subject to the findings or are excluded as "waterproof plastic footwear". Accordingly, M & M contended, the only disputed matter was whether plastic includes nylon, as both parties agreed that the goods in issue were waterproof. Relying on Dr. Guillet's testimony that nylon is a plastic, and remains as such even in the form of a yarn or fabric, M & M submitted that the goods in issue clearly meet the definition of "waterproof plastic footwear".

In respect of the Commissioner's contention that the nylon used to make the upper is a textile, M & M argued that this conclusion was based on the laboratory reports, the latter being based entirely on the *Harmonized Commodity Description and Coding System*.[5] M & M submitted that the rules of tariff classification are not relevant in the present case and are intended for a different purpose. The issue of whether nylon is to be considered a textile is, in M & M's view, not relevant, given that the issue is whether nylon is a plastic. M & M submitted that, according to Dr. Guillet's expert testimony, nylon is a plastic, and remains such even when it is extruded into a nylon yarn or woven into a nylon fabric. Moreover, the goods in issue clearly qualify as "plastic" within the express terms of the final determination of dumping and subsidizing made by the Deputy Minister on April 3, 1990. This definition refers not to a final product but to the raw material, since it is clear that an upper cannot be constructed of plastic in primary form. Given that heading No. 39.08 of the schedule to the *Customs Tariff* covers "[p]olyamides in primary forms", and since the *Explanatory Notes to the Harmonized Commodity Description and Coding System*[6] to that heading confirm that nylon is a polyamide, it is clear that the goods in issue qualify as "plastic" for purposes of the definition of the exclusion for "waterproof plastic footwear".

In the event that the Tribunal needs to refer to the extended definition of "waterproof plastic footwear" in its statement of reasons, M & M argued, the extended definition does not provide any further guidance on the definition of "plastic" and the ordinary meaning therefore continues to apply. Accordingly,

3. S.C. 1997, c. 36.
4. *2703319 Canada Inc. O/A VWV Enterprises* (6 February 1998), AP-96-211 (CITT) [*VWV Enterprises*].
5. Customs Co-operation Council, 1st ed., Brussels, 1987.
6. Customs Co-operation Council, 2d ed., Brussels, 1996 [*Explanatory Notes*].

the nylon upper is considered a plastic. M & M also submitted that the goods in issue were recently considered in Inquiry No. NQ-2000-004[7] and that the Tribunal found that they were neither produced nor about to be produced in Canada and that no substitutable products were available from domestic production. The goods in issue were also excluded from the finding in Inquiry No. NQ-2000-004 on the basis that they did not compete with domestic production of like goods. This, in M & M's view, confirms that the goods in issue are not causing injury to domestic production and that there is no policy basis for imposing anti-dumping duties on such goods. The imposition of anti-dumping duties on non-injurious goods is anomalous and should be avoided.

In reply to the Commissioner's argument that stitching is present below the level of the ankle and that, therefore, the goods in issue do not meet the requirement of the extended definition of waterproof plastic footwear, M & M argued that this part of the definition applied only to one-piece boots and not to two-piece boots with a stitched upper attached to the sole by injection moulding. It submitted that this was meant to cover a very specific product and did not apply to the goods in issue. In addition, M & M pointed out that the requirement not to have stitching must be linked to the intent of the exclusion not to cover waterproof plastic footwear. In the case of the goods in issue, the stitching does not impair the waterproof quality.

The Commissioner argued that the parties agreed on several points, but disagreed on whether the fact that the nylon upper is in textile form is sufficient for the goods in issue to be excluded from the definition of "waterproof plastic footwear". In the Commissioner's view, the fact that the nylon has been further manufactured to a sufficient degree that it is now in textile form is enough for the goods in issue to be excluded from the definition of "waterproof plastic footwear". The Commissioner also pointed out that stitching was present on the upper below the ankle level and that, consequently, the goods in issue did not meet that requirement of the extended definition in order to be excluded from the findings.

Regarding the extended definition in the statement of reasons, the Commissioner, relying on a decision of the Federal Court of Appeal,[8] submitted that recourse can be had to the definition not only if the terms of the findings are ambiguous, but also to clarify the meaning of the terms of the findings. With respect to the definition of plastic found in the final determination of dumping and subsidizing, the Commissioner submitted that the Tribunal purposely omitted it from the statement of reasons. He argued that the Tribunal, the final drafter of the applicable exclusions, determined the scope of the subject goods.

DECISION

In this appeal, the Tribunal must determine whether the goods in issue are of the same description as the goods to which its findings in Inquiry No. NQ-89-003 apply. The findings specifically exclude waterproof plastic footwear, as noted earlier.

The first question that the Tribunal must decide is whether it must resort to the extended definition of "waterproof plastic footwear" in its statement of reasons.

The Federal Court of Appeal, when determining if recourse to the definition was required in order to determine the meaning of the term "sports footwear", stated that the immediate question was whether the

7. *Waterproof Footwear and Bottoms* (8 December 2000) (CITT).
8. *Deputy M.N.R. (Customs and Excise) v. Trane Company of Canada*, [1982] 2. F.C. 206 (C.A.).

meaning was clear on its face.[9] It noted: "The reality is that the category of 'sports footwear' is a trade term of indeterminate meaning which connotes a broad range of footwear. For example, it would be difficult to distinguish between some athletic and leisure shoes. I conclude, therefore, that the term 'sports footwear', standing alone, is ambiguous."[10] The Tribunal finds that this reasoning applies equally to the term "waterproof plastic footwear". On that basis, it may, and indeed should, have recourse to the extended definition of "waterproof plastic footwear" in its statement of reasons.

The extended definition provides as follows

> Waterproof rubber footwear and waterproof plastic footwear **were defined** as footwear with outer soles and uppers made of rubber or plastic, the uppers of which were neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes. The term "outer sole" meant that part of the footwear (other than an attached heel) which, when in use, was in contact with the ground. The "upper" was the part of the shoe or boot above the sole. Where a single piece of material was used to form the sole and either the whole or part of the upper, the upper was generally defined as that portion of the shoe which covered the sides and top of the foot. For further clarity, plastic or rubber footwear with tops assembled by stitching was excluded from the inquiry if the upper was moulded to a height in the near vicinity of the ankle and was free of stitching or fastenings below that level. For example, footwear commonly known as "duck boots" or "bean boots" were not subject to this inquiry. [Emphasis added]

In *J.V. Marketing*, the Federal Court of Appeal noted that the use of the expression "were defined", in contrast with the use of the expression "were generally defined", suggests that the definition is exhaustive.[11] The Tribunal agrees. Therefore, in order to qualify as "waterproof plastic footwear", the goods in issue must meet the requirements of the extended definition. Failure to meet any of the requirements will result in the goods in issue being excluded from the definition.

One of the requirements of the extended definition is that the outer soles and uppers of the goods in issue be made of rubber or plastic. M & M contended, in light of Dr. Guillet's expert testimony, that this requirement was met, as the uppers are made of nylon, which is a plastic. On the other hand, the Commissioner argued that, given that the nylon has been further manufactured into textile form, this is enough for the goods in issue to be excluded from the definition of "waterproof plastic footwear".

The extended definition of "waterproof plastic footwear" in the Tribunal's statement of reasons does not indicate what types of materials are considered plastics. It is the Tribunal's usual practice, in such circumstances, to give words their common meanings and to be guided, for example, by dictionary definitions. However, in this instance, Appendix C to the final determination of dumping and subsidizing, entitled "Product Definition Guidelines", provides a definition of the term "plastic". That definition of "waterproof rubber footwear and waterproof plastic footwear", from which the Tribunal's extended definition is drawn, includes an additional paragraph that reads as follows:

> The term "plastic" is defined as those materials of headings 39.01 to 39.14 of the Harmonized System which are or have been capable, either at the moment of polymerisation or at some

9. See *J.V. Marketing Inc. v. Canadian International Trade Tribunal* (29 November 1994), A—1349—92 (F.C.A.) [*J.V. Marketing*].
10. *Ibid.* at 5.
11. For example, the definition states that *"***[s]ports footwear was generally defined** as footwear which was designed for a sporting activity and had, or had provision for, the attachment of spikes, sprigs, stops, clips, bars or the like. It also included skating boots, ski boots, cross-country ski footwear, wrestling boots, boxing boots, cycling boots, bowling shoes, curling shoes and moto-cross racing boots. For purposes of this inquiry, sports footwear also referred to tennis shoes, jogging shoes and running shoes." [Emphasis added]

> subsequent stage, of being formed under external influence (usually heat and pressure, if necessary with a solvent or plasticiser) by moulding, casting, extruding, rolling or other process into shapes which are retained on the removal of the influence.[12]

Before going any further, the Tribunal must determine whether it can take this definition into account. The Commissioner submitted that the Tribunal purposely omitted the definition of "plastic" of Appendix C to the final determination of dumping and subsidizing. He argued that the Tribunal, the final drafter of the applicable exclusions, determined the scope of the subject goods. The Tribunal adopts a different view. Section 42 of *SIMA* reads, in part, as follows:

> 42. (1) The Tribunal, forthwith after receipt by the Secretary pursuant to subsection 38(3) of a notice of a preliminary determination, shall make inquiry with respect to such of the following matters as is appropriate in the circumstances:
>
> (*a*) **in the case of any goods to which the preliminary determination applies**, as to whether the dumping or subsidizing of **the goods**
>
> (i) has caused injury or retardation or is threatening to cause injury. [Emphasis added]

In *VWV Enterprises*, in the context of an appeal under section 61 of *SIMA*, which also relates to the same findings, the Tribunal explained the nature of its findings and noted that *SIMA* establishes a bifurcated regime which provides to a Canadian industry relief from material injury, retardation and threat of material injury caused by the effects of dumping and subsidizing. It went on to say that the Deputy Minister of National Revenue was responsible for investigating and determining whether dumped or subsidized goods were being imported into Canada. The Tribunal stated that it was clear, based on the plain wording of the relevant sections of *SIMA* and, more generally, on the bifurcated regime established under *SIMA*, that it was the respondent who defined what goods were subject to an investigation and what goods would ultimately form the starting point for the Tribunal's inquiry.[13] The Tribunal concurs and notes that, in its statement of reasons, under the section entitled "The Product", it expressly used the following wording: "The product which was the subject of the inquiry was **described in the preliminary determination of dumping and subsidizing**". [Emphasis added] In addition, it is clear that the wording of the Tribunal's extended definition comes from the preliminary and final determinations of dumping and subsidizing. Unless an exclusion from an injury finding is granted by the Tribunal for specific goods, it is well settled in law that the Tribunal has no jurisdiction over the scope of the definition of the subject goods.[14] The corollary is that for the Tribunal to redefine the goods would be an excess of jurisdiction.[15] It is the Tribunal's usual practice to reproduce, in its statement of reasons, the "Product Information" section of the Commissioner's preliminary or final determination of dumping and subsidizing. The Tribunal notes that nowhere is it mentioned that the Tribunal intended to do otherwise and is of the view that the omission of the definition of plastic, as well as any other changes, were made inadvertently. There is also no doubt that the source of this definition is Appendix C to the final determination of dumping and subsidizing. Accordingly, the Tribunal finds it appropriate to rely on that appendix for guidance in clarifying the definition of "waterproof plastic footwear" in its statement of reasons.

M & M submitted that nylon, described by Dr. Guillet as a polyamide, falls in heading No. 39.08, which provides for "[p]olyamides in primary forms." The *Explanatory Notes* to this heading state, in part, that "[t]his heading covers polyamides and copolymers thereof. Linear polyamides are known as nylons."

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12. Tribunal Exhibit NQ-89-003-4, Administrative Record, Vol. 1A at 1.114.
13. See *DeVilbiss (Canada) Ltd. v. Anti-dumping Tribunal*, [1983] 1 F.C. 706 (C.A.).
14. *Deputy M.N.R. v. General Electric Canada Inc.* (1 June 1994), A—388—93 (F.C.A.).
15. *Ibid.*

Note 6 to Chapter 39 of the *Customs Tariff* provides that the expression "primary forms" applies only to liquids and pastes, including dispersions (emulsions and suspensions) and solutions, blocks of irregular shape, lumps, powders (including moulding powders), granules, flakes and similar bulk forms. Moreover, Notes 1 and 2 to Chapter 39 make it clear that the reference to "plastics" does not apply to materials regarded as textile materials of Section XI. Nylon in textile form is covered under Chapter 54, which includes, among other things, nylon yarn.

The Tribunal is satisfied that nylon is a polyamide and, in its primary form, would be classifiable in heading No. 39.08. However, the issue is whether a nylon textile would still meet the definition of "plastic" in Appendix C to the final determination of dumping and subsidizing even if not in primary form. In the Tribunal's view, the fact that nylon is present in textile form does not preclude it from meeting the definition of "plastic". Once the plastic is part of a boot, it can of course no longer be in primary form. The requirement that it be in primary form, although pertinent in the context of the whole tariff nomenclature, would be inapplicable here and can only be interpreted as referring to the raw material and not to the final product. In light of the above, given that the upper of the goods in issue is made of nylon, and as nylon is a polyamide covered in heading No. 39.08, the Tribunal finds that the goods in issue are made of "plastic" as defined in Appendix C. It also notes that, even without relying on the definition of "plastic" found in Appendix C, it would have come to the same conclusion. Indeed, Dr. Guillet's expert testimony and the literature filed with the Tribunal leave no doubt that nylon, being a polymer, is a plastic. The fact that it has been further transformed into a textile is, in the Tribunal's view, irrelevant. Therefore, in the Tribunal's view, the definition of "waterproof plastic footwear" can include footwear with uppers made of nylon in textile form.

Having found that the uppers of the goods in issue are made of plastic, the Tribunal must now determine whether they meet the other requirements of the definition of "waterproof plastic footwear". For a better understanding, it is necessary to refer again to the extended definition of "waterproof plastic footwear".

One of the requirements of the definition is that the uppers not be fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes. The definition also provides that plastic footwear with tops assembled by stitching was excluded from the inquiry if the upper was moulded to a height in the near vicinity of the ankle and was free of stitching or fastenings below that level.

Mr. Potvin testified that the outsole was fastened to the upper by injection moulding. He stated that stitching was present on the uppers and that it served the purpose of holding the pieces of the uppers together. The next question that the Tribunal must answer is whether the stitching, which is found below the ankle level, excludes the goods in issue from the definition of "waterproof plastic footwear". A reading of the phrase "the uppers of which were neither fixed to the sole" yields the clear meaning that the soles must not be fastened to the uppers by any of the methods named. However, the subsequent phrase "nor assembled" leads to two possible interpretations. The first is that the upper itself must not be assembled by any of these methods, including stitching. The second is that the upper and the sole must not be assembled together into a whole boot by any of these methods. In the Tribunal's view, both interpretations may be seen as valid.

The English and French versions of the definition of "waterproof rubber footwear and waterproof plastic footwear" in Appendix C of the final determination of dumping and subsidizing read, in part, as follows:

Waterproof rubber footwear and waterproof plastic footwear are defined as footwear with	*Les chaussures imperméables en caoutchouc et les chaussures imperméables en plastique sont*

outer soles and uppers of rubber or of plastics, the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes. The term "outer sole" means that part of the footwear (other than an attached heel) which, when in use, is in contact with the ground. The upper is the part of the shoe or boot above the sole. Where a single piece of material is used to form the sole and either the whole or part of the upper, the upper is generally defined as that portion of the shoe which covers the sides and top of the foot.	*définies comme étant des chaussures dont les semelles extérieures et le dessus sont fabriqués de caoutchouc ou de plastique. Le dessus n'est ni fixé à la semelle, ni retenu à celle-ci par des coutures, des rivets, des clous, des vis, des goujons ou un autre dispositif semblable. L'expression « semelle extérieure » s'entend de la partie de la chaussure qui, à part un talon ajouté, est en contact avec le sol lorsque l'on marche. Le dessus est la partie du soulier ou de la botte au-dessus de la semelle. Lorsqu'une seule pièce de matières premières est utilisée pour former la semelle et la totalité ou une partie du dessus, on définit généralement le dessus comme étant la partie de la chaussure couvrant les côtés et le dessus du pied.*

The Tribunal notes that the French text provides that "*[l]e dessus n'est ni fixé à la semelle, ni retenu à celle-ci par des coutures, des rivets, des clous, des vis, des goujons ou un autre dispositif semblable*", in contrast with the English text, which provides that "the uppers of which are neither fixed to the sole nor assembled by stitching, riveting, nailing, screwing, plugging or similar processes." In the French definition, both phrases clearly refer to the way in which the upper is attached **to the sole**: "*ni fixé **à la semelle** ni retenu **à celle-ci***". [Emphasis added]

As explained earlier, the Tribunal finds that recourse to the final determination of dumping and subsidizing is permissible and helps in ascribing the meaning to be given to the Tribunal's extended definition. For unknown reasons, the French version of the Tribunal's extended definition does not reflect the French version of the final determination.[16] However, as there is no indication that the Tribunal intended to modify the scope of the subject goods, and since the Tribunal's extended definition was based on the final determination, the Tribunal finds that the French version of Appendix C to the final determination clarifies the meaning to be given to the specific wording of the Tribunal's extended definition. As a result, the Tribunal finds that the fact that parts of the uppers of the goods in issue are assembled together by stitching does not preclude them from meeting the requirements of the extended definition of "waterproof plastic footwear".

The Tribunal must now deal with the part of the definition that excludes footwear with tops assembled by stitching if the upper is moulded to a height in the near vicinity of the ankle and is free of stitching or fastening below that level. The Commissioner argued that the goods in issue fail to meet this requirement. On the other hand, M & M argued that this part of the definition applied only to one-piece boots and not to two-piece boots with a stitched upper attached to the sole by injection moulding. It submitted that this was meant to cover a specific product and did not apply to the goods in issue. In addition, M & M submitted, the requirement not to have stitching must be linked to the intent of the exclusion not to cover waterproof plastic footwear. In the case of the goods in issue, M & M submitted that the stitching does not impair the waterproof quality.

In the Tribunal's view, this exclusion, which is part of the extended definition, does not limit the range of waterproof plastic footwear covered by the first part of the extended definition. Its purpose is to indicate with more clarity which products do not meet this definition and to expressly exclude a specific kind of footwear. Further, the Tribunal finds that this second part does not apply to the goods in issue, as

16. It is the Tribunal's normal practice to use the original text.

they do not have moulded uppers. Therefore, the fact that the goods in issue do not meet this specific exclusion, given that they are not free of stitching below ankle level, is not relevant, as they still meet the extended definition of "waterproof plastic footwear".

Therefore, the Tribunal concludes that the goods in issue meet the definition of waterproof plastic footwear, are excluded from the findings and are not goods of the same description as those to which the Tribunal's findings apply.

For the foregoing reasons, the appeal is allowed.

James A. Ogilvy
James A. Ogilvy
Presiding Member

Pierre Gosselin
Pierre Gosselin
Member

Zdenek Kvarda
Zdenek Kvarda
Member