



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2008-006

Cobra Anchors Co. Ltd.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Friday, May 8, 2009*

TABLE OF CONTENTS

DECISION.....	i
STATEMENT OF REASONS	1
BACKGROUND.....	1
SUBJECT GOODS	1
PROCEDURAL HISTORY	2
PHYSICAL EXHIBITS.....	2
ANALYSIS	3
Law	3
Are the Goods in Issue of the Same Description as the Subject Goods?.....	4
Can the Goods in Issue Be Disassembled for the Purpose of Imposing Anti-dumping Duties?	6
DECISION	6

IN THE MATTER OF an appeal heard on January 14, 2009, under section 61 of the *Special Import Measures Act*, R.S.C. 1985, c. S-15;

AND IN THE MATTER OF decisions of the President of the Canada Border Services Agency, dated April 23, 2008, with respect to requests for re-determinations under section 59 of the *Special Import Measures Act*.

BETWEEN

COBRA ANCHORS CO. LTD.

Appellant

AND

**THE PRESIDENT OF THE CANADA BORDER SERVICES
AGENCY**

Respondent

DECISION

The appeal is allowed.

Pasquale Michael Saroli
Pasquale Michael Saroli
Presiding Member

Ellen Fry
Ellen Fry
Member

Diane Vincent
Diane Vincent
Member

Hélène Nadeau
Hélène Nadeau
Secretary

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	January 14, 2009
Tribunal Members:	Pasquale Michael Saroli, Presiding Member Ellen Fry, Member Diane Vincent, Member
Counsel for the Tribunal:	Eric Wildhaber
Research Director:	Audrey Chapman
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PARTICIPANTS:**Appellant**

Cobra Anchors Co. Ltd.

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Respondent

President of the Canada Border Services Agency

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WITNESSES:

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STATEMENT OF REASONS

BACKGROUND

1. This is an appeal filed with the Canadian International Trade Tribunal (the Tribunal) by Cobra Anchors Co. Ltd. (Cobra) pursuant to section 61 of the *Special Import Measures Act*¹ from decisions of the President of the Canada Border Services Agency (CBSA) dated April 23, 2008, with respect to requests for re-determinations under section 59.

2. The issue in this appeal is whether certain goods imported into Canada by Cobra (the goods in issue) are of the same description as the goods subject to the Tribunal findings in *Certain Fasteners*² (the subject goods) made under subsection 43(1) of *SIMA*, and therefore subject to the imposition of anti-dumping duties.

3. The goods in issue are six different sealed clamshell-type retail packages containing two zinc “shields”³ and two steel “lag bolts”⁴ of a length and diameter that work with the shields. The shield, when used together with the lag bolt, is a friction-type anchoring system designed for use in base materials, such as concrete, brick, block and stone, that are not suitable for directly receiving a lag bolt. Typical applications include the support of shelving, awnings, signs and ornamental fixtures. Holes are drilled into the base materials before the shields are fastened in place by the corresponding lag bolts. The holding power is derived through the creation of a frictional force between the shields and lag bolts and the base materials.

4. The CBSA determined that the lag bolt components of the goods in issue were of the same description as the subject goods and that, accordingly, anti-dumping duties were payable on the lag bolts.

5. Cobra argued that, as a component of the goods in issue (which it described as consumer-ready “anchor kits” put up in packages for retail sale), the lag bolts were not goods of the same description as the subject goods and, therefore, were not subject to anti-dumping duties.

6. Subsection 61(3) of *SIMA* allows the Tribunal to “. . . make such order or finding as the nature of the matter may require and . . . declare what duty is payable or that no duty is payable on the goods with respect to which the appeal was taken . . .” In the present circumstances, the Tribunal must determine whether the goods in issue are of the same description as the subject goods.

SUBJECT GOODS

7. The Tribunal’s findings in *Certain Fasteners* describe the subject goods as follows:

[C]arbon steel and stainless steel fasteners, i.e. screws, nuts and bolts of carbon steel or stainless steel that are used to mechanically join two or more elements . . . originating in or exported from the People’s Republic of China . . .

The statement of reasons indicates as follows:

A screw is a headed and externally threaded mechanical device that possesses capabilities which permit it to be inserted into holes in assembled parts, to be mated with a pre-formed internal thread or to form its own thread, and to be tightened or released by torquing its head. Screws include machine screws, wood screws, self-drilling, self-tapping, thread forming, and sheet metal screws. Screws may

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

2. (7 January 2005), NQ-2004-005 (CITT) [*Certain Fasteners*].

3. Commonly known as “anchors”.

4. Although the parties refer to “lag bolts” interchangeably as “lag bolts” or “lag screws”, for clarity, they are referred to as “lag bolts” in this statement of reasons.

have a variety of head shapes (round, flat, hexagonal, etc.), drives (slot, socket, square, phillips, etc.), shank lengths and diameters. The shank may be totally or partially threaded.⁵

PROCEDURAL HISTORY

8. The goods in issue, comprising six models of anchor kits, were imported into Canada from the People's Republic of China (China) by Cobra, a manufacturer and distributor of anchoring products, in four separate transactions that occurred between April 2006 and May 2007.

9. Between November 2006 and June 2007, the CBSA issued a Detailed Adjustment Statement for each transaction, determining, pursuant to section 57 of *SIMA*, that the goods imported into Canada were subject goods.

10. On August 22, 2007, the CBSA issued an advance ruling stating that the goods in issue were, for tariff purposes, properly classified under tariff item No. 7907.00.90 of the schedule to the *Customs Tariff*⁶ as other articles of zinc.

11. In April and September 2007, pursuant to section 58 of *SIMA*, Cobra appealed the CBSA's decisions made under section 57.

12. On April 23, 2008, the CBSA determined, pursuant to section 59 of *SIMA*, that the lag bolt components of the goods in issue were subject goods and that the lag screw shield components were not.

13. On July 8, 2008, pursuant to section 61 of *SIMA*, Cobra filed an appeal with the Tribunal from the CBSA's decisions with respect to the requests for re-determinations under section 59.

14. The Tribunal held a public hearing in Ottawa, Ontario, on January 14, 2009.

15. Cobra called one witness, Mr. Pierre L. McDuff, President, Cobra. The CBSA called one witness, Mr. Richard Pragnell, Senior Program Officer, Anti-Dumping and Countervailing Program, CBSA.

PHYSICAL EXHIBITS

16. On November 17, 2008, Cobra filed the following physical exhibits:

Exhibit Number	Description
A-01	280SJ425-1/4S (242 S): 2 lag screw shields with screws, 1/4 in., short
A-02	280SJ510-5/16S (243 S): 2 lag screw shields with screws, 5/16 in., short
A-03	280SJ560-3/8S (244 S): 2 lag screw shields with screws, 3/8 in., short
A-04	280SL436-1/4L (252 S): 2 lag screw shields with screws, 1/4 in., long
A-05	280SL515-5/16L (253 S): 2 lag screw shields with screws, 5/16 in., long
A-06	280SL567-3/8L (254 S): 2 lag screw shields with screws, 3/8 in., long

5. At para. 19. In *APR Imports Ltd. v. Deputy M.N.R.C.E.* (28 February 1994), AP-93-141 (CITT) at 3, the Tribunal stated as follows: "... In deciding whether anti-dumping duties are payable, it is the description of the goods in the Tribunal's finding itself that is determinative. However, the Tribunal may seek guidance in interpreting the description of the goods in the finding by referring to the product description in the statement of reasons ..."

6. S.C. 1997, c. 36.

17. On December 24, 2008, the CBSA filed the following physical exhibits:

Exhibit Number	Description
B-01	2 lag screws, 5/16 in. and 2 1/2 in.
B-02	15 lag screw shields, 5/16 in.
B-03	2 lag screw shields with screws
B-04	2 lag shields (red head), 5/16 in.
B-05	4 lead shields with screws (red head)

ANALYSIS

Law

18. Section 61 of *SIMA* provides as follows:

61. (1) Subject to section 77.012 or 77.12, a person who deems himself aggrieved by a re-determination of the [CBSA] made pursuant to section 59 with respect to any goods may appeal therefrom to the Tribunal by filing a notice of appeal in writing with the [CBSA] and the Secretary of the Tribunal

...

(3) On any appeal under subsection (1), the Tribunal may make such order or finding as the nature of the matter may require and, without limiting the generality of the foregoing, may declare what duty is payable or that no duty is payable on the goods with respect to which the appeal was taken, and an order, finding or declaration of the Tribunal is final and conclusive subject to further appeal as provided in section 62.

61. (1) Sous réserve des articles 77.012 et 77.12, quiconque s'estime lésé par un réexamen effectué en application de l'article 59 peut en appeler au Tribunal en déposant, auprès du président et du secrétaire du Tribunal [...] un avis d'appel.

[...]

(3) Le Tribunal, saisi d'un appel en vertu du paragraphe (1), peut rendre les ordonnances ou conclusions indiquées en l'espèce et, notamment, déclarer soit quels droits sont payables, soit qu'aucun droit n'est payable sur les marchandises visées par l'appel. Les ordonnances, conclusions et déclarations du Tribunal sont définitives, sauf recours prévu à l'article 62.

19. Anti-dumping duties are payable when the goods imported into Canada are of the same description as the goods in respect of which the Tribunal has made an order or finding under section 43 of *SIMA*. Subsection 3(1) provides as follows:

3. (1) Subject to section 7.1, there shall be levied, collected and paid on all dumped and subsidized goods imported into Canada in respect of which the Tribunal has made an order or finding, before the release of the goods, that the dumping or subsidizing of goods of the same description has caused injury . . . a duty as follows:

(a) in the case of dumped goods, an anti-dumping duty in an amount equal to the margin of dumping of the imported goods; and

...

3. (1) Sous réserve de l'article 7.1, les marchandises sous-évaluées ou subventionnées importées au Canada alors que le Tribunal a établi avant leur dédouanement, par ordonnance ou dans ses conclusions, que le dumping ou le subventionnement de marchandises de même description a causé un dommage [...] sont assujetties aux droits suivants :

a) dans le cas de marchandises sous-évaluées, des droits antidumping d'un montant égal à la marge de dumping des marchandises;

[...]

Are the Goods in Issue of the Same Description as the Subject Goods?

20. Cobra claimed that the goods in issue are anchor kits containing a specific number of zinc shields and a matching number of correspondingly sized steel lag bolts. Cobra submitted that the imported goods are not screws, nuts or bolts and that, while the anchor kits include one or more lag bolts, they are different from their individual components. In this regard, Cobra submitted that the Tribunal's findings in *Certain Fasteners* do not cover the goods in issue because the imported goods are not of the same description as the subject goods, which are carbon steel *screws* originating in or exported from China and Chinese Taipei and stainless steel *screws* originating in or exported from Chinese Taipei.

21. Cobra submitted that the CBSA's position to the effect that zinc shields in the anchor kits are not subject to anti-dumping and countervailing duties but that the lag bolt components are subject to such duties, implies that two separate goods were imported (i.e. non-subject zinc shields and subject lag bolts) when, in reality, the goods in issue constitute a single product, specifically, consumer-ready anchor kits put up in packages for retail sale, which are not intended to be opened and disassembled prior to retail sale.

22. Cobra submitted that there is no statutory authority that allows the CBSA to disassemble an imported product for the purpose of applying anti-dumping duties to a specific component of that product. Cobra argued that, pursuant to section 3 of *SIMA*, the CBSA is required to calculate anti-dumping duties on the basis of the margin of dumping of the imported goods. In this regard, Cobra asserted that it is well established in customs law that goods are to be classified according to their nature at the time of importation, which, according to Cobra, was not done by the CBSA in this instance.

23. Cobra argued that the factors considered by the Tribunal in *Macsteel International (Canada) Limited v. Commissioner of the Canada Customs and Revenue Agency* are absent in the present case. In particular, the Tribunal, in that decision, determined as follows:

... the goods in issue compete directly with [one another] ... [They] are relatively identical and interchangeable products that can be used for the same applications ... [They] are sold at the same price ...⁷

24. In particular, Cobra submitted that the goods in issue are not relatively identical to, interchangeable with, or used for the same applications as the subject goods. It added that lag bolts and anchor kits are not sold at the same price and that it would not be economical for someone wanting to purchase a lag bolt to purchase an anchor kit.

25. The CBSA submitted that the lag bolt component, not having been determined to be incidental to the anchor kit, falls within the definition of subject goods. It noted that the fact that lag bolts imported separately would have attracted anti-dumping duties was not contested. The CBSA further noted that Cobra also imported lag screw shields separately, which would require the consumer to purchase the corresponding lag bolts independently. Finally, the CBSA indicated that, in *Certain Fasteners*, the Tribunal rejected an exclusion request for "pre-packaged fasteners put up for retail sale".

26. The Tribunal is of the view that the determination of whether goods are goods of the same description as the goods to which a Tribunal finding applies must be based on an examination of the goods as a whole, in the manner in which they were presented at the time of their importation.⁸

7. (16 January 2003), AP-2001-012 (CITT) [*Macsteel*] at 4.

8. See *Deputy M.N.R.C.E. v. MacMillan & Bloedel (Alberni) Ltd.*, [1965] S.C.R. 366. See also *Tiffany Woodworth v. President of the Canada Border Services Agency* (11 September 2007), AP-2006-035 (CITT) at para. 21.

27. In determining whether imported goods are of the same description as goods subject to a Tribunal order or finding, the Tribunal has, in the past, considered a number of criteria, such as physical description, end-use applications, interchangeability, competition in the marketplace, price and marketing.⁹ In this case, considering the manner in which the goods in issue were presented at the time of their importation, the Tribunal finds as follows:

- in terms of physical description, the goods in issue, at the time of their importation, were pre-packaged anchoring kits consisting of a specific number of zinc shields and a matching number of correspondingly sized lag bolts.¹⁰ The imported anchor kits are not covered by the physical description of the subject goods in the Tribunal's findings in *Certain Fasteners*;¹¹
- the anchoring kits have specialized end-use applications in respect of certain surfaces, such as concrete, brick, block and stone, in respect of which a lag bolt alone would not be functionally effective. In this regard, an examination of the goods and related testimony indicates that it is the lag bolt and shield together that give the anchoring system its functionality in these specialized end-use applications, which differ significantly from those of lag bolts alone;¹²
- because of their different end-use applications, anchoring systems and lag bolts are not directly interchangeable products;¹³
- although anchoring systems and lag bolts are displayed near each other in stores in some instances, it is reasonable to conclude that they do not compete with each other in the marketplace. In this respect, Mr. McDuff testified that lag bolts and anchoring kits are typically displayed in different sections of big-box stores.¹⁴ Mr. Pragnell testified that the lag bolts that he purchased were on one side of the aisle, whereas the shields were directly behind him, on the other side of the aisle, as were the kits, which were on the same display shelf as the shields;¹⁵
- the consumer-ready anchoring kits are marketed differently than lag bolts in terms of mode of sale and price, with the latter typically sold in bulk at a significantly lower price.¹⁶ Given the price difference, Cobra and the CBSA agreed that it would not be economically rational for someone wanting to acquire lag bolts to acquire them through the purchase of anchoring kits.¹⁷

28. Given the above analysis, the Tribunal finds that the goods in issue, in the manner in which they were presented at the time of their importation, are not goods of the same description as the subject goods.

9. See, for example, *Nikka Industries Ltd. v. Deputy M.N.R.C.E.* (20 August 1991), AP-90-018 (CITT); *Macsteel; Zellers Inc. v. Deputy M.N.R.* (25 January 1996), AP-94-351 (CITT).

10. Tribunal Exhibit AP-2008-006-06B at 4, 7.

11. During testimony, the witness for Cobra accepted the fact that lag bolts, on their own, are not the same products as anchor kits, stating as follows: "you would have to combine the lag screw with the lag shield" in order to make up the lag screw kit. *Transcript of Public Hearing*, 14 January 2009, at 97-98.

12. Tribunal Exhibit AP-2008-006-03A at 11; *Transcript of Public Hearing*, 14 January 2009, at 43-46, 98-99. The witness for Cobra testified that lag screw shields are a friction-type anchor designed for medium-duty use in concrete, brick, block and stone. They are used in specific applications where screws (or nuts and bolts) would not be able to do the job. The interdependence between the shield and the lag bolt for the proper functioning of the anchor system was confirmed by the witness for the CBSA.

13. Tribunal Exhibit AP-2008-006-03A at 11; *Transcript of Public Hearing*, 14 January 2009, at 45-46, 98-99.

14. *Transcript of Public Hearing*, 14 January 2009, at 9.

15. *Ibid.* at 58, 78.

16. *Ibid.* at 29, 86; Tribunal Exhibit AP-2008-006-15B, Tab 3.

17. *Ibid.* at 29, 86.

Can the Goods in Issue Be Disassembled for the Purpose of Imposing Anti-dumping Duties?

29. In arguing that the lag bolt components of the goods in issue are goods of the same description as the subject goods, the CBSA asserted that the imported goods in this case, anchor kits, are in reality two goods packaged together.¹⁸ In this respect, the CBSA submitted that, since the steel lag bolt component was not incidental to the anchor kit, it was properly taken to fall within the scope of the definition of subject goods.

30. In the Tribunal's view, having found that the steel lag bolt and zinc shield are both integral to the overall ability of the anchoring system to fulfill its functional purpose in respect of the specialized applications for which it was specifically designed, it follows that separating the lag bolt from the anchoring kit and treating it as a separate good for the purpose of applying anti-dumping duties under *SIMA* would deprive the anchoring system (which requires both the lag bolt and shield) of its functionality.¹⁹ Accordingly, it is the Tribunal's view that neither the steel lag bolt nor the zinc shield can properly be considered separately from the goods in issue, of which each forms an integral part.

DECISION

31. Pursuant to subsection 61(3) of *SIMA*, the appeal is allowed.

Pasquale Michael Saroli

Pasquale Michael Saroli
Presiding Member

Ellen Fry

Ellen Fry
Member

Diane Vincent

Diane Vincent
Member

18. *Ibid.* at 46.

19. By contrast, a drill bit included with the anchoring kit could legitimately be considered a separate good, as it would be extraneous to the "functionality" of the anchoring system itself. By way of further example, the bag of screws or lag bolts that came with a barbecue kit, being essential to the assembly of the barbecue, would be "integral" to the functionality of the unit, whereas a barbecue utensil set included with the barbecue kit, being extraneous to the functionality of the unit itself, would be gratuitous and, as such, would properly be considered a separate good.