Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2017-065

Impex Solutions Inc.

v.

President of the Canada Border Services Agency

Decision issued
Monday, May 27, 2019

Reasons issued
Thursday, June 6, 2019

Corrigendum issued
Tuesday, June 18, 2019

Canada

TABLE OF CONTENTS

IN THE MATTER OF an appeal heard on December 3, 2018, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated January 10, 2018, with respect to requests for further re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

IMPEX SOLUTIONS INC. **Appellant**

AND

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

DECISION

The appeal is allowed.

Randolph W. Heggart
Randolph W. Heggart
Presiding Member

The statement of reasons will be issued at a later date.

IN THE MATTER OF an appeal heard on December 3, 2018, pursuant to section 67 of the *Customs Act*, R.S.C., 1985, c. 1 (2nd Supp.);

AND IN THE MATTER OF a decision of the President of the Canada Border Services Agency, dated January 10, 2018, with respect to requests for further re-determination pursuant to subsection 60(4) of the *Customs Act*.

BETWEEN

IMPEX SOLUTIONS INC. **Appellant**

AND

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

CORRIGENDUM

The last sentence of paragraph 47 should read as follows:

The issue of whether or not the goods in issue are excluded on the basis of note 3(b) or (c) to Chapter 56 is therefore moot.

By order of the Tribunal

Randolph W. Heggart
Randolph W. Heggart
Presiding Member

Place of Hearing:	Ottawa, Ontario
Date of Hearing:	December 3, 2018
Tribunal Panel:	Randolph W. Heggart, Presiding Member
Support Staff:	Helen Byon, Lead Counsel Heidi Lee, Counsel

PARTICIPANTS:

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STATEMENT OF REASONS

INTRODUCTION

1. This is an appeal filed by Impex Solutions Inc. (Impex) pursuant to subsection 67(1) of the *Customs Act*[1] from a decision made by the President of the Canada Border Services Agency (CBSA) dated January 10, 2018, pursuant to subsection 60(4).

2. The issue in this appeal is whether certain disposable shoe covers (model No. KBCP525) (the goods in issue) are properly classified under tariff item No. 6307.90.99 of the schedule to the *Customs Tariff*[2] as other made up articles, including dress patterns, of other textile materials, as determined by the CBSA, or should be classified under tariff item No. 3926.20.95 as other articles of apparel and clothing accessories, of plastics combined with knitted or woven fabrics, bolducs, nonwovens or felt, as claimed by Impex.

PROCEDURAL HISTORY

3. The goods in issue were imported in June 2015 and December 2016, under tariff item No. 6307.90.99, consistent with the CBSA Trade Compliance Verification Report dated April 16, 2014, which made certain findings with respect to the tariff classification of goods similar to the goods in issue.

4. On March 1, 2017, the CBSA received adjustment requests from Impex, pursuant to subsection 32.2(2) of the *Act*, to correct the tariff classification of the goods in issue. Impex submitted that the goods in issue should be classified under tariff item No. 3926.20.95. The CBSA treated Impex's correction of the tariff classification as a re-determination under paragraph 59(1)(a). This is reflected on the Detailed Adjustment Statement dated May 10, 2017.

5. On May 17, 2017, the CBSA further re-determined the tariff classification of the goods in issue pursuant to paragraph 59(1)(b) of the *Act*, classifying them under tariff item No. 6307.90.99.

6. On August 3, 2017, Impex's requests for further re-determination pursuant to subsection 60(1) of the *Act* were filed with the CBSA. Impex maintained its position that the goods in issue were properly classified under tariff item No. 3926.20.95.

7. On December 13, 2017, the CBSA issued its preliminary decision on Impex's appeal requests. Impex submitted additional information to the CBSA on January 8, 2018.

8. On January 10, 2018, the CBSA confirmed its tariff classification of the goods in issue under tariff item No. 6307.90.99.

9. Impex filed this appeal with the Tribunal on March 15, 2018.

10. On September 7, 2018, the Tribunal denied a request by Impex to strike the Confidential Laboratory Report of the CBSA from the record and affirmed that it would give no weight to any opinions contained therein on the issue of tariff classification. Also, the Tribunal requested that the parties make further submissions regarding the composition of the components of the goods in issue and, in particular, on

1. R.S.C., 1985, c. 1 (2nd Supp.) [*Act*].
2. S.C. 1997, c. 36.

whether the sheet of chlorinated polyethylene (CPE) is a "cellular" or "non-cellular" plastic. Those submissions were filed on October 9, 2018, November 2, 2018, and November 13, 2018.

11. The Tribunal held a file hearing on December 3, 2018.

DESCRIPTION OF THE GOODS IN ISSUE

12. The parties agree that the goods in issue are disposable shoe coverings. They are designed to be worn over shoes and have applications in clean rooms, food processing, real estate, health care, construction, manufacturing, energy, and research and development.

13. The goods in issue are composed of a layer of thermally bonded spunbond polypropylene (PP), which is laminated on one side to a sheet of CPE. They are produced from a rectangular-shaped cut-out of the material, folded at the shorter ends and bonded by heat-sealing, with the top opening of the goods hemmed to encase an elastic band.

LEGAL FRAMEWORK

14. The tariff nomenclature is set out in detail in the schedule to the *Customs Tariff*, which is designed to conform to the Harmonized Commodity Description and Coding System (the Harmonized System) developed by the World Customs Organization (WCO).[3] The schedule is divided into sections and chapters, with each chapter containing a list of goods categorized in a number of headings and subheadings and under tariff items.

15. Subsection 10(1) of the *Customs Tariff* provides that the classification of imported goods shall, unless otherwise provided, be determined in accordance with the *General Rules for the Interpretation of the Harmonized System*[4] and the *Canadian Rules*[5] set out in the schedule.

16. The *General Rules* comprise six rules. Classification begins with Rule 1, which provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes and, provided such headings or notes do not otherwise require, according to the other rules.

17. Section 11 of the *Customs Tariff* provides that, in interpreting the headings and subheadings, regard shall be had to the *Compendium of Classification Opinions to the Harmonized Commodity Description and Coding System*[6] and the *Explanatory Notes to the Harmonized Commodity Description and Coding System*,[7] published by the WCO. While classification opinions and explanatory notes are not binding, the Tribunal will apply them unless there is a sound reason to do otherwise.[8]

18. The Tribunal must therefore first determine whether the goods in issue can be classified at the heading level according to Rule 1 of the *General Rules* as per the terms of the headings and any relative section or chapter notes in the *Customs Tariff*, having regard to any relevant classification opinions and

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3. Canada is a signatory to the *International Convention on the Harmonized Commodity Description and Coding System*, which governs the Harmonized System.
4. S.C. 1997, c. 36, schedule [*General Rules*].
5. S.C. 1997, c. 36, schedule [*Canadian Rules*].
6. World Customs Organization, 4th ed., Brussels, 2017.
7. World Customs Organization, 6th ed., Brussels, 2017.
8. See *Canada (Attorney General) v. Suzuki Canada Inc.*, 2004 FCA 131, at paras. 13, 17 and *Canada (Attorney General) v. Best Buy Canada Inc.*, 2019 FCA 20, at para. 4.

explanatory notes. As the Supreme Court of Canada indicated in *Igloo Vikski*, it is ". . . only where Rule 1 does not conclusively determine the classification of the good that the other General Rules become relevant to the classification process."[9]

19. Once the Tribunal has used this approach to determine the heading in which the goods in issue should be classified, the next step is to use a similar approach to determine the proper subheading.[10] The final step is to determine the proper tariff item.[11]

20. The relevant tariff nomenclature for heading No. 39.26 provides as follows:

SECTION VII

PLASTICS AND ARTICLES THEREOF;
RUBBER AND ARTICLES THEREOF

. . .

Chapter 39

PLASTICS AND ARTICLES THEREOF

. . .

39.26	**Other articles of plastics and articles of other materials of headings 39.01 to 39.14.**
. . .	
3926.20	**-Articles of apparel and clothing accessories (including gloves, mittens and mitts)**
. . .	
	- - -Other:
. . .	
3926.20.95	- - - -Other articles of apparel and clothing accessories, of plastics combined with knitted or woven fabrics, bolducs, nonwovens or felt

21. The relevant notes to Chapter 39 read as follows:

> 1. Throughout the Nomenclature the expression "plastics" means those materials of headings 39.01 to 39.14 which are or have been capable, either at the moment of polymerisation or at some 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 external influence.

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9. *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, at para. 21 [*Igloo Vikski*].
10. Rule 6 of the *General Rules* provides that ". . . the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, *mutatis mutandis*, to the above Rules [i.e. Rules 1 through 5] . . ." and that ". . . the relative Section and Chapter Notes also apply, unless the context otherwise requires."
11. Rule 1 of the *Canadian Rules* provides that ". . . the classification of goods in the tariff items of a subheading or of a heading shall be determined according to the terms of those tariff items and any related Supplementary Notes and, *mutatis mutandis*, to the [*General Rules*] . . ." and that ". . . the relative Section, Chapter and Subheading Notes also apply, unless the context otherwise requires." Classification opinions and explanatory notes do not apply to classification at the tariff item level.

Throughout the Nomenclature any reference to "plastics" also includes vulcanised fibre. The expression, however, does not apply to materials regarded as textile materials of Section XI.

2. This Chapter does not cover:

. . .

(p) Goods of Section XI (textiles and textile articles);

. . .

6. In headings 39.01 to 39.14, the expression "primary forms" applies only to the following forms:

(a) Liquids and pastes, including dispersions (emulsions and suspensions) and solutions;

(b) Blocks of irregular shape, lumps, powders (including moulding powders), granules, flakes and similar bulks forms.

22. The relevant explanatory notes to Chapter 39 read as follows:

Plastics and textile combinations

Wall or ceiling coverings which comply with Note 9 to this Chapter are classified in heading 39.18. Otherwise, the classification of plastics and textile combinations is essentially governed by Note 1(h) to Section XI, Note 3 to Chapter 56 and Note 2 to Chapter 59. The following products are also covered by this Chapter:

. . .

(b) Textile fabrics and nonwovens, either completely embedded in plastics or entirely coated or covered on both sides with such material, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change of colour;

23. The relevant explanatory notes to heading No. 39.26 read as follows:

This heading covers articles, not elsewhere specified or included, of plastics (as defined in Note 1 to the Chapter) or of other materials of headings 39.01 to 39.14.

They include:

(1) Articles of apparel and clothing accessories (**other than** toys) made by sewing or sealing sheets of plastics, e.g., aprons, belts, babies' bibs, raincoats, dress-shields, etc. Detachable plastic hoods remain classified in this heading if presented with the plastic raincoats to which they belong.

24. The relevant notes to Section XI read as follows:

1. This Section does not cover:

. . .

(h) Woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics, or articles thereof, of Chapter 39;

. . .

(n) Footwear or parts of footwear, gaiters or leggings or similar articles of Chapter 64;

. . .

7. For the purpose of this Section, the expression "made up" means:

. . .

(f) Assembled by sewing, gumming or otherwise (other than piece goods consisting of two or more lengths of identical material joined end to end and piece goods composed of two or more textiles assembled in layers, whether or not padded);

. . .

8. For the purposes of Chapters 50 to 60:

(a) Chapters 50 to 55 and 60 and, except where the context otherwise requires, Chapters 56 to 59 do not apply to goods made up within the meaning of Note 7 above;

25. The relevant tariff nomenclature for heading No. 56.03 provides as follows:

SECTION XI

TEXTILES AND TEXTILE ARTICLES

. . .

Chapter 56

WADDING, FELT AND NONWOVENS; SPECIAL YARNS; TWINE, CORDAGE, ROPES AND CABLES AND ARTICLES THEREOF

. . .

56.03 Nonwovens, whether or not impregnated, coated, covered or laminated.

26. The relevant notes to Chapter 56 read as follows:

3. Headings 56.02 and 56.03 cover respectively felt and nonwovens, impregnated, coated, covered or laminated with plastics or rubber whatever the nature of these materials (compact or cellular).

Heading 56.03 also includes nonwovens in which plastics or rubber forms the bonding substance.

Headings 56.02 and 56.03 do not, however, cover:

. . .

(b) Nonwovens, either completely embedded in plastics or rubber, or entirely coated or covered on both sides with such materials, provided that such coating or covering can be seen with the naked eye with no account being taken of any resulting change of colour (Chapter 39 or 40); or

(c) Plates, sheets or strip of cellular plastics or cellular rubber combined with felt or nonwovens, where the textile material is present merely for reinforcing purposes (Chapter 39 or 40).

27. The relevant explanatory notes to heading No. 56.03 read as follows:

A **nonwoven** is a sheet or web of predominantly textile fibres oriented directionally or randomly and bonded. These fibres may be of natural or man-made origin. They may be staple fibres (natural or man-made) or man-made filaments or be formed in situ.

Nonwovens can be produced in various ways and production can be conveniently divided into three stages: web formation, bonding and finishing.

28. The relevant tariff nomenclature for heading No. 63.07 provides as follows:

SECTION XI

TEXTILES AND TEXTILE ARTICLES

. . .

Chapter 63

OTHER MADE UP TEXTILE ARTICLES; SETS;
WORN CLOTHING AND WORN TEXTILE ARTICLES; RAGS

. . .

63.07 Other made up articles, including dress patterns.

. . .

6307.90 -Other

. . .

- - -Other:

. . .

6307.90.99 - - - -Of other textile materials

29. The relevant notes to Chapter 63 read as follows:

1. Sub-Chapter I applies only to made up articles, of any textile fabric.

2. Sub-Chapter I does not cover:

(a) Goods of Chapters 56 to 62

30. The relevant explanatory notes to Chapter 63 read as follows:

This Chapter includes:

(1) Under headings 63.01 to 63.07 (sub-Chapter I) made up textile articles of any textile fabric (woven or knitted fabric, felt, nonwovens, etc.) which are **not** more specifically described in other Chapters of Section XI or elsewhere in the Nomenclature. (The expression "made up textile articles" means articles made up in the sense defined in Note 7 to Section XI (see also Part (II) of the General Explanatory Note to Section XI.)

. . .

The classification of articles in this sub-Chapter is not affected by the presence of minor trimmings or accessories of furskin, metal (including precious metal), leather, plastics, etc.

Where, however, the presence of these other materials constitutes **more than** mere trimmings or accessories, the articles are classified in accordance with the relative Section or Chapter Notes (General Interpretative Rule 1), or in accordance with the other General Interpretative Rules as the case may be.

In particular, this sub-Chapter **does not include**:

. . .

(b) Nonwovens merely cut into squares or rectangles (e.g., disposable bed sheets) (**heading 56.03**).

31. The relevant explanatory notes to heading No. 63.07 read as follows:

> This heading covers made up articles of any textile material which are **not included** more specifically in other headings of Section XI or elsewhere in the Nomenclature.
>
> . . .
>
> The heading **excludes** textile articles classified in more specific headings of this Chapter or of Chapters 56 to 62.

32. The relevant notes to Chapter 64 read as follows:

> **Chapter 64**
>
> **FOOTWEAR, GAITERS AND THE LIKE; PARTS OF SUCH ARTICLES**
>
> . . .
>
> 1. This Chapter does not cover:
>
> (a) Disposable foot or shoe coverings of flimsy material (for example, paper, sheeting of plastics) without applied soles. These products are classified according to their constituent material;
>
> (b) Footwear of textile material, without an outer sole glued, sewn or otherwise affixed or applied to the upper (Section XI);
>
> . . .
>
> 4. Subject to Note 3 to this Chapter:
>
> (a) The material of the upper shall be taken to be the constituent material having the greatest external surface area, no account being taken of accessories or reinforcements such as ankle patches, edging, ornamentation, buckles, tabs, eyelet stays or similar attachments;
>
> (b) The constituent material of the outer sole shall be taken to be the material having the greatest surface area in contact with the ground, no account being taken of accessories or reinforcements such as spikes, bars, nails, protectors or similar attachments.

33. The relevant explanatory notes to Chapter 64 read as follows:

> For the purposes of this Chapter, the term "footwear" **does not**, however, **include** disposable foot or shoe coverings of flimsy material (paper, sheeting of plastics, etc.) without applied soles. These products are classified according to their constituent material.
>
> (A) . . . The Chapter includes:
>
> . . .
>
> (10) Disposable footwear, with applied soles, generally designed to be used only once.
>
> . . .
>
> (C) . . . The term "outer sole" as used in headings 64.01 to 64.05 means that part of the footwear (other than the attached heel) which, when in use, is in contact with the ground. . . .
>
> In the case of footwear made in a single piece (e.g., clogs) without applied soles, no separate outer sole is required; such footwear is classified with reference to the constituent material of its lower surface.
>
> . . .
>
> (D) . . . The upper is the part of the shoe or boot above the sole.

TRIBUNAL ANALYSIS

34. As stated above, the Tribunal must begin its analysis with Rule 1 of the *General Rules.* The goods in issue, as described above, are disposable shoe coverings. The parties agree that the goods are composed (primarily) of a layer of thermally bonded spunbond polypropylene (PP), which is laminated on one side to a sheet of CPE.

35. Chapter 64 of the schedule is specific to footwear.[12] Since the goods in issue are intended to be worn on the feet, the Tribunal will first consider whether any of the headings in this chapter are applicable to the goods in issue.

Chapter 64

36. A threshold issue for headings of Chapter 64 is whether the goods in issue are *without applied soles*. According to note 1(a) to Chapter 64, disposable foot or shoe coverings of flimsy (for example, paper, sheeting of plastics) material *without applied soles*[13] cannot be classified under Chapter 64. Moreover, these products are to be classified according to their constituent material.[14]

Without applied soles

37. The CBSA submitted that the goods in issue are "without applied soles" based on its view that an "applied sole" is ". . . a separate piece attached to the (mid)sole to constitute an outer sole."[15] The CBSA's position in this regard is uncontroverted. However, it is not clear to the Tribunal that the term "applied soles" is necessarily limited to outer soles[16] as opposed to other types of soles contemplated in Chapter 64, i.e. inner and middle soles.[17] Had this been the intent, note 1(a) could have been drafted to describe the outer sole in a manner similar to paragraph (b) which refers to "[f]ootwear of textile material, *without an outer sole* glued, sewn or otherwise affixed or applied to the upper" [emphasis added]. That said, the Tribunal is satisfied that for the purposes of the present case, it must consider a sole to be that part of the article below the upper and that does not constitute part of the upper.[18] Furthermore, the Tribunal is of the view that an "applied sole", as asserted by the CBSA, requires the sole to be a separate piece that is in some way attached to the upper.

12. Pursuant to note 1(n) of Section XI (which includes heading No. 63.07), footwear or parts of footwear, gaiters or leggings or similar articles of Chapter 64 are excluded from Section XI.
13. There are no relative section or chapter notes which directly address the meaning of "applied soles".
14. This is in contrast to note (A)(10) of the explanatory notes to Chapter 64, which provides for the inclusion of disposable footwear, with applied soles, generally designed to be used only once.
15. The CBSA cites paragraph (C) of the explanatory notes to Chapter 64 to support its view that "applied soles" contemplates the attachment of a separate piece to constitute an outer sole. See Respondent's Brief, Exhibit No. AP-2017-065-07A, Vol. 1 at footnote 63. The Tribunal finds paragraph (C) to be inconclusive with regard to the meaning of "applied soles". Paragraph (C) provides direction on how to classify footwear without applied soles made of a single piece, i.e. such footwear is classified with reference to the constituent material of its lower surface.
16. See paragraph (C) of the explanatory notes to Chapter 64 for a description of the term "outer sole".
17. See heading No. 64.06 and subparagraph (A)(3) of the explanatory notes to heading No. 64.06, which refers to "inner, middle and outer soles. . . ."
18. See paragraph (D) of the explanatory notes to Chapter 64.

38. On the basis of the composition of the goods in issue submitted by the parties, the Tribunal finds that the disposable shoe covers are without applied soles, as asserted by the CBSA. Impex submitted that the materials, i.e. the PP nonwoven and CPE plastic sheet, are combined to result in a *single sheet* which is subsequently cut to its final shape. This is consistent with the CBSA's submissions insofar as the goods in issue are made from a rectangular shape that is cut out from a single sheet of a nonwoven which has been laminated on one side to a sheet of CPE. No separate piece was applied to the shoe cover to form a sole. The shoe coverings are of flimsy material, made of "sheeting of plastics",[19] without applied soles and are therefore excluded from Chapter 64. Consequently, the goods in issue must be classified according to their constituent material.

The "constituent material"

39. The CBSA submitted that the constituent material is the combination of the PP nonwoven and CPE layers. Impex referred to the PP nonwoven and CPE layers as distinct constituent materials. CBSA's submissions also described the opening of the shoe covers as being hemmed and encasing an elastic band. Neither party referenced the elastic band as a constituent material.

40. To determine the constituent material of the goods in issue, the Tribunal refers to notes 4(a) and (b) to Chapter 64 which provide that the "material of the upper" is "the constituent material having the greatest external surface area, no account being taken of accessories or reinforcements such as ankle patches, edging, ornamentation, buckles, tabs, eyelet stays or similar attachments". Additionally, the "constituent material of the outer sole" is ". . . the material having the greatest surface area in contact with the ground, no account being taken of accessories or reinforcements such as spikes, bars, nails, protectors or similar attachments." Neither of the parties referred to the constituent material of the shoe covers in terms of the material of the upper and of the outer sole.[20]

41. The Tribunal finds that the material of the upper consists of the PP nonwoven.[21] This is evident from the BootieButler Datasheet for model No. KBCP525.[22] The Tribunal also finds that the elastic band serves as reinforcement around the opening of the shoe cover and therefore, pursuant to note 4(a), need not be accounted for. The constituent material of the outer sole is the CPE layer.

42. The next step in the Tribunal's analysis will be to look specifically at the classification favoured by the CBSA and its arguments in relation to that classification.

Heading No. 63.07

43. According to the CBSA, there are three conditions that must be satisfied in order for the goods in issue to fall under heading No. 63.07. They must be (1) a "made up" article, (2) of any textile fabric, and (3) not included more specifically in other headings of Section XI or elsewhere in the nomenclature (including Chapters 56 to 62). The CBSA based this argument on the first part of paragraph (1) of the explanatory notes to Chapter 63.

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19. See note 1(a) to Chapter 64.
20. The CBSA submitted that the sample that it analyzed, although differing in appearance from the goods in issue (i.e. amount of coverage of the blue plastic layer), did not differ in material of composition. Respondent's Brief, Exhibit No. AP-2017-065-07A, Vol. 1 at para. 9.
21. The term "nonwoven" is defined in the explanatory notes to heading No. 56.03. The parties agree that the PP layer is a nonwoven and the Tribunal has no reason to find otherwise.
22. Respondent's Brief, Exhibit No. AP-2017-065-07A, Vol. 1 at 31.

44. With respect to the first condition, note 7 to Section XI provides the meaning of "made up". The Tribunal notes that there are seven possible definitions provided for "made up" and that only one needs to be met for the goods to be considered "made up".[23] The CBSA submitted that the goods in issue meet the definition of "made up" set out in paragraph (f) of note 7. In this regard, the goods in issue are assembled by bonding the shorter ends by heat sealing, and hemming the top opening edge. The CBSA also relied on WCO Classification Opinion 6307.90/3 which covers, "protective covering made of a single oval piece of nonwoven fabric, the outside edge of which has an elastic hemmed seam. This product takes the form of a stretchable envelope which can be worn over footwear."[24] The Tribunal finds that this opinion confirms that shoe covers (made of nonwoven fabric) may constitute "made up" articles for the purposes of heading No. 63.07.[25] Furthermore, the Tribunal agrees with the CBSA that the goods in issue are "made up" within the meaning of note 7.

45. With respect to whether the constituent materials constitute a textile fabric, the CBSA submitted that the combination of the PP nonwoven and CPE plastic layers may be properly classified in heading No. 56.03, which provides for "[n]onwovens, whether or not impregnated, coated, covered or laminated". Moreover, the CBSA submitted that notes 3(b) and (c) to Chapter 56, which exclude certain materials from heading No. 56.03, do not apply. With respect to paragraph (b), as the PP layer is laminated with CPE only on one side, it is not "completely embedded" or "entirely coated or covered on both sides" with plastic. With respect to paragraph (c), the CPE layer is a non-cellular plastic and the textile material is not present merely for reinforcing purposes. For its part, Impex submitted that the CPE layer constituted a cellular plastic and that the essential character of the shoe covers is derived from the CPE layer and not the PP nonwoven layer.

46. Finally, with respect to the third condition, the CBSA submitted that while the constituent material is otherwise a textile fabric of heading No. 56.03, it could not be classified in that heading due to the application of note 8(a) to Section XI, which excludes goods "made up within the meaning of Note 7" from Chapter 56, unless the context otherwise requires.

47. The Tribunal does not agree with the CBSA's analysis. As the shoe covers are "made up within the meaning of Note 7", pursuant to note 8(a) to Section XI, Chapters 56 to 59 do not apply to them, and the Tribunal finds that the context does not require otherwise.[26] Consequently, heading No. 56.03 is not

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23. This is consistent with the approach taken by the Tribunal in *Rui Royal International Corp. v. President of the Canada Border Services Agency* (30 March 2011), AP-2010-003 (CITT) [*Rui Royal*] at para. 64.
24. See Respondent's Brief, Exhibit No. AP-2017-065-07A, Vol. 1 at para. 69. The Tribunal finds that the goods in issue are distinguishable from this opinion as it does not address a nonwoven combined with a plastic material.
25. The CBSA referred to the Tribunal's decision in *Trudell Medical Marketing Limited v. Canada (National Revenue)* (24 July 1997), AP-96-16 (CITT) [*Trudell*] to further support the classification of shoe covers composed of a combination of nonwoven (of PP) and non-textile material under heading No. 63.07. The Tribunal is of the opinion that this case is distinguishable from the present one, which requires consideration of two constituent materials (i.e. the nonwoven PP layer and the CPE layer). It is not clear that, in *Trudell,* the Tribunal considered the non-textile material, i.e. the rubber anti-slip treads, as a constituent material for the purposes of classification. There were three different models of shoe covers, two of which had rubber anti-slip treads. The witness for the appellant indicated the treads prevented slippage; however, the goods in issue would not be bought for this purpose.
26. The explanatory notes to heading No. 56.03 also read as follows: "**Except** where they are covered more specifically by other headings in the Nomenclature, the heading covers nonwovens in the piece, cut to length or simply cut to rectangular (including square) shape from larger pieces *without other working* . . ." [emphasis added].

applicable. The issue of whether or not the goods in issue are excluded on the basis of note 3(b) or (c) to heading No. 56.03 is therefore moot.

48. That said, the Tribunal is of the view that the applicability of heading 63.07 is not contingent on heading No. 56.03 applying to the constituent materials. There is no language in the terms of the heading or in any relative section or chapter notes that would suggest that "textile fabric", for the purposes of applying heading No. 63.07, is limited to materials of heading No. 56.03 or other headings of Section XI.[27] The question therefore remains as to whether the constituent materials constitute *any textile fabric* (woven or knitted fabric, felt, nonwovens, etc.).[28] This requires consideration of the plastic CPE layer, which is not a textile fabric.

The CPE layer

49. Pursuant to the explanatory notes to Chapter 63, the presence of minor trimmings or accessories of plastic would not affect the classification of articles in heading No. 63.07. However, if the presence of plastic constitutes *more* than *mere trimming* or *accessories*, then "the articles are classified in accordance with relative Section or Chapter Notes (General Interpretive Rule 1) or in accordance with the other General Interpretative Rules as the case may be".[29] In other words, if the plastic constitutes more than mere trimming or accessories, then the article must be classified in accordance with the *General Rules*.[30]

50. In *Canadian Tire*, the Tribunal found that where the material has some fundamental purpose in respect of the goods in issue, then that material is not a mere accessory.[31] Both parties submitted that the CPE layer provides traction, durability, and protection from water.[32] In the Tribunal's view, these qualities in conjunction with the extent to which the nonwoven is covered with the CPE layer establish that the plastic material is more than merely an accessory or trimming. Accordingly, the Tribunal finds that the constituent materials must be classified in accordance with the *General Rules.*

51. Before further considering the applicability of heading No. 63.07, under the *General Rules*, the Tribunal must first establish, pursuant to paragraph (1) of the explanatory notes to chapter 63, whether the constituent materials may be classified elsewhere in the nomenclature.[33] The Tribunal must therefore consider the applicability of heading No. 39.26.

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27. For example, heading No. 62.10 refers to garments made up of fabrics of heading Nos. 56.02, 56.03, 59.03, 59.06 or 59.07. Another example is the note to Chapter 39, which limits the materials that may qualify as "plastics" to those of heading Nos. 39.01 to 39.14.
28. See paragraph (1) of the explanatory notes to Chapter 63.
29. *Ibid.*
30. See *Rui Royal* at para. 69. Also, the explanatory note to Chapter 62 is similar to the explanatory notes to Chapter 63, insofar that it states that "[t]he classification of the goods in this Chapter is not affected by the presence of parts or accessories of, for example . . . plastics or metal. Where, however, the presence of such materials constitutes **more than mere trimming** the articles are classified in accordance with the relative Chapter Notes . . . or failing that, according to the General Interpretive Rules." The Supreme Court interpreted the explanatory notes to heading No. 62.16 to mean the following: "Where additional materials constitute more than mere trimming, the Explanatory Note directs that classification proceed according to the General Rules." *Igloo Vikski* at para. 36.
31. *Canadian Tire Corporation Limited v. President of the Canada Border Services Agency* (6 August 2010), AP-2009-019 (CITT) at para. 45.
32. See Respondent's Brief, Exhibit AP-2017-065-07A, Vol. 1 at para. 56 and Appellant's Reply, Exhibit AP-2017-065-16A, Vol. 1A at para. 45(c).
33. The Tribunal took a similar approach in *Rui Royal* at para. 85.

Heading No. 39.26

52. In considering the application of heading No. 39.26, the first issue to determine is whether the constituent materials constitute "plastics" within the meaning of the heading. This term is defined in note 1 to Chapter 39 as meaning ". . . those materials of headings 39.01 to 39.14 which are or have been capable, either at the moment of polymerisation or at some subsequent stage, of being formed under external influence . . ." The first part of the definition of "plastics" therefore requires determination of whether the constituent materials are comprised of materials of heading Nos. 39.01 to 39.14. In this regard, Impex submitted that the CPE and PP layers are materials of headings No. 39.01 and No. 39.02, respectively. For its part, the CBSA submitted that as the PP and CPE are not, at the time of production, in their "primary forms" as defined in note 6 to Chapter 39, they are not covered by these heading numbers. At the time of production, the PP and CPE layers were in the form of sheets.

53. The Tribunal does not agree that to qualify as "plastics", the materials must be in their primary form at the time of production. It bears repeating that the definition of "plastics" provides that the relevant materials ". . . are or *have been capable*, either at the moment of polymerisation or *at some subsequent stage*, of being formed under external influence . . ." [emphasis added]. Impex submitted that the material must merely be derived from a component which can be properly traced back to a plastic in its primary form and has been further formed under an external influence. The Tribunal agrees with Impex insofar as the definition of "plastics" does not limit the event of being capable of being formed under external influence at a particular point in time, such as the time of production of the goods in issue.[34] The constituent materials are therefore comprised of plastics for the purposes of heading No. 39.26.

54. The CBSA also referred to paragraph (b) under "plastics and textile combinations" in the explanatory notes to Chapter 39 to support its position that heading No. 39.26 does not apply. The Tribunal agrees that the constituent material is not, as described in paragraph (b) of that note, ". . . nonwovens, either completely embedded in plastics or entirely coated or covered on both sides with such material". However, this is not a correct interpretation of the relevant note. Paragraph (b) is part of a list of products that "are also covered by this Chapter". To give meaning to the term "also covered" the list must be non-exhaustive. Therefore, the inapplicability of paragraph (b) does not preclude the goods in issue from being covered in Chapter 39. The preface to the list reads as follows: "the classification of plastics and textile combinations is essentially governed by Note 1(h) to Section XI, Note 3 to Chapter 56 and Note 2 to Chapter 59." As discussed above, pursuant to note 8(a) of Section XI, Chapter 56 and Chapter 59 do not apply to the goods in question. Note 1(h) to Section XI indicates that Section XI (which includes Chapter 63) does not apply to woven, knitted or crocheted fabrics, felt or nonwovens, impregnated, coated, covered or laminated with plastics, or articles thereof, of Chapter 39.

55. As it pertains to articles of apparel or clothing accessories, paragraph (1) of the explanatory notes to heading No. 39.26 directs the Tribunal to limit the heading to articles made by "sewing or sealing sheets of plastics". In cases where the article is not made by either sewing or sealing sheets of plastics, the article would not fall under heading No. 39.26. The application of the explanatory notes to heading No. 39.26 in this manner has been confirmed in the Tribunal's previous decisions.[35] Although no specific submissions were made concerning this part of the explanatory notes, the parties' submissions that the PP nonwoven sheet is bonded/laminated to a plastic CPE sheet, are nevertheless relevant. The Tribunal also notes that

34. As the definition applies throughout the nomenclature, the CBSA's narrow interpretation in this regard would also have the effect of precluding parts of the explanatory notes to Chapter 63 that address plastics from applying to the CPE layer.

35. See *Sher-Wood Hockey Inc. v. President of the Canada Border Services Agency* (10 February 2011), AP-2009-045 (CITT) [*Sher-Wood*] at para. 44 and *Igloo Vikski* at paras. 43 and 44.

according to the BootieButler Datasheet, the PP baselayer is "coated" with the CPE layer.[36] The Tribunal finds, based on the uncontroverted evidence, that the condition in paragraph (1) of the explanatory notes to heading No. 39.26 is met.

56. The next step is to determine whether the constituent materials may be classified under subheading No. 3926.20 as articles of "apparel" or "clothing accessories". Impex submitted that the goods in issue are articles of apparel or clothing accessories given that they are designed to be worn over the feet and shoes. The Tribunal finds Impex's submissions unclear as to whether it views the goods in issue either as articles of apparel or clothing accessories. Nevertheless, the Tribunal finds that classification opinions No. 3926.20/1 and 3926.20/2[37] leave little doubt that protective shoe coverings fall within the scope of "articles of apparel and clothing accessories" under subheading No. 3926.20.[38]

57. For the reasons above, the Tribunal finds that the constituent material, a nonwoven laminated with plastics, may be classified under tariff item No. 3926.20.95 as other articles of apparel and clothing accessories, of plastics combined with nonwovens. As such, pursuant to the explanatory notes to Chapter 63, the goods in issue are excluded from heading 63.07 on the basis that they are more specifically described elsewhere in the nomenclature. Furthermore, given that the goods in issue are nonwovens laminated with plastics of Chapter 39, in accordance with note 1(h) to Section XI, they are precluded from being classified as textile materials of Section XI.[39]

CONCLUSION

58. On the basis of the above reasons, the goods in issue are properly classified under tariff item No. 3926.20.95.

DECISION

59. The appeal is allowed.

Randolph W. Heggart
Randolph W. Heggart
Presiding Member

36. Respondent's Brief, Exhibit No. AP-2017-065-07A, Vol. 1 at 31.
37. The classification opinions for heading No. 3926.20 provide as follows:

    3926.20/1: Protective covering made of a single sheet of coloured, printed plastics which is folded in half and then bonded along two edges to form a cover for the lower part of the leg. This article is intended to be worn over normal footwear on wet or muddy ground, for example.

    3926.20/2: Protective covering made of two equal-sized transparent sheets of plastics, cut more or less in the shape of a foot and bonded together to leave an opening in the top through which the foot (including footwear) can be slipped.

38. The CBSA submitted that these opinions were not relevant as the products depicted therein were entirely made of plastics, not a nonwoven fabric. See Respondent's Brief, Exhibit No. AP-2017-065-07A, Vol. 1 at para. 82. The Tribunal does not accept this argument given that the nonwoven is a plastic within the meaning described in note 1 to Chapter 39.
39. The Tribunal notes that, as stated by the parties, since the competing headings in this appeal are subject to mutually exclusive section or chapter notes (i.e. note 1(h) to Section XI and note 2(p)), the goods in issue cannot be *prima facie* classifiable in both headings. See *Sanus Systems v. President of the Canada Border Services Agency* (8 July 2010), AP-2009-007 (CITT) at para. 35; *Sher-Wood* at para. 39.