



Canadian International
Trade Tribunal

Tribunal canadien du
commerce extérieur

CANADIAN
INTERNATIONAL
TRADE TRIBUNAL

Appeals

DECISION AND REASONS

Appeal No. AP-2017-065R

Impex Solutions Inc.

v.

President of the Canada Border
Services Agency

*Decision and reasons issued
Monday, December 13, 2021*

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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 judgment of the Federal Court of Appeal dated October 15, 2020, which set aside the decision of the Canadian International Trade Tribunal in Appeal No. AP-2017-065 dated May 27, 2019, and remitted the matter to the Canadian International Trade Tribunal.

BETWEEN

IMPEX SOLUTIONS INC.

Appellant

AND

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

Respondent

DECISION

The appeal is dismissed.

Peter Burn

Peter Burn
Presiding Member

Tribunal Panel:

Peter Burn, Presiding Member

Tribunal Secretariat Staff:

Helen Byon, Counsel
Stephanie Blondeau, Registrar Officer

PARTICIPANTS:

Appellant

Impex Solutions Inc.

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Respondent

President of the Canada Border Services Agency

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STATEMENT OF REASONS

INTRODUCTION

[1] The Canadian International Trade Tribunal conducted this remand proceeding further to a judgment of the Federal Court of Appeal (the Court),¹ which set aside the Tribunal's decision in *Impex*.²

[2] The goods in issue are disposable shoe coverings, model No. KBCP 525. They are composed of a layer of thermally bonded spunbond polypropylene (PP), a textile, laminated on one side to a sheet of chlorinated polyethylene (CPE), a plastic. 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.³

[3] In *Impex*, the Canada Border Services Agency (CBSA) submitted that the goods in issue should be classified under tariff item No. 6307.90.99 as "other made up articles, including dress patterns, of other textile materials".⁴ The CBSA contended that the goods were made of a textile material covered by heading No. 56.03, which applies to "[n]onwovens, whether or not impregnated, coated, covered or laminated". However, as note 8(a) to Section XI precludes Chapter 56 from applying to goods that are "made up" within the meaning of note 7 to Section XI, the goods in issue were properly classified in heading No. 63.07. Note 8(a) reads as follows:

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.⁵

[4] For its part, *Impex* submitted that the goods in issue 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".⁶ *Impex* submitted that the goods were not made of material described in heading No. 56.03, as it was excluded under note 3 to Chapter 56. Note 3 reads 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.

¹ *Attorney General of Canada v. Impex Solutions Inc.*, 2020 FCA 171 [FCA decision].

² *Impex Solutions Inc. v. President of the Canada Border Services Agency* (27 May 2019), AP-2017-065 (CITT) [*Impex*].

³ *Impex* at paras. 12, 13; FCA decision at para. 5.

⁴ *Impex* at para. 2.

⁵ The full text of the relevant tariff nomenclature can be found in *Impex* at paras. 20–33.

⁶ *Impex* at para. 2.

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).

[5] Moreover, the shoe covers derived their essential character from the CPE layer and not the PP nonwoven.

[6] The Tribunal found that the goods were properly classified under tariff item No. 3926.20.95, as argued by Impex. In reaching this conclusion, the Tribunal determined that the disposable shoe covers were without applied soles and therefore, under note 1(a) to Chapter 64, were excluded from said chapter and were to be classified according to their constituent material. Based on its examination of the upper and outer sole, the Tribunal determined that the constituent materials were comprised of the PP nonwoven and the CPE layer.⁷ The Tribunal then found that as the goods were “made up” within the meaning of note 7 to Section XI, pursuant to note 8(a) to Section XI, heading No. 56.03 was not applicable. The Tribunal proceeded to consider heading No. 63.07. To determine whether the constituent materials were a textile fabric, the Tribunal considered the purpose served by the CPE layer, a non-textile fabric. However, before rendering its decision on the applicability of heading No. 63.07, the Tribunal turned to the issue of whether the constituent materials could be classified elsewhere in the nomenclature (applying paragraph 1 of the explanatory notes to Chapter 63⁸). The Tribunal found that the constituent materials were plastics within the meaning of heading No. 39.26, and that the goods could be properly classified under tariff item No. 3926.20.95. Pursuant to the explanatory notes to Chapter 63, the goods were therefore excluded from heading No. 63.07.

[7] In its judgment, the Court found that the Tribunal made errors in its analysis. First, the Tribunal incorrectly considered note 8(a) to Section XI to the extent that “it prevents the application of Chapter 56 to the constituent material of the goods because the goods themselves are ‘made up’ within the meaning of Note 7.”⁹ The Court further stated that “[n]ote 8(a) provides that unless the

⁷ *Impex* at para. 41. Previously, in *Impex*, the Tribunal referred to the PP nonwoven and CPE layer as the “constituent materials” in the plural form. In the Tribunal’s view, the PP nonwoven and CPE layer may be referred, interchangeably, in the plural form as the “constituent materials” or in the singular form “constituent material”. In this regard, the Tribunal notes that subsection 33(2) of the *Interpretation Act*, R.S.C. 1985, c. I-21, provides that “[w]ords in the singular include the plural, and words in the plural include the singular.”

⁸ The relevant explanatory note to Chapter 63 reads 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. . . .

⁹ FCA decision at para. 55.

context requires otherwise, Chapters 56 to 59 do not apply to ‘made up’ goods It does not state that those chapters are not to be applied for determining whether the goods’ constituent material is of textile.”¹⁰ Consequently, the Court was of the view that the Tribunal must first assess whether the constituent material can be classified as a textile in Chapter 56 to determine whether the goods in issue are “of other textile materials”, as contemplated by Chapter 63.¹¹ Consistent with the Tribunal’s analytical framework in *Sher-Wood Hockey*¹² and *Louise Paris*¹³, the Court confirmed that “the Tribunal must first examine how the constituent material would be classified before then classifying the goods themselves.”¹⁴

[8] The Court also found that the Tribunal failed to consider note 1 to Chapter 39, which reads 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.

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.*

[Emphasis added]

[9] In this regard, the Court stated that “the broad exclusionary rule found in Notes 1 and 2(p) to Chapter 39, which covers both textile materials and goods of Section XI, has no equivalent in said Section. This means that while textile materials of Section XI are not to be considered plastics within the meaning of heading Nos. 39.01 and 39.14, the converse is not necessarily true, as plastic materials of Chapter 39 could possibly be considered textiles within the meaning of Section XI.”¹⁵ Accordingly, the Tribunal was required to *first* consider whether the constituent material of the goods are textiles of Section XI and if they are not, to further consider whether they are plastics as defined in Chapter 39.

[10] The Court directed the Tribunal to reassess the facts of the case, which included expert evidence, and which did not lead to only one clear result, against the appropriate framework.¹⁶

¹⁰ *Ibid.* at para. 58.

¹¹ *Ibid.*

¹² *Sher-Wood Hockey Inc. v. President of the Canada Border Services Agency* (10 February 2011), AP-2009-045 (CITT) [*Sher-Wood Hockey*].

¹³ *Louise Paris Ltd. v. President of the Canada Border Services Agency* (9 July 2019), AP-2017-001 (CITT) [*Louise Paris*].

¹⁴ FCA decision at para. 64. The Court also noted that note 8(a) was not an impediment to Chapters 56 to 59 being considered as part of the analytical framework in *Sher-Wood Hockey* and *Louis Paris*. FCA decision at para. 70.

¹⁵ FCA decision at para. 79. According to note 2(p) to Chapter 39, “Goods of Section XI (textiles and textile articles)” are not covered by Chapter 39.

¹⁶ FCA decision at para. 96.

[11] The Tribunal placed the arguments and evidence from *Impex* on the record of these remand proceedings.

[12] On November 13, 2020, the Tribunal received supplementary submissions from *Impex*. Supplementary submissions from the CBSA were filed on November 20, 2020.

ANALYSIS

Heading No. 56.03

[13] The key question before the Tribunal is whether the constituent material, previously determined in *Impex* to consist of the PP nonwoven and CPE layer, may be classified in heading No. 56.03 as “nonwovens, whether or not impregnated, coated, covered or laminated”. Only if the constituent material can be classified as a textile of Chapter 56 can the Tribunal proceed to consider the classification of the goods under Chapter 63.

[14] As submitted by the parties, based on the terms of the heading, and applicable notes and explanatory notes, for the constituent material of the shoe covers to be classified in heading No. 56.03, the following criteria must be met:

- (a) The constituent material is a “nonwoven”, whether or not impregnated, coated, covered or laminated;
- (b) The constituent material must not be excluded by virtue of note 3(b) to Chapter 56;
- (c) The constituent material must not be excluded by virtue of note 3(c) to Chapter 56; and
- (d) The constituent material must derive its essential character from the nonwoven PP.

[15] Having applied the framework set out above, for the reasons below, the Tribunal finds that heading No. 56.03 applies to the constituent material.

Nonwoven

[16] The first element is satisfied. In this regard, there is no dispute between the parties that the PP layer is a nonwoven.¹⁷

[17] The next issue for the Tribunal to consider is whether the constituent material is excluded from heading No. 56.03 on the basis of either note 3(b) or (c) to Chapter 56.

Note 3(b) to Chapter 56

[18] As noted above, under note 3(b) to Chapter 56, nonwovens that are either completely embedded in plastics or entirely coated or covered on both sides with such materials are excluded from Chapter 56. The CBSA submitted that the goods are not excluded under note 3(b), as the material is not embedded with plastics or entirely coated or covered on both sides with plastics. In

¹⁷ *Impex* at para. 38.

these remand proceedings, Impex submitted that note 3(b) is not relevant.¹⁸ The Tribunal agrees with the parties and finds that the goods are not excluded under note 3(b).

Note 3(c) to Chapter 56

[19] For the constituent material to be excluded from heading No. 56.03 under note 3(c) to Chapter 56, noted above, the Tribunal must determine whether (i) the CPE layer is a plate, sheet or strip¹⁹ of *cellular plastics*; and (ii) the PP nonwoven *is present merely for reinforcing purposes*.

– *Is the CPE layer composed of cellular or non-cellular plastic?*

[20] The starting point in analyzing whether the CPE layer is cellular or non-cellular is the definition of cellular plastics found in the explanatory notes to Chapter 39, which read as follows:

Cellular plastics

Cellular plastics are plastics having *many cells (either open, closed or both), dispersed throughout their mass*. They include foam plastics, expanded plastics and microporous or microcellular plastics. They may be either flexible or rigid.

Cellular plastics are produced by a variety of methods. These include incorporating a gas into plastics (e.g. by mechanical mixing, evaporation of a low boiling point solvent, degradation of a gas-producing material), mixing plastics with hollow micro-spheres (e.g., of glass or phenolic resin), sintering granules of plastics and mixing plastics with water or solvent-soluble material which are leached out of plastics leaving voids.

[Emphasis added]

[21] Based on the above note, cellular plastics are characterized by the presence of “many cells” that are “dispersed throughout their mass.” As further discussed below, the key question arising from the parties’ submissions is whether this means that the cells must be in the plastic’s *internal* structure or if it is sufficient that there are voids on the surface of the material that reduce the material’s density.

[22] According to Impex, the CPE layer is a cellular plastic in that the material has been mechanically altered during production to create voids which lower the density of the material.²⁰ This process makes the plastic material “cellular”.

¹⁸ Exhibit AP-2017-065R-08, footnote 5.

¹⁹ During the original proceedings, on September 7, 2018, the Tribunal requested submissions regarding the composition of the components of the goods in issue and specifically whether the CPE was a cellular or non-cellular plastic. In its submissions filed on October 9, 2018, Impex included submissions on whether the CPE layer constituted a “plate, sheet or strip” for the purposes of note 3(c). The CBSA objected to these submissions on the basis that they exceeded the scope of the Tribunal’s request. As the CBSA did not contest that the CPE layer was a “plate, sheet or strip”, for reasons of judicial economy, the Tribunal will not address Impex’s submission in this regard.

²⁰ Exhibit AP-2017-065-25 at paras. 26–28.

[23] To further support its position, during the original proceedings, Impex submitted an expert witness report from J. Phillip Berrier (the Impex report) addressing the question of whether the CPE layer is cellular or non-cellular. The CBSA did not contest Mr. Berrier's expertise. The Tribunal finds that Mr. Berrier is qualified as an expert witness with respect to the present issue, as he has had extensive experience in the polymer technology and material science profession, as demonstrated in his curriculum vitae (approximately 26 years).²¹

[24] In the Impex report, Mr. Berrier explained the following:

The advent of technologies to create cells or voids in plastic-based materials has greatly expanded the utility and performance of plastics . . . many modern cellular plastics are purpose-built to specific applications. In these newer uses, the key feature is that the cellular nature allows the plastic to feel and perform as if it is softer and more flexible than it would otherwise be.²²

[25] Mr. Berrier further noted that the definition of "cellular" is not standardized in the plastic and material science industry and generally refers to technologies that "reduce the apparent density versus a similar 'non-cellular' version by incorporating voids such as wells, pores, or bubbles onto or within the plastic article."²³ These technologies include chemically formed voids (e.g. chemical blowing agents that leave bubbles inside the plastic), physically formed voids (e.g. using air or gas that is whipped, blown or frothed into molten plastic before it cools), and mechanically formed open cells (e.g. topography imprinted into the plastic).²⁴ With respect to the plastic material at issue, Mr. Berrier indicated that "the size, shape, and number of closed-cells within the plastic sheet were not consistent with a cellular plastic formed by physical or chemical void formation."²⁵

[26] According to Mr. Berrier, features were observed in the CPE layer that would cause the plastic "to perform in a manner characteristic of having lower density than it would otherwise have."²⁶ Microscopy showed the "cells having been imprinted to a depth 3x the thickness of the sheet's original thickness throughout its mass lengthwise, widthwise and depthwise."²⁷ Based on this observation, Mr. Berrier opined that the CPE layer meets the definition of "cellular plastics" set out in the explanatory note to Chapter 39, even if mechanically formed voids are not offered as examples in the definition.²⁸ In addition, the CPE layer met the definition of "cellular plastics" according to ASTM International's "Standard Terminology Relating to Plastics" (ASTM D883-17), which reads as follows: "'a plastic containing numerous cells, intentionally introduced, interconnecting or not, distributed throughout the mass.'"²⁹

²¹ Exhibit AP-2017-065-31A, Tab 2. Mr. Berrier also filed a signed Acknowledgement and Undertaking of Proposed Expert Witness. Exhibit AP-2017-065-31A, Tab 3.

²² Exhibit AP-2017-065-31A, Tab 4 at para. 2.1.

²³ *Ibid.* at para. 2.2.

²⁴ *Ibid.* at paras. 2.3–2.5.

²⁵ *Ibid.* at para. 3.2.

²⁶ *Ibid.* at para. 3.1.

²⁷ *Ibid.* at para. 4.4.

²⁸ *Ibid.*

²⁹ *Ibid.* at para. 4.5. The CBSA also noted that definition of "cellular plastics" in the explanatory note to Chapter 39 was consistent with ASTM's definition. Exhibit AP-2017-065-024.

[27] Mr. Berrier also explained the purpose of lowering the density of the plastic sole as follows:

CPE has a low coefficient of friction, and sheet material of this thickness is stiff, leading to a slip and fall hazard. Polymer additives or foam based treads . . . would make the sole stickier or porous, and could lead to soils being picked up and cross-contaminating other areas The cellular sheet topography solves both problems by reducing the effective density of the plastic sole. . . . The cellular structure allows the sheet to deform under the wearer's body weight against the floor topography, effectively lowering the apparent density of the sheet, and providing traction.³⁰

[28] For its part, the CBSA's position is that the CPE layer is a non-cellular plastic. The CBSA submitted that the definition of cellular plastics in the explanatory notes to Chapter 39, means that the plastic must "contain" numerous cells.³¹ As further elaborated on in the CBSA's expert witness report (the CBSA report) written by Ms. Maria Litva, who as discussed below, is the CBSA's senior chemist, this means that the cells must be present in the plastic's internal structure. The distribution of cells or voids must be seen internally in the material and be consistent throughout, even though the shapes and sizes of the cells may vary. Cellularity cannot be based on features of the material's surface topography. The embossing process imparts a texture to the surface and does not penetrate into the material to alter the internal structure of the material and, therefore, does not make the material a cellular plastic.³²

[29] With respect to Ms. Maria Litva's qualification as an expert witness, she stated she has 18 years of experience as a scientist and senior chemist and has participated in the analysis, design, development, manufacturing and testing of textile fibres, polymer-based processes and chemistry-based processes. In particular, she has spent 11 years analyzing products containing textile and plastic combinations. Ms. Litva's curriculum vitae was included in the report and the Tribunal finds that it supports her qualifications.

[30] Ms. Litva provided the original laboratory report during the CBSA's verification proceedings held in 2014. On this basis, Impex argued that the Tribunal should give less weight to the CBSA report. As an employee of the CBSA, Ms. Litva had a vested interest in reconfirming her own original findings from 2014 and as such, she was not an impartial expert.

[31] The Tribunal has previously acknowledged that a pre-existing financial, employment, or fiduciary relationship with one of the parties could undermine the expert's independence. However, it does not automatically disqualify a proposed witness, but it does weigh into the cost-benefit analysis of the Tribunal when deciding to admit the expert testimony.³³ Moreover, the Tribunal has also noted that in *White Burgess*, the Supreme Court of Canada held that with respect to rendering evidence of a

³⁰ Exhibit AP-2017-065-31A, Tab 4 at para. 4.3. The Tribunal notes that Mr. Berrier uses the term "cellular" in describing the plastic sheet. In citing this passage from the Impex report, the Tribunal does not affirm Impex's position that the CPE layer is a cellular plastic.

³¹ Exhibit AP-2017-065-24.

³² Exhibit AP-2017-065-32A at paras. 8, 9, 18, 19.

³³ *C. Keay Investments Ltd. dba Ocean Trailer Rentals v. President of the Canada Border Services Agency* (15 May 2018), AP-2017-031 (CITT) [*C. Keay*] at para. 22; *Emco Corporation Westlund v. President of the Canada Border Services Agency* (21 December 2015), AP-2014-042 (CITT) [*Emco*] at paras. 18, 19, applying SCC decision in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, [2015] 2 S.C.R. 182, 2015 SCC 23 (CanLII) [*White Burgess*].

proposed expert inadmissible, “[i]n most cases, a mere employment relationship with the party calling the evidence will be insufficient to do so.”³⁴

[32] Other than the fact that Ms. Litva authored the original laboratory report, there is no evidence on the record indicating that she had or has a vested interest in the outcome of these proceedings. Moreover, considering the underlying position of the CBSA, that is, that cells must be present within the internal structure of the plastic material, the Tribunal found that the analysis of the sample, supported by microscopic images, was more objective in nature. This notwithstanding, as discussed below, in determining the meaning of “cellular plastics”, the Tribunal does not find that this issue can be resolved by choosing either one of the opinions submitted by the parties. Rather, it is a matter of statutory interpretation. As such, the Tribunal is of the view that the CBSA report remains helpful to its analysis insofar as it establishes certain facts regarding the plastic sheet which are illustrated through microscopic images of the material.³⁵ Moreover, the Tribunal also took into consideration the technical definitions of “embossing” included in the report and microscopic images of a different plastic material in which cells were present within its internal structure.³⁶

[33] To determine the meaning of “cellular plastics” for tariff classification purposes, the Tribunal must rely on the principles of statutory interpretation.³⁷ The modern rule of statutory interpretation requires that “the words of an Act . . . be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.”³⁸ The *Customs Tariff*³⁹ encompasses an inclusive classification system, where all imported goods must be identified under a specific tariff item in the nomenclature for the purposes of applying the applicable duties.

[34] The explanatory note to Chapter 39 describes cellular plastics as having many cells “dispersed throughout their mass”. For the reasons below, the Tribunal is of the view that this refers to cells that are dispersed all the way through the material (i.e. cells, either opened or closed, must be present in the internal structure of the material). It does not refer to voids which are imprinted or embossed on the surface of the material.

[35] As submitted by the CBSA, the conceptual distinction between cellularity and embossing becomes apparent when considering heading Nos. 39.20 and 39.21, which apply to non-cellular and cellular plastics, respectively, and their explanatory notes. Heading No. 39.20 covers “[o]ther plates, sheets, film, foil and strip, of plastics, *non-cellular* and not reinforced, laminated, supported or similarly combined with other materials” [emphasis added]. The explanatory note to heading No. 39.20

³⁴ *Emco* at para. 21, citing *White Burgess* at para. 49.

³⁵ The Tribunal notes that the CBSA did not file with the CBSA report an Acknowledgement and Undertaking of Proposed Expert Witness. However, based on the limited scope in which the Tribunal refers to the CBSA report, the Tribunal sees no reason to find the report inadmissible.

³⁶ The ISO 472:1999 definition of “embossed sheet” refers to “sheet with a textured pattern on one or both sides”. The term “embossing” is defined as “process of producing contoured patterns on surfaces”. In *Fairchild’s Dictionary of Textiles 7th Edition*, “embossing” is defined as “[a] process to produce a raised design or pattern in relief on fabrics by passing the cloth between hot, engraved rollers that press the design into the fabric.” Exhibit AP-2017-065-32A at para. 18.

³⁷ In *C. Keay* at para. 20, the Tribunal stated that “questions of domestic law are not the proper subject of testimony by experts; rather, they are for the Tribunal and reviewing courts to decide”

³⁸ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, at para. 21.

³⁹ S.C. 1997, c. 36.

confirms that the heading applies to plates, sheets, film, foil and strip, “whether or not printed or otherwise *surface-worked* (for example, polished, *embossed*, coloured, merely curved or corrugated) . . .” [emphasis added]. Heading No. 39.21 covers “[o]ther plates, sheets, film, foil and strip, of plastics – [c]ellular”. The explanatory note to heading No. 39.21 similarly confirms that it applies whether or not the cellular plastic is “surface-worked (for example, polished, embossed . . .”⁴⁰

[36] The CBSA submitted that if surface-worked, embossed, plastic may be non-cellular, the concept of a cellular plastic as defined, must be more than “skin deep - that true cellularity must require the distribution of cells throughout the three dimensions of a material”.⁴¹ The Tribunal agrees.

[37] The *Customs Tariff* contemplates the embossing process as a technique for working the surface of material that is either cellular or non-cellular. This is evident from the explanatory notes to heading Nos. 39.20 and 39.21. In the Tribunal’s view, this indicates that the *Customs Tariff* does not contemplate the conversion of non-cellular plastics into cellular plastics by working the surface of a non-cellular plastic. While the list of production methods for cellular plastics described in the explanatory note to Chapter 39 may not be exhaustive, the embossing process, or altering the material’s surface topography, is not contemplated as a method for producing cellular plastics.

[38] Furthermore, the Tribunal finds no material difference between “embossing” and “imprinting”, the latter of which is the term used by Mr. Berrier to describe the process in which voids were created on the surface of the CPE layer. Both refer to a mechanical process that leaves a textured pattern on the surface of the material.⁴² Impex also indicated in its submissions that the production process involves rolling out the CPE sheet “through an embossing machine”.⁴³

[39] Moreover, the explanatory note does not refer to density or to an intent that the dispersion of cells throughout the mass of the plastic is to affect the plastic’s density. Consequently, even if it were the case that the embossing process achieves the effect of lowering the material’s density, in the Tribunal’s view, this would not render the plastic cellular for the purposes of the *Customs Tariff*.

[40] As discussed above, the Impex report suggests that there have been technological developments to create cellular plastics and that there are newer uses for modern cellular plastics.⁴⁴ Even if the Tribunal were to accept that the embossed CPE sheet is a modern cellular plastic according to present industry standards, this would not mean that the material is a cellular plastic as defined in the explanatory note to Chapter 39. For the purposes of the *Customs Tariff*, if the term “cellular plastics” was meant to apply to plastics which have only been surface-worked to manipulate their density, in the Tribunal’s view, this would have been more expressly stated in the explanatory notes. As the Tribunal has stated previously, the proper application of the *Customs Tariff* cannot be modified simply as a result of developments in the marketplace.⁴⁵ In the absence of such language,

⁴⁰ Note 10 to Chapter 39 reads “[i]n headings 39.20 and 39.21, the expression ‘plates, sheets, film, foil and strip’ applies only to plates, sheets, film, foil and strip . . . whether or not printed or otherwise surface-worked. . . .”

⁴¹ Exhibit AP-2017-065-34 at para. 13.

⁴² The Impex report noted that the imprinted voids formed a honeycomb-like appearance on the sheet material. Exhibit AP-2017-065-31A, Tab 4 at para. 3.3.

⁴³ Exhibit AP-2017-065-25 at 11, 63.

⁴⁴ *Ibid.*

⁴⁵ *Cavavin (2000) Inc. v. President of the Canada Border Services Agency* (4 October 2019), AP-2017-021 (CITT) at para. 60, affirmed in *Danby Products Limited v. President of the Canada Border Services Agency*, 2021 FCA 82.

the Tribunal finds that it would be improper to interpret the meaning of “cellular plastics” in the manner argued by Impex.

[41] Accordingly, the Tribunal finds that the term “cellular plastics”, as defined in the explanatory notes to Chapter 39, does not apply to plastics which do not have any cells within their internal structure and which have only been surface-worked through an embossing process to create voids or indentations on the surface of the plastic.

[42] Having established the meaning of “cellular plastics” in the context of this case, the Tribunal turns to the expert witness reports to assess their findings regarding the CPE sheet. In the Tribunal’s view, the findings in the reports are not contradictory; they both confirm that no cells within the internal structure of the CPE layer were detected. The CBSA report contained scanning electron microscopic images of cross-sections of the sample CPE layer. These images confirmed Ms. Litva’s conclusion that there were no visible cells or voids in the plastic sheet.⁴⁶ The Intertek Analytical Report included with the Impex report also reached the same conclusion, noting that “[n]o voids or cellular morphology were observed in the cover.”⁴⁷ Under the section entitled “Discussion and Observations”, the same report indicated that “[n]o voids or other porosity were detected on any areas of the Impex KBCP shoe cover examined.”⁴⁸

[43] The CBSA report also contained images showing a microscopic cross-section of a cellular plastic laminated to a woven layer of textile fabric.⁴⁹ While the images were not of the CPE layer at issue, they were nevertheless helpful to the Tribunal in illustrating how cells present within the internal structure of a plastic material would appear as compared to plastic material that had no cells or voids in its internal structure.

[44] Based on the images contained in the CBSA report and the Impex report, it is clear to the Tribunal that there are no cells or voids within the internal structure of the CPE layer. The material is solid throughout. The Tribunal therefore finds that the CPE layer does not constitute a cellular plastic within the meaning of note 3(c) to heading No. 56.03. Consequently, the constituent material of the goods in issue is not excluded under note 3(c) to heading No. 56.03, which applies to cellular plastics.

[45] That said, even if the CPE layer constituted a “cellular plastic”, note 3(c) would still not apply to the constituent material, as the Tribunal also finds that the second part of note 3(c), which requires that the textile material be present merely for reinforcing purposes, is not satisfied. The reasons for the Tribunal’s conclusion in this regard are set out below.

⁴⁶ Exhibit AP-2017-065-032A at paras. 15, 16.

⁴⁷ Exhibit AP-2017-065-31A at 205.

⁴⁸ *Ibid.* The CBSA submitted that the conclusions of the Intertek Analytical Report were inconsistent with Mr. Berrier’s report, which referred to the presence of cells in the plastic. In the Tribunal’s view, Mr. Berrier’s comments regarding the plastic’s cells were with respect to the voids seen on the surface of the sheet. The Intertek Analytical Report’s conclusions referred to the plastic’s internal composition and structure.

⁴⁹ Exhibit AP-2017-065-32A at para. 11.

- *Does the PP layer merely reinforce the CPE layer?*

[46] Impex argued that the PP layer is merely present to reinforce the CPE.⁵⁰ In this regard, Impex referred to the CBSA's Memorandum D10-14-59 (D-Memo), which provides a guideline as to whether textile fabric merely reinforces the cellular plastic. Below is the relevant excerpt from the D-Memo:

10. Factors indicating that the textile fabric or material has a purpose other than merely reinforcing the cellular plastic include fashion, drape or style as well as features that impart functionality or qualities such as durability, reduced friction, protection from the elements.

11. In order for a textile fabric or material that has been combined with a plate, sheet or strip of cellular plastic to be considered "merely for reinforcing purposes", it must be demonstrated that the textile fabric or material has no other function or role.

12. An example of a textile fabric, that has been combined with a plate, sheet or strip of cellular plastic in which the textile fabric would be considered merely for reinforcing purposes would be a loosely woven, unfigured and unbleached fabric applied to one face of a cellular plastic sheet embossed with a leather-like grain pattern. Such would also be the case if the textile fabric was instead a nonwoven material added for strength.

13. In all cases, if a garment is made up from plates, sheets or strip of cellular plastic combined with a textile fabric or material, and the textile fabric or material faces the exterior, it is considered to have a purpose beyond reinforcing the structural integrity of the cellular plastic.⁵¹

[47] With reference to the CBSA's D-Memo, Impex submitted that the PP nonwoven has no other purpose than to strengthen or support the structural integrity of the CPE layer. Moreover, the PP layer does not provide "fashion, drape or style" nor does it increase durability, reduce friction, or add protection from the elements. Impex argued that these characteristics are inherent to the CPE layer. The PP nonwoven is the base upon which the CPE is added and faces the interior.

⁵⁰ In its submissions filed on October 9, 2018, responding to the Tribunal's request for submissions on whether the CPE is a cellular or non-cellular plastic, Impex included submissions on whether the PP layer is merely present for reinforcing purposes. The CBSA objected to these submissions on the basis that they went beyond the scope of the issue relevant to the Tribunal's request. Additionally, the CBSA submitted that paragraphs 3.4, 4.1, 4.2 and 4.3 of the Impex report should be given no weight by the Tribunal as they discuss other features or attributes of the goods in issue. The Tribunal found these submissions relevant to the issue of the applicability of note 3(c) to the constituent material and, therefore, gave them the weight they deserved during these remand proceedings. Both parties were also permitted to file additional submissions during these remand proceedings.

⁵¹ Exhibit AP-2017-065-25 at 40.

[48] Impex also submitted that the PP nonwoven would satisfy the requirement to be “merely for reinforcing purposes” set out in the exclusionary clause in note 2 to Chapter 59, which it submitted is similar to note 3(c) of Chapter 56.⁵² The explanatory note to Chapter 39 elaborates on the meaning of “merely for reinforcing purposes” as follows:

In this respect, unfigured, unbleached, bleached or uniformly dyed textile fabrics, felt or nonwovens, when applied to one face only of these plates, sheets or strip, are regarded as serving merely for reinforcing purposes. . . .

[49] Impex submitted that the PP layer is “unfigured” (without weave or pattern), is uniformly white or in a uniform colour, and simply attached, unaltered, to the CPE layer.⁵³ Accordingly, it should be viewed as merely reinforcing the CPE layer.

[50] The Tribunal finds that Impex’s submissions do not account for the fact that the textile material is only partially covered by the CPE layer, as depicted in the BootieButler® datasheet.⁵⁴ The textile material has a greater surface area than the CPE layer and is used for the upper part of the shoe covers.

[51] This is in contrast with the model of disposable shoe covers that was originally submitted to the CBSA for analysis in 2014 (model No. KBCP), which was a different model than that of the goods in issue. The sample analyzed in 2014 was comprised of the same constituent materials, however, the CPE covered the entirety of the nonwoven.⁵⁵

[52] In the Tribunal’s view, the nonwoven reinforces the CPE layer where the materials are attached. However, the fact that the CPE layer does not cover the entirety of the nonwoven and that the nonwoven is used for the upper part of the shoe covers indicates that reinforcing the CPE layer is not the nonwoven’s only function. The PP nonwoven has an independent function beyond reinforcing the CPE layer.

Essential character

[53] As the constituent material is not excluded from Chapter 56, the final consideration for classification in heading No. 56.03 is whether it derives its essential character from the nonwoven. The relevant part of the explanatory notes to heading No. 56.03 reads as follows:

⁵² Note 2(a)(5) to Chapter 59 provides as follows:

2. Heading 59.03 applies to:

(a) Textile fabrics, impregnated, coated, covered or laminated with plastics . . . (compact or cellular), other than:

. . .

(5) Plates, sheets or strip of cellular plastics, combined with textile fabric, where the textile fabric is present merely for reinforcing purposes (Chapter 39); or

⁵³ In this regard, Impex referred to the Tribunal’s examination of the meaning of “unfigured, unbleached, bleached or uniformly dyed textile fabrics” as set out in the explanatory note to Chapter 39 in *Helly Hansen Leisure Canada Inc. v. President of the Canada Border Services Agency* (2 June 2008), AP-2006-054 (CITT).

⁵⁴ Exhibit AP-2017-065-07A at 31.

⁵⁵ *Ibid.* at para. 9; Exhibit AP-2017-065-07B (protected) at 7, 8, 11.

III. Finishing

Nonwovens may be dyed, printed, impregnated, coated, covered or laminated. Those covered on one or both surfaces (by gumming, sewing or by any other process) with textile fabric or with sheets of any other material are classified in this heading *only if they derive their essential character from the nonwoven*.

[Emphasis added]

[54] During these remand proceedings, the CBSA submitted that an assessment of essential character was not applicable as it was only required where a nonwoven is “covered” by “sheets of any other material”. According to the CBSA, based on photographs of the manufacturing process provided by Impex, the nonwoven is only “partially coated” by CPE in “liquid state” and not covered by a plastic sheet.⁵⁶

[55] Having reviewed the photographs described by the CBSA,⁵⁷ the Tribunal finds that they show that the CPE is in a liquid state *prior* to application to the nonwoven. The photographs do not show that the nonwoven is covered by something other than a sheet. The description of the image in “Photo 2” states the following: “Showing the CPE layer in liquid state after being heated and *prior to application to the nonwoven PP*” [emphasis added].⁵⁸ The photo does not indicate that the CPE is in a “liquid state” after it is applied to the nonwoven.⁵⁹ Impex’s description of the production process confirms that the CPE is a sheet in its final form. In this regard, Impex stated as follows:

The . . . CPE layer is formed by heating CPE pellets, which are subsequently flattened into a sheet. This sheet is then rolled out through an embossing machine, creating texture and varying the density of the plastic throughout its pattern.⁶⁰

[56] Furthermore, the Tribunal is not persuaded that the “partial” coverage of the nonwoven by the CPE precludes the application of the “essential character” assessment. If the entirety of the surface of the nonwoven had to be covered by the other material for the “essential character” assessment to be applicable, in the Tribunal’s view, this would have been explicitly stated. This intent is, for instance, clearly expressed in note 3(b) to Chapter 56, which refers to “[n]onwovens . . . *entirely* coated or covered . . .” [emphasis added].

[57] Finally, the essential character assessment applies regardless of whether the nonwoven is “coated” or covered by some other process. In this regard, the explanatory note to heading No. 56.03 provides that the nonwoven may be “covered” on one surface “by gumming, sewing or by *any other process*” [emphasis added]. The Tribunal noted in *Impex* that the parties agreed that the PP was *laminated* on one side to a sheet of CPE.⁶¹ The BootieButler® datasheet indicates that the PP is

⁵⁶ Exhibit AP-2017-065R-11 at para. 10.

⁵⁷ Exhibit AP-2017-065-25 at 61–63.

⁵⁸ *Ibid.* at 62.

⁵⁹ “Photo 1” is an image of the shoe cover production equipment and “Photo 3” is an image of the mechanical embossing process of the CPE layer. *Ibid.* at 61, 63.

⁶⁰ Exhibit AP-2017-065-25 at para. 27.

⁶¹ *Impex* at para. 34. The Impex report also referred to the PP as the “laminated structure”. Exhibit AP-2017-065-31A, Tab 4 at para. 3.4.

coated with the CPE.⁶² In the Tribunal's view, it is sufficient that a portion of the nonwoven is combined with the CPE such that the nonwoven is covered.

[58] Considering the above, the Tribunal is of the view that the condition that the constituent material derives its essential character from the nonwoven, as directed by the explanatory note to heading No. 56.03, must be satisfied.

[59] As guidance on the meaning of "essential character", the parties referred to paragraph VIII of the explanatory note to Rule 3(b) of the *General Rules for the Interpretation of the Harmonized System* for clarification regarding the concept of "essential character". Paragraph VIII provides a non-exhaustive list for determining the essential character of the goods as follows:

The factor which determines essential character will vary as between different kinds of goods. It may, for example, be determined by the nature of the material and component, its bulk, quantity, weight, value or role of the constituent material in relation to the use of the goods.

[60] During these remand proceedings, Impex submitted that based on the explanatory note to Rule 3(b) and the Tribunal's decision in *Kraft*, discussed below, the role of the material to the use of the item is of utmost importance.⁶³ However, the CBSA submitted that as it is only the material and not the goods that must be classified at this stage, the weight and bulk of the nonwoven take on primary importance.

[61] The Tribunal's approach to assessing "essential character" is well established. In *Kraft*, in determining the meaning of "essential character", the Tribunal cited the decision of the Federal Court of Appeal in *Mon-Tex*, in which the Court stated that "'to be essential, a characteristic must pertain to the essence of something. It must be fundamental.'" ⁶⁴ However, the Tribunal further elaborated that in assessing whether one component of the goods in issue could be said to determine their essential character, the Tribunal noted, "while criteria such as bulk, quantity, weight and value are intrinsically objective, they are not in and of themselves, necessarily dispositive."⁶⁵ More recently, the Tribunal

⁶² Exhibit AP-2017-065-07A at 31.

⁶³ Impex previously referred to the Tribunal's decisions in *Kappler Canada Ltd. v. The Deputy Minister of National Revenue* (26 October 1995) AP-94-232 (CITT) [*Kappler*] and *AMD Ritmed Inc. v. President of the Canada Border Services Agency* (24 September 2015), AP-2014-013, AP-2014-015 (CITT) [*AMD Ritmed*] to support the position that the intended use of an item is a determinative factor in classification and that the good's characteristics can be determinative. The Tribunal does not find these cases to be relevant to the issue at hand, i.e. whether one component of the constituent material of the goods provides it with its essential character. In *AMD Ritmed*, the Tribunal was required to consider whether the goods met the terms of the tariff item at issue, which itself referred to a specific use, i.e. tariff item No. 6210.10.10 which applies to "[p]rotective suits, to be employed in a noxious atmosphere". At issue was whether the goods qualified as "protective suits" and a hospital setting qualified as a "noxious atmosphere". In *Kappler*, for the purposes of duty relief under Code 1001 of the schedule to the Customs Tariff, the key issue was whether the goods were a "protective suit" despite that they did not fully protect a person against the risk of inhalation of asbestos particles.

⁶⁴ *Kraft Canada Inc.* (5 November 2014), AP-2013-055 (CITT) [*Kraft*] at para. 44; *Mon-Tex Mills Ltd. v. Canada (Commissioner of the Customs and Revenue Agency)*, 2004 FCA 346 (CanLII) [*Mon-Tex*] at para. 13.

⁶⁵ *Kraft* at para. 45. In *Kraft*, the goods in issue were seasoned coatings for poultry, seafood or meat. The two components of the goods were the cheese and the seasoned breadcrumbs.

has stated that the decisive factor in determining the “essential character” of goods is the relative importance of their various components, considering their use and value in relation to the whole.⁶⁶

[62] In assessing whether the constituent material derives its essential character from the nonwoven, the weight and bulk of the nonwoven may very well be indicative. That said, in the Tribunal’s view, to determine which component (either the PP nonwoven or the CPE layer) gives the constituent material its essential character, all characteristics of that component should be considered. This includes the components in relation to each other and the value of or role played by each of the components in the final product (i.e. the shoe covers). Such an analysis does not detract from the fact that at this stage, it is the constituent material that is to be classified rather than the goods themselves. It ensures a comprehensive analysis of the constituent material.

[63] Impex argued that the comparative weight or density of the PP nonwoven and the CPE layer is not dispositive of the constituent material’s essential character. Instead, the Tribunal should focus on the intended use of the goods and the functionality conferred by the CPE layer, as evidenced by the marketing information for the shoe covers. In this regard, Impex noted that the CPE layer differentiates the goods from other shoe covers sold by BootieButler®.

[64] According to Impex, the CPE layer makes the shoe covers “waterproof”, “most durable” and with “moderate traction”, features that would be lacking in a shoe cover made only of PP.⁶⁷ Impex submitted that the product datasheet focuses on the functions provided by the CPE layer that are relevant to the intended use of the shoe covers: “[t]he waterproof CPE layer, extra-deep design, and durable CPE coating make this bootie an ideal solution for users with large workboots.”⁶⁸ The CPE layer is the “heavy-duty layer”⁶⁹ which specifically allows the goods to be marketed for use in specific environments, such as clean rooms, food processing, real estate, health care, construction, manufacturing, research and development, and energy.⁷⁰ The features attributable to the CPE were not mentioned in marketing information for other shoe covers from BootieButler®, which did not have the CPE layer.⁷¹ Impex also noted that marketing material for similar shoe covers made of PP combined with CPE by a different manufacturer (Hybrid Shoe Covers 7HBD-70HC), also prominently featured the functions conferred by the CPE layer.⁷²

[65] In terms of the role of the nonwoven, Impex submitted that its general characteristics, including breathability, serving as a protective barrier, and retaining its shape, are common elements of a shoe cover and are not determinative of essential character.

[66] For its part, the CBSA argued that the constituent material’s essential character is derived from the nonwoven. In addition to the higher weight of the nonwoven as compared to the CPE

⁶⁶ *Le Groupe Bugatti Inc. v. President of the Canada Border Services Agency* (13 June 2018), AP-2017-020 (CITT) at paras. 57-58. Cited in *Anderson Watts* (13 February 2019), AP-2018-003 (CITT) at para. 76. See also *Oriental Trading (MTL) Ltd. v. The Deputy Minister of National Revenue* (31 August 1992), AP-91-081 and AP-91-223 (CITT).

⁶⁷ Exhibit AP-2017-065-16A at para. 45.

⁶⁸ Exhibit AP-2017-065-07A at 31.

⁶⁹ *Ibid.*

⁷⁰ *Ibid.*

⁷¹ *Ibid.* at 40. The goods in issue are described as “[d]urable CPE reinforced shoe cover for moderate traffic areas.”

⁷² Exhibit AP-2017-065-08 at para. 13(f); Exhibit AP-2017-065-07A at 170.

layer,⁷³ the nonwoven provides the goods with their basic structure, durability, strength, tear-resistance, shape and primary protective barrier. As further support regarding the physical properties of the nonwoven, the CBSA cited information published by the Association of the Nonwovens Fabrics Industry, which describe functions that are provided by a nonwoven fabric. From among this list were “absorbency, liquid repellency, resilience, stretch, softness, strength, flame retardancy . . . bacterial barriers and sterility”.⁷⁴

[67] With respect to the CPE layer, the CBSA submitted that its role is to improve the nonwoven and provide waterproofing. In this regard, the CBSA referred to marketing material for the shoe covers at issue which stated that they are “reinforced” with CPE.⁷⁵

[68] To further illustrate the significance of the nonwoven, the CBSA noted that similar shoe covers, the Hybrid Shoe Covers (7HBD-70HC), made by a different manufacturer with the same material as the goods in issue (also referred to by Impex, as discussed above), were described online as “[m]ost durable shoe cover and is waterproof at the bottom. Constructed of durable spunbonded [PP] material with cast polyethylene (CPE) layer for durability.” The listed features included: “[e]xcellent durability”, “[w]aterproof bottom layer”, and “[m]oderate traction”.⁷⁶ The Hybrid Shoe Covers were featured on the website of the Shoe Inn, a company which, according to the CBSA, sells a variety of shoe covers for industrial and consumer use.⁷⁷

[69] The CBSA also referred to other shoe covers, the Fabric Shoe Covers with Traction (7FWT-80CS), these being made of a spunbond PP nonwoven fabric with a tread pattern made of latex.⁷⁸ The CBSA noted that these shoe covers were not waterproof. The Tribunal notes from photos of the product on the website that the latex tread does not cover the entirety of the sole.

[70] The Fabric Shoe Covers with Traction were described on the Shoe Inn’s website as “breathable, durable . . . ideal for filtering particulates in environments that require contamination control.”⁷⁹ According to the product datasheet, the shoe covers have “good durability and moderate traction” and are “[c]onstructed of heavy-duty spunbond [PP] material with traction pattern.” The datasheet also noted that the product was certified for cleanrooms and could be used for the following applications: medical/health care facilities, food processing, manufacturing, cleanrooms, laboratories, research & development.⁸⁰ In comparing these shoe covers with the goods in issue, which have a CPE layer, the CBSA argued that while the CPE provides waterproof properties and contributes to the shoe covers’ durability and traction, the fundamental properties come from the PP nonwoven, which provides breathability, durability, and acts as a barrier to control contamination.

⁷³ The product datasheet indicates that the PP is 40 grams per meter squared and the CPE is 30 grams per meter squared. Exhibit AP-2017-065-07A at 31. Impex submitted that these measurements refer to the material’s density and not its weight.

⁷⁴ Association of the Nonwovens Fabrics Industry, *INDA Nonwovens Glossary*, Exhibit AP-2017-065-07A at 165.

⁷⁵ Exhibit AP-2017-065-07A at 40. The Tribunal notes that the website refers to the shoe covers only as “Item # KBCP” as opposed to model No. KBCP 525. As Impex also referred to the same marketing information in relation to the goods in issue, and the photo of the goods appear the same, the Tribunal accepts that the information cited by the CBSA refers to the goods in issue.

⁷⁶ Exhibit AP-2017-065-07A at 170.

⁷⁷ *Ibid.* at para. 54.

⁷⁸ *Ibid.* at 176.

⁷⁹ *Ibid.* at 172.

⁸⁰ *Ibid.* at 176.

[71] The Tribunal agrees with the CBSA that the CPE layer is an added feature of the mostly nonwoven shoe cover. The CPE layer provides a useful and marketable function; however, it does not find its value and role to be so fundamental that it provides the constituent material its essential character. The CPE layer provides greater traction. It also provides further protection (waterproofing) and enhances the durability of the nonwoven, but it does so only to the *part* of the PP material that it covers.

[72] In the Tribunal's view, it is the PP nonwoven which is fundamental and therefore provides the constituent material its essential character. The nonwoven has a greater surface area than the CPE layer and is used to form the upper part of the shoe.⁸¹ This militates towards the significance of the PP nonwoven, as argued by the CBSA. It provides the means for shoes or boots (including larger ones) to be *covered* and provides a *protective barrier*, which in the Tribunal's view remains the main function of the product. The evidence on the record confirms that the PP nonwoven has physical properties which enable this function, namely durability, barrier to contaminants, breathability, as well as retaining the shape and structure for the entirety of the shoe cover.

[73] Moreover, the Tribunal finds that the PP nonwoven also has a role in the use of the shoe covers in the environments specified in the BootieButler® datasheet. It bears repeating that in its submissions, Impex focused on the role of the CPE layer and the use of the shoe covers in clean rooms, food processing, real estate, health care, construction, manufacturing, research and development, and energy.⁸² The Fabric Shoe Covers with Traction (7FWT-80CS), made from the same type of nonwoven fabric as the goods in issue, the soles of which are only partially covered by latex (due to the tread pattern of the latex), are made for use in similar environments as the goods in issue.⁸³ This indicates that the nonwoven is also a material that is used by manufacturers for its ability to protect shoes and prevent contamination in such environments. The Fabric Shoe Covers with Traction are marketed for these same environments as the goods in issue, except for real estate, construction, and energy. The lack of reference to these specific environments (i.e. real estate, construction and energy), in the Tribunal's view, does not amount to a material difference between the types of environments for which the goods in issue are made and those for which the Fabric Shoe Covers with Traction are made. Furthermore, there is no argument or evidence on the record that refutes the use of the Fabric Shoe Covers with Traction for the same applications as the goods in issue.

[74] Considering the evidence on the record with respect to all of the characteristics of the PP nonwoven and the CPE layer, the Tribunal finds that the use and value of the nonwoven is fundamental to the final product, which fundamentally is intended to cover shoes, provide protection and to prevent contamination. Accordingly, the constituent material derives its essential character from the PP nonwoven.

[75] For the reasons above, the Tribunal finds that the constituent material of the goods in issue may be classified in heading No. 56.03.

⁸¹ This is in contrast with the shoe covers that were originally examined by the CBSA, with respect to which the CPE layer fully covered the nonwoven. Exhibit AP-2017-065-07A at para. 9.

⁸² Exhibit AP-2017-065-07A at 31.

⁸³ *Ibid.* at 176.

Heading No. 63.07

[76] Having determined that the constituent material of the goods in issue can be classified as a textile of heading No. 56.03, the Tribunal must apply note 8(c), which prohibits goods that are “made up” from being classified in this heading. In *Impex*, the Tribunal determined that the goods in issue are “made up” within the meaning of note 7 to Section XI.⁸⁴ In this regard, the Tribunal notes that there was no dispute between the parties regarding the issue of whether the goods are “made up” articles, either before the Court on judicial review or in these remand proceedings. Accordingly, as the goods are “made up” and therefore cannot be classified in heading No. 56.03, the Tribunal finds that they are therefore classifiable in heading No. 63.07. The only applicable tariff item is tariff item No. 6307.90.99. As such, by virtue of note 2(p) to Chapter 39, which precludes “goods of Section XI” from being classified in said chapter, the goods in issue are therefore excluded from classification in heading No. 39.26.

DECISION

[77] The appeal is dismissed.

Peter Burn

Peter Burn

Presiding Member

⁸⁴ *Impex* at para. 44.