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Substantially Transformed or Not, That Is the Question
Understanding U.S. Origin Rules in Uncertain Times

Until the Trump administration's war on trade, many companies did not consider country of origin to be of critical importance to their import process. Certainly, country of origin questions were, and remain, important for determining whether goods are subject to import restraints (quotas) or for qualification under various free trade agreements and special duty programs such as 9801 or 9802; and it is of critical importance when we consider whether certain goods and materials are subject to Antidumping or Countervailing duties, but, for much of the goods that are imported, it was a non-issue. But no longer. Under the Trump administration's war on trade, we must now contend with and consider whether the goods we import are subject to additional duties under Section 201, 232 and the overwhelming impact of section 301 duties on goods from China. Companies are asking about whether they can shift their supply chain to take advantage of more favorable countries, and if so, how far down the supply chain the shift must occur.

Whose Responsibility is It to Determine Country of Origin?

Section 484 of the Tariff Act, as amended (19 U.S.C. § 1484), obligates an importer of record (IOR) to use reasonable care when entering or classifying imported merchandise, assessing duties, reporting accurate trade statistics and determining whether any other applicable legal requirement has been met. Determining and reporting the origin of imported goods falls within the scope of section 1484, both for purposes of duty preference claims as well as complying with basic entry requirements for reporting the correct country of origin of imported merchandise. (CBP Form 7501 "Entry Summary" Instructions: Detailed instructions on completing CBP Form 7501. https://www.cbp.gov/trade/programs-administration/entry-summary/cbp-form-7501) False statements with respect to origin can result in the assessment of penalties under 19 U.S.C. §1592. Additionally, errors made with respect to the country of origin can result in the loss of special duty privileges, detention or exclusion of goods at the time of admission, or a demand for redelivery of the articles to Customs custody. Articles that are not timely returned to Customs custody are subject to liquidated damages equal to the value of the unreturned articles. Goods that are improperly marked or not marked in accordance with the country of origin marking statute (19 U.S.C. § 1304) can also be assessed a special "marking duty" equal to 10 percent of the value of the mis-marked goods.

In *United States v. Golden Ship Trading Company*, 25 C.I.T. 40 (2001) the government sued an importer of t-shirts from the Dominican Republic, claiming that the true country of origin of the t-shirts was China and not the Dominican Republic as reported. The government sought a monetary penalty for

negligence. The importer argued that it was not negligent in misrepresenting the origin of the t-shirts because she relied on the information provided by the exporter and accepted his representations that the Dominican Republic was the country of origin of the t-shirts. The court, however, determined that the importer, Ms. Wu, failed to exercise reasonable care because she failed to verify the information contained in the entry documents related to country of origin. The court explained that under the definition of reasonable care, Ms. Wu had the responsibility to at least undertake an effort to verify the information on the entry documents. The court said that there is a distinct difference between legitimately attempting to verify the entry information and blindly relying on the exporter's assertions. Had Ms. Wu inquired as to the origin of the imported t-shirts or, at minimum, attempted to check the credentials and business operations of the exporter, she could make an argument that she attempted to exercise reasonable care and competence to ensure that the statements on the entry documents were accurate, but she had not. The court found that Ms. Wu's failure to attempt to verify the entry document information shows she did not act with reasonable care, and had, therefore, attempted to negligently introduce merchandise into the commerce of the United States in violation of 19 U.S.C.§ 1592 (a)(1)(A). Because of this, she was required to pay a civil penalty for her negligence.

Understanding the U.S. Country of Origin Rules

For non-preferential duty treatment, the U.S. country or origin (COO) rules follow the U.S. country of origin marking rules laid out in section 134 of the Customs Regulations. (19 CFR Part 134, et seq.)

These rules provide that the "country of origin" of a good is the country in which the good is wholly manufactured, produced, or grown. Such an article is said to be "wholly the growth or product" of that country and as such, it is considered to be "originating" in that country. Similarly, articles that are processed or manufactured exclusively in a country from materials that have been wholly grown or produced in that same country are also considered to be "wholly the product or manufacture" of that country.

When an article is not wholly the growth, product, or manufacture of that country, that is, when the product incorporates or reflects materials or processing, or both, which are attributable to two or more countries, origin determinations become more problematic. In such cases, the impact of materials or articles that originate in a country other than the country of final processing must be considered when determining the country of origin of the finished good.

If the article in question is not wholly manufactured, produced, or grown within a single country, then we must consider the source or origin of any component or material that is used in the manufacture, production, or assembly of the good, and whether the further work or material added to an article in a subsequent country effected a "substantial transformation" on that part, component or material, so as to render such other country the "country of origin" of the end product. (19 CFR Part 134.1)

U.S. Customs" Country of Origin Regulations

A common misconception by importers and the trade is that Part 102 of the Customs Regulations provides for general non-preferential origin rules. This is not the case. The preamble to Part 102 of the Customs Regulations provides that this part sets forth rules for determining the country of origin of imported goods for the purposes the North American Free Trade Agreement (NAFTA), the United States-

Morocco Free Trade Agreement regulations; the United States-Bahrain Free Trade Agreement, and for determining the country of origin of textile and apparel products.

The Substantial Transformation Rule

First set forth a century ago by the U.S. Supreme Court in *Anheuser-Busch Brewing Ass'n v. United States*, 207 U.S. 556, 562 (1908) the "substantial transformation" rule has been applied throughout the United States customs laws to determine the origin of goods for such varied purposes as: admissibility, eligibility for preferential trade programs, country of origin marking, drawback of duties, administration of the U.S. textile import program, American goods returned, and government procurement under the Trade Agreements Act of 1979.

The essence of the substantial transformation rule is that a product cannot be said to originate in the country of exportation if it was not manufactured there. The question, therefore, has been whether operations performed on products in the country of exportation are of such a substantial nature so as to justify the conclusion that the resulting product is a manufacture of that country. In *Anheuser-Busch Brewing Ass'n* the Supreme Court said: "[m]anufacture implies a change, but every change is not manufacture * * *. There must be transformation; a new and different article must emerge, 'having a distinctive name, character, or use.'"

In *United States v. Gibson-Thomsen Co., Inc.*, 27 C.C.P.A. 267 (C.A.D. 98) (1940) the Court of Customs & Patent Appeals held that a product undergoes a "substantial transformation" if, as a result of further manufacturing or processing, the product loses its identity and is transformed into a new product having "a new name, character, and use." As observed in *Tropicana Products, Inc. v. United States* (6 C.I.T. 155, 159, 789 F. Supp. 1154,1157 (1992)) substantial transformation is a concept of major importance in administering the customs and trade laws."

Complexity and Confusion Abounds

According to Customs, the substantial transformation rule of *Gibson-Thomsen* (the change of "name, character, and use" test) has been difficult for the importing community, Customs, and the courts to apply, and that the rule has often resulted in a lack of predictability and certainty to its decisions. At the root of this frustration is the fact that the *Gibson-Thomsen* substantial transformation rule must to be applied on a case-by-case basis, often involving subjective judgments as to what constitutes a new and different article, or whether certain processing resulted in an article with a new name, character, or use.

The concepts and rules surrounding substantial transformation can be confusing for the uninitiated. Very often, importers mistakenly base their conclusion on a local or "Regional Value Content" (RVC), or a change or shift in tariff classification, as evidence of a substantial transformation for purposes of determining origin. While these concepts have their place in determining the origin of goods for specific preferential trade programs, they have limited application when determining the origin of goods for general origin determinations. (Many of the current U.S. preferential trade programs, such as NAFTA, Chile (CLFTA), Singapore (SGFTA) Australia (AUFTA), Bahrain (BHFTA), Morocco (MAFTA), Oman (OMFTA), CAFTA-DR, Peru (PETPA), Korea (KORUS), Colombia (COTPA), and Panama (PATPA apply a tariff shift and/or a RVC requirement for determining the origin of goods. See CBP Side-by-Side Comparison of Free Trade Agreements and Selected Preferential Trade Legislation Programs--Non-Textile. While other

trade preference programs, such as Israel (ILFTA), Jordan (JOFTA), GSP, AGOA and CBERA all base their origin rule on the traditional substantial transformation rule and the change of “name, character, and use" test first enunciated in *Anheuser-Busch Brewing Ass’n* and in *Gibson-Thomsen Co., Inc*.)

The Substantial Transformation Rule: Variations on a Theme

While the traditional substantial transformation rule and the change of “name, character, and use" test remains the lodestone of country of origin determinations, it is not without its variations.

A Change in Name by Itself, Not so Much

For instance, A name change, for example, is not always considered determinative. (*United States v. International Paint Co.*, 35 C.C.P.A. 87, 93-94, C.A.D. 376 (1948)) Although it is clear that a change in name from "wire rod" to "wire" occurred in *Superior Wire v. United States* (when only a change in name is found, "such a change has rarely been dispositive"), this fact alone is not necessarily determinative of a substantial transformation. (*Superior Wire, Div. of Superior Prods. Co. v. United States*, 11 C.I.T. 608 (1987), aff'd, 867 F.2d 1409 (CAFC, 1989)) It may be supportive, however, of a finding of substantial transformation, as it did in *Ferrostaal Metals v. United States*, 11 C.I.T. 470; 664 F. Supp. 535 (1987). The name criterion is generally considered the least compelling of the factors that will support a finding of substantial transformation. *National Juice Producers,* ("a change in the name of the product is the weakest evidence of a substantial transformation"). *Uniroyal, Inc. v. United States*, 3 C.I.T. 220, 542 F. Supp. 1026 (1982), aff'd, 702 F.2d 1022 (CAFC, 1983) and *United States v. International Paint Co.* ("Under some circumstances a change in name would be wholly unimportant and equally so is a lack of change in name under circumstances such as [in this drawback case]."). See *Ferrostaal Metals Corp.*, and *Superior Wire*.

A Focus on Change in Use or Character

In recent years Customs and the courts have concentrated on change in use or character of the components or materials when processed into finished goods, and sometimes finding other various subsidiary tests appropriate to consider, depending on the situation at hand. (Energizer Battery, Inc. v. United States, 190 F. Supp. 3d 1308) Courts have held that when the properties and uses of a product are predetermined by the material from which it was made, no substantial transformation occurs. For example, in *Superior Wire*, wire rod in coils was shipped to Canada where it was drawn into wire. The court determined that the drawing operation did not result in a substantial transformation, pointing out that the properties of the wire rod and its uses were determined by the chemical content of the rod and the cooling processes used in its manufacture, and therefore, the wire rod dictated the final form of the finished wire.

"Character" is defined as the "mark, sign [or] distinctive quality" of a thing. Webster's Third New Int'l Dictionary of the English Language Unabridged (2002) at 376. For courts to find a change in character, there often needs to be a substantial alteration in the characteristics of the article or components. See, e.g., *Ran-Paige Co., Inc. v. United States*, 35 Fed. Cl. 117 (1996) and *National Hand Tool Corp. v. United States*, 16 C.I.T. 308 (1992). Changes that are deemed cosmetic are insufficient for a finding of substantial transformation. See, e.g., *Superior Wire*. The court previously has found a change in character when a "continuous hot-dip galvanizing process transformed a strong, brittle product which

cannot be formed into a durable, corrosion-resistant product which is less hard, but formable for a range of commercial applications," *Ferrostaal Metals*, but not when the "form of the components remained the same" and a heating process "change[d] the microstructure of the material, but there was no change in the chemical composition." While there can be changes in the "characteristics of the material, they d[id] not change the character of the articles." *Nat'l Hand Tool*, 16 CIT at 311.

In other cases, the court has attempted to ascertain the "essence" of a completed article to determine whether an imported article has undergone a change in character as a result of post-importation processing. (See *Uniden America Corp. v. United States*, 24 CIT 1191, 120 F. Supp. 2d 1091 (2000) a GSP case in which a cordless telephone consisted of 275 parts sourced in the Philippines and third-countries and an A/C adapter imported pre-assembled in China, where the court found that the A/C adapter did not impart the essential character of the cordless telephone and, thus, did not undermine the conclusion that the cordless telephone's other imported parts, once assembled together, had undergone a substantial transformation and were a product of a beneficiary developing country (BDC); see also *Uniroyal* where the court held that imported shoe uppers were the "essence of the finished shoe" and were not substantially transformed into something different by the addition of an outer sole in the United States.)

In analyzing whether there is a change in use, the court has found that such a change occurred when the end use of the imported product was no longer interchangeable with the end use of the product after post-importation processing. (See *Ferrostaal Metals* where the court found "substantial changes in the use of the [imported cold-rolled] steel sheet as a result of the continuous hot-dip galvanizing process" because "the frequency with which the two types of steel compete with or are interchangeable with each other is 'very limited,' perhaps less than one or two percent.")

However, when the end use was predetermined at the time of importation, courts have generally not found a change in use. See, e.g., *Nat'l Hand Tool* (when post-importation processing primarily consisted of an assembly process, having one predetermined end use at the time of importation does not preclude a finding of substantial transformation; however, based on the totality of the evidence, the court did not find substantial transformation had occurred). See also *Ran-Paige* (when post-importation processing consisted primarily of attaching handles to pans and covers the court likened it to Nat'l Hand Tool when "plaintiff did not change the use of the components, especially given the fact that the use was predetermined at the time of importation") and see *Uniroyal* (the court did not find substantial transformation when the imported upper underwent no physical change, "[n]or was its intended use changed. It was manufactured by plaintiff in Indonesia to be attached to an outsole; it was imported and sold to Stride-Rite for that purpose; and Stride-Rite did no more than complete the contemplated process").

Consideration of Subsidiary or Additional Factors

In addition to name, character, and use, the courts have also considered from time to time, subsidiary or additional factors, such as the extent and nature of operations performed, value added during post-importation processing, a change from producer to consumer goods, or a shift in tariff provisions. Consideration of subsidiary or additional factors is not consistent, and there is no uniform or exhaustive list of acceptable factors. For example, the court is split on whether to consider value added or costs

incurred as a factor. See *Superior Wire* ("[a]n inquiry that is sometimes treated as a type of cross-check or additional factor to be considered in substantial transformation cases is whether significant value is added or costs are incurred by the process at issue"), but see *Nat'l Hand Tool* (rejecting value added as a factor because it "could lead to inconsistent marking requirements for importers who perform exactly the same processes on imported merchandise but sell at different prices").

An article, however, need not experience a change in name, character, and use to be substantially transformed. All three of these elements need not be met before a court may find substantial transformation. *Koru North America v. United States*, (1988). *SDI Technologies Inc., v. United States* (1997). Likewise, components or materials that change in tariff classification is not dispositive, although it also may be supportive. (*Belcrest Linens v. United States*, 741 F.2d 1368, 1372 (CAFC, 1984)) An inquiry that is sometimes treated as a type of cross-check or additional factor to be considered in substantial transformation cases is whether significant value is added or costs are incurred by the process at issue. See *United States v. Murray* (1980).

Courts have also attempted to distinguish between minor manufacturing and combining operations or simple assembly, and processing that is more complex. See and compare *Uniroyal*, *Belcrest Linens* and *Ran-Paige*.

Substantial Transformation and Post-Importation Assemble of Components

When the post-importation processing consists of assembly, courts have been reluctant to find a change in character, particularly when the imported articles do not undergo a physical change. See, e.g., *Uniroyal*. In cases in which the post-importation processing entails assembly, courts have considered the nature and complexity of the assembly together with the name, character, or use test in making a substantial transformation determination. See *Ran-Paige*; *Belcrest Linens*; *Uniroyal*. The Federal Circuit, in *Belcrest Linens*, considered the difference between minor manufacturing and combining operations and substantial transformation when stenciled, marked and embroidered bolts of cloth were cut into individual pieces, scalloped, folded, sewn, pressed and packaged, and found that substantial transformation occurred based on "the extent of the operations performed and whether the parts lose their identity and become an integral part of a new article." *Belcrest Linens*.

When assembly operations, however, are manual and required some "skill and dexterity to put components together with a screw driver" but the names of each article and the form and character of each component remained unchanged, and the use of the imported articles was predetermined at the time of importation, the court concluded that substantial transformation had not occurred. See *Nat'l Hand Tool*.

Consider the Complexity of Assembly Operations

CBP and the court will often compare the degree and complexity of operations in pre-versus post-importation processing to evaluate whether a substantial transformation occurred. Again, for example, in *Nat'l Hand Tool*, the court contrasted the pre-importation processing of cold forming and hot-forging and noted that it required more complicated functions than post-importation processing, which included heat treatment and electroplating.; see also Uniroyal, (comparing a post-importation "minor manufacturing or combining process" in which imported shoe uppers were attached to outsoles with

"complex manufacturing processes" that occurred pre-importation when the imported uppers were produced). In *Ran-Paige*, the court did not focus on the nature of assembly operations except for characterizing them as an "attachment process," but found there was no substantial transformation because the name and character of the imported articles (pans and handles) did not change, and the end-use of the imported articles was pre-determined at the time of importation. While Customs and the courts consider the nature of post-importation processing in their substantial transformation analysis, there is no bright line rule on the number of components required or the minimum amount of time spent on assembly before an assembly process is no longer considered "simple assembly" or "combining operations" and is, instead, considered substantial transformation.

When determining whether the assembly or combining of parts or materials constitutes a substantial transformation, the determinative issue has been the extent of operations performed and whether the parts lose their identity and become an integral part of the new article. Assembly operations that are minimal or simple, as opposed to complex or meaningful, will generally not result in a substantial transformation.

In C.S.D. 85-25 (1985), Customs held that for purposes of the Generalized System of Preferences (GSP), the assembly of a large number of fabricated components onto a printed circuit board in a process involving a considerable amount of time and skill resulted in a substantial transformation. In that case, in excess of 50 discrete fabricated components (such as resistors, capacitors, diodes, integrated circuits, sockets, and connectors) were assembled. Whether an operation is complex and meaningful depends on the nature of the operation, including the number of components assembled, number of different operations, time, skill level required, attention to detail, quality control, the value added to the article, and the overall employment generated by the manufacturing process.

In *Uniden America Corporation v. United States*, the court considered the assembly of a cordless telephone and the installation of their detachable A/C (alternating current) adapters. The cordless telephones had three main detachable components, of 275 separate parts, that were assembled together in the Philippines. One of the three components, the A/C adapter, was imported into the Philippines from China. The court held that a substantial transformation occurred because each component had a different name from the phone that emerged and the A/C adapter had a different purpose than the cordless phone. The court found that a new character emerged because "the A/C adapter neither characterize[d] nor define[d] the phone in question." The court also believed the A/C adapter had a different character because of the "essence test" which the court used to determine if there was a change in character. In applying an "essence test", the CIT found that the "[t]he essence of the telephone is housed in the base and the handset. The court noted that consumers do not buy the article because of the specific function of the A/C adapter, but rather because of what the complete handset and base provide – communication over telephone wire. Thus, the court found that the detachable A/C adapter was substantially transformed when it was included with the cordless telephones. The court noted that the substantial transformation test is to be applied to the product as a whole and not to each of its detachable components. Consequently, the court found that the A/C adapter was a part of the cordless phone and that it had a new character, use, and name. CBP has applied the CIT's analysis in *Uniden* to determine whether other minor components when combined

with a larger and a more complex system would lose their separate identities to become part of that larger system. Relying on the *Uniden* decision, CBP has noted that the substantial transformation test should be applied to the product as a whole and not to each of the parts.

U.S Assembly of Electronics and Treatment of U.S. Software

The programming of a device that changes or defines its use generally constitutes substantial transformation. See Headquarters Ruling Letter (HQ) 558868, dated February 23, 1995 (programming of SecureID Card substantially transforms the card because it gives the card its character and use as part of a security system and the programming is a permanent change that cannot be undone); HQ 735027, dated September 7, 1993 (programming blank media [EEPROM] with instructions that allow it to perform certain functions that prevent piracy of software constitutes substantial transformation); and HQ 733085, dated July 13, 1990; but see HQ 732870 , dated March 19, 1990 (formatting a blank diskette does not constitute substantial transformation because it does not add value, does not involve complex or highly technical operations and did not create a new or different product); HQ 734518 , dated June 28, 1993, (motherboards are not substantially transformed by the implanting of the central processing unit on the board because, whereas in Data General use was being assigned to the PROM, the use of the motherboard had already been determined when the importer imports it).

No all simple assembly precludes a finding of substantial transformation. In HRL H175415, dated October 4, 2011, CBP held that development of U.S. software at significant cost to the company and over many years plus the programming of the U.S. assembled imported local area network switch in the U.S. substantially transformed the imported components of the switch into an article of U.S. origin for purposes of government procurement rules. In this case, CBP said that the software provided the hardware with its essential character of data transmission by providing network switching and routing functionality among other operations. Other CBP rulings that supported this result include H052325 (2009), H025023 (2003), HQ 968000 (2006) and HQ 563012 (2004).

In HQ H250154, February 23, 2018 (Country of Origin of Gateway Products for U.S. Government Procurement) CBP wrote:

> All the hardware components are designed in the United States and produced and assembled in China. Sierra imports the completed gateways into the United States, where authorized retailers install the ALEOS software. Sierra states that, at the time of importation, the fully assembled gateway is not functional because it does not contain the ALEOS software.

Substantial Transformation of Chemicals and Drugs

In determining whether a substantial transformation occurs in the manufacture of products from chemicals, CBP has consistently examined whether a chemical reaction occurs when two chemicals are mixed in the production of the final article. See HRL 555248 dated April 9, 1990; 556064 dated March 29, 1990; 555403 dated June 6, 1990. When chemical compounds are mixed together to form a different substance and the individual properties of each ingredient are no longer discernable, they have

undergone a substantial transformation. See HRL 555989 dated June 24, 1991, in which CBP held that raw materials used to produce three varieties of antioxidants undergo a double substantial transformation in the Bahamas.

In HQ 561282 (1999) CBP said that it was its understanding that the basic underlying chemical properties of SAN-acrylic rubber concentrate remained essentially unchanged when mixed with styrene-acrylonitrile (SAN) copolymers, and that the blending process performed in the United States, therefore, did not create a substantially different substance. CBP concluded that the two products, the styrene-acrylonitrile (SAN) copolymers and styrene-acrylonitrile rubber concentrates, were not substantially transformed when mixed together in the United States.

HQ 562316 (2002) involved the origin determination for trans-dermal nicotine patches (as well as inhalers and nasal sprays). CBP determined that the bulk-nicotine was changed in character and use because the nicotine went from a bulk-ingredient to a patch adhesive dressing formulated for timed release. There was a change in use because the bulk-nicotine went from being unsuitable for human use to a form usable as an aid in treating a person's nicotine addiction. Similarly, in HQ 563301, dated August 26, 2005, CBP determined that a bulk chemical called "parathormone" underwent a substantial transformation when subjected to a process to produce single-dose vials because the process transformed the raw bulk-parathormone from an "unstable, non-sterile, frozen material unsuitable for human use into a pharmaceutical agent ready for human use."

Considering prior rulings involving bulk substances, relevant factors include:

- whether an article is fit for human use (consumption or medicinal uses);
- whether there is a change in use and/or is the use predetermined at time of import;
- whether there is a change in name; and
- the extent the chemical or physical properties are changed.

CBP has consistently held that refining or purification of a crude substance does not generally effect a substantial transformation.

The Substantial Transformation Rule in AD and CVD Cases

Another costly mistake that importers make is thinking that the third country processing or assembly can preclude goods from be subject to Antidumping or Countervailing duty orders.

While it is true that in Antidumping and Countervailing duty cases, the Department of Commerce anti-circumvention provision takes an approach that is different from CBP, the CAFC has held that Commerce is free to use the traditional substantial transformation test to determine the origins of the finished goods, and its materials. See *Bell Supply Company, LLC v. United States*, 888 F.3d 1222 (CAFC, 2018) (Supporting the application of CBP's substantial transformation test prior to the consideration of Commerce's circumvention analysis.).

Importers and foreign exporters faced with an AD/CVD order may ship parts, subassemblies or components to a third country for completion, prior to export of the finished article to the United States. Because final assembly of the merchandise is completed in a third country, the importer or foreign exporter may believe that the finished product is a product of that third country, and thus is not

within the scope of the order. Through a circumvention inquiry, however, such third-country imports can be brought within the scope of the AD/CVD order if Commerce finds that:

- merchandise imported into the United States is the same "class or kind" as the merchandise subject to the order;
- the merchandise is completed or assembled from merchandise covered by an AD/CVD order, or from merchandise produced in the foreign country to which the order applies;
- the process of assembly or completion in the third country is minor or insignificant; and
- the value of the parts or components produced in the foreign country subject to the AD/CVD order is a significant portion of the total value of merchandise exported to the United States.

See 19 USC 781(b)(1) and 19 CFR 351.225(h); "Enforcement and Compliance Antidumping Manual," Chapter 26: Scope Determinations and Circumvention. *Peer Bearing Co. - Changshan v. United States*, 128 F. Supp. 3d 1304.

In *Bell Supply*, the CAFC said that both the substantial transformation analysis and the circumvention inquiry can apply to imported products that are made in one country but finished or assembled in a different country. Noting that in general, the substantial transformation analysis is used to determine country of origin for an imported article. The CAFC conclude that Commerce is entitled to use the substantial transformation analysis to determine country of origin before resorting to a circumvention inquiry, stating that:

> Where an imported article is "from" can be an inherently ambiguous question. Because a single article can be assembled from various components and undergo multiple finishing steps, Commerce must have some way to determine the country of origin during scope inquiries. To that end, "[t]he 'substantial transformation' rule provides a yardstick for determining whether the processes performed on merchandise in a country are of such significance as to require that the resulting merchandise be considered the product of the country in which the transformation occurred."

Conclusion

Origin determinations are very fact-specific, but as CBP itself has acknowledged, there can still be considerable uncertainty about what is deemed to be substantial transformation due to the "inherently subjective nature" which may be involved in CBP interpretations of these facts. When determining origin, CBP takes into account one or more of the following factors:

- the character/name/use of the article and that of it individual parts;
- the nature of the article's manufacturing process, as compared to the processes used to make the imported parts, components, or other materials used to make the product;

- the value added by the manufacturing process (as well as the cost of production),
- the amount of capital investment, or labor required compared to the value imparted by other component parts; and
- whether the essential character is established by the manufacturing process or by the essential character of the imported parts or materials.

As the court's decision in *Golden Ship Trading Company* reveals, it is the importer that has the responsibility to at least undertake an effort to verify the information on the entry documents, rather than blindly relying on the exporter's assertions of the origin of the goods. With so many products originating China, importers today are looking to transfer production or assembly of product to third counties. This process requires careful consideration of all the facts, and how that process is impacted by the substantial transformation rule. Errors or even a good faith disagreement with CBP can result in an expensive lesson for importers.

For more information U.S. Country of Origin rules, importers and brokers should consult CBP's Informed Compliance Publication (ICP) on U.S. Rules of Origin, and related website links.

For further information or questions about this or other customs issues, contact George R. Tuttle, III at geo@tuttlelaw.com or at (415) 986-8780.

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