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## Rules of Origin or Rules of Restriction? A Commentary on a New Form of Protectionism

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# Rules of Origin or Rules of Restriction? A Commentary on a New Form of Protectionism

N. David Palmeter

## **Abstract**

Part I of this Article discusses the development of the basic United States rule of origin, the “substantial transformation” test, and its application to the various country of origin determinations required by U.S. law. Part II examines the application of the substantial transformation test to imports that compete with two politically powerful domestic industries, textiles and steel. Part III surveys the requirements for marking goods.

# RULES OF ORIGIN OR RULES OF RESTRICTION? A COMMENTARY ON A NEW FORM OF PROTECTIONISM

*N. David Palmeter\**

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### *INTRODUCTION*

"Rules of origin" are those laws, regulations, and practices that govern the determination of the country of origin of an imported product. These rules have become increasingly important in recent years with the growth of import quotas, rather than tariffs, as a primary form of protection from imports for domestic producers, and with the growth of tariff schemes that prefer imports from certain countries to those from others.

Traditionally, in the United States, country of origin disputes have been concerned with two major issues: (1) whether operations performed on an imported product by a manufacturer substantially transform it into a product of the United States, and thereby render it exempt from the country of origin marking requirements of the Tariff Act; and (2) whether an imported product that undergoes processing in more than one foreign country, to which different rates of duty apply, is the product of the country with the higher or the lower duty both for marking and for duty assessment purposes.

While these problems remain very important ones, the issues with which country of origin determinations are concerned today are far more extensive. These determinations are part of the test for eligibility for duty-free treatment under the Generalized System of Preferences and the Caribbean Basin Initiative, as well as the U.S.-Israel Free Trade Area, and for products of the insular possessions of the United States. They are an important factor in establishing the dutiable status

of American goods exported for further processing or assembly that subsequently are re-imported. They are relevant to a determination of an exported product's eligibility for duty drawback. And they are important in establishing an article's status as a U.S. product for government procurement purposes.

But a major reason for the increasing importance of country of origin determinations is, in a word, quotas. An increasing amount of merchandise imported into the United States is subject to country-specific import quotas, including virtually all steel, all textile, and all manufactured dairy product imports. A determination of the country of origin of these imports is tantamount to a determination of the country quota to which they will be charged. And, depending upon the availability of quota from that country, this can be a determination of whether the articles may be imported at all. Increasingly, country of origin determinations are being made in ways that limit imports, or subject them to higher duties. Rules of origin are becoming rules of restriction.

Part I of this Article discusses the development of the basic United States rule of origin, the "substantial transformation" test, and its application to the various country of origin determinations required by U.S. law. Part II examines the application of the substantial transformation test to imports that compete with two politically powerful domestic industries, textiles and steel. Part III surveys the requirements for marking goods.

## I. COUNTRY OF ORIGIN DETERMINATION

### A. *The "Substantial Transformation" Test*

The legal test employed in the United States to determine country of origin is one of "substantial transformation." A person who "substantially transforms" an imported article is not required to mark that article with the name of a foreign country; an article that undergoes processing in two or more foreign countries is the product of the country in which it last underwent a "substantial transformation." "[A] substantial transformation occurs," said a United States Court of Appeals, "when an article emerges from a manufacturing process with a name, character, or use which differs from those of the original

material subjected to the process.”<sup>1</sup>

“Name, character, or use”—when general formulae of this nature are applied to specific circumstances, inconsistencies usually arise and arbitrary lines frequently are drawn. This has occurred in the application of the substantial transformation test. But problems of this kind are not the only ones that have arisen. Another significant problem results from the fact that the definitions of the term “substantial transformation” that appear in regulations and rulings of the Customs Service, and in court decisions, differ slightly from one substantive legal area to another: a “transformation” apparently may be “substantial” enough for one purpose but not for another. Some substantial transformations, the United States Customs Service says, sometimes must be more “substantial” than others.

The differences that have arisen in the definition of the term “substantial transformation” appear to be more the result of inattention or accident than of any purposeful scheme. However, they have bred confusion in the law and have aided restrictionist interpretations by the Customs Service, which has sometimes justified determinations in one area by reference to principles enunciated in a different area, and at other times has dismissed with little or no comment attempts to rely on principles in one area as the basis for determinations in another. The only consistency is a policy that results either in higher duties or in fewer imports. This will become evident in the course of a survey of the variety of contexts in which country of origin determinations apply in the administration of the customs laws.

#### B. *Section 304 and the “Ultimate Purchaser”*

Section 304 of the Tariff Act, the “marking statute,” requires that an imported article, or its container, be marked in a manner that will inform the “ultimate purchaser” in the United States of its country of origin.<sup>2</sup> The “ultimate purchaser” gen-

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1. *Torrington Co. v. United States*, 764 F.2d 1563, 1568 (Fed. Cir. 1985).

2. 19 U.S.C. § 1304(a) (1982). “[T]he primary purpose of the country-of-origin marking statute,” said the Court of International Trade, “is to ‘mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will.’ (Congress, of course, had in mind a consumer preference for American made goods.)” *National Juice Prods. Ass’n v. United States*, 7 I.T.R.D. (BNA)

erally is the last person in the United States who receives the article in the form in which it was imported.<sup>3</sup> Thus, if the article is to be sold at retail in its imported form, the retail customer is the "ultimate purchaser." But if the imported article is to undergo further processing in the United States, the processor will be the "ultimate purchaser"—provided the process, in the words of the Customs Regulations, "results in a substantial transformation of the article, even though the process may not result in a new or different article."<sup>4</sup> If the manufacturing process is merely a minor one that leaves the identity of the imported article intact, the regulations continue, the person who obtains the article after the processing will be regarded as the "ultimate purchaser."<sup>5</sup>

By providing that a substantial transformation can occur without the production of a "new or different" article, the regulation highlights the definitional problem, for it departs from the language of the fundamental court decision dealing with the subject, the unanimous 1908 Supreme Court decision in *Anheuser-Busch Brewing Association v. United States*:

Manufacture implies a change, but every change is not manufacture . . . . [S]omething more is necessary . . . . There must be *transformation; a new and different article must emerge, "having a distinctive name, character or use."*<sup>6</sup>

While *Anheuser-Busch* dealt with duty drawback and not with country of origin marking, it is not clear what policy grounds would justify a distinction between a substantial transformation that does not result in a "new or different" article for marking purposes and a transformation that produces an article that is both "new *and* different" for drawback purposes.<sup>7</sup> Moreover, the Customs Service itself confuses the issue elsewhere in its regulations when it exempts from marking requirements at the time of importation articles intended for substantial change by manufacture in the United States:

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1921, 1930 n.14 (Ct. Int'l Trade 1986). "The purpose of the marking requirements is to enable the ultimate purchaser to decide whether to buy goods with knowledge of the goods' country of origin." C.S.D. 80-21, 14 Cust. B. & Dec. 758, 760 (1979).

3. 19 C.F.R. § 134.1(d) (1987).

4. *Id.* § 134.1(d)(1).

5. *Id.* § 134.1(d)(2).

6. 207 U.S. 556, 562 (1908) (emphasis added).

7. See *infra* notes 81-85 and accompanying text.

An article used in the United States in manufacture which results in an article having *a name, character, or use differing from that of the imported article*, will be within the principle of the decision in the case of *United States v. Gibson-Thomsen Co., Inc.*, 27 C.C.P.A. 267 (C.A.D. 98). Under this principle, the manufacturer or processor in the United States who converts or combines the imported article into the *different article* will be considered the "ultimate purchaser" of the imported article . . . .<sup>8</sup>

Perhaps a metaphysician can make sense of the terminology used, but even that is doubtful. In any event, it may be described as needlessly—if not hopelessly—confusing. Concrete examples of the application by courts of these words to the facts of specific cases involving the marking statute may serve to give them some content:

- A manufacturer of toothbrushes and hair brushes was determined to be the ultimate purchaser of toothbrush handles and wooden brush blocks to which the manufacturer attached bristles.<sup>9</sup> The imported items, the court said, "are mere materials to be used in the United States in the manufacture of new articles—toothbrushes and hair brushes, respectively."<sup>10</sup>

- An importer of steel forgings who converts them to flanges and fittings is the ultimate purchaser because conversion substantially transforms "producers' goods," incapable of being used by the consumer in their imported state, into "consumers goods."<sup>11</sup>

- A shoe manufacturer who attaches outsoles to imported shoe uppers does not substantially transform the uppers; accordingly, the manufacturer is not the ultimate purchaser of the uppers, and the completed shoe is not exempt from country of origin marking.<sup>12</sup>

- Racetrack patrons who were given umbrellas upon payment of an admission fee were the ultimate purchasers of the umbrellas, not the racetrack itself, which purchased and dis-

8. 19 C.F.R. § 134.35 (1987) (emphasis added).

9. *United States v. Gibson-Thomsen Co.*, 27 C.C.P.A. 267 (1940).

10. *Id.* at 273.

11. *Midwood Indus., Inc. v. United States*, 64 Cust. Ct. 499 (1970).

12. *Uniroyal, Inc. v. United States*, 3 Ct. Int'l Trade 220, 542 F. Supp. 1026 (1982), *aff'd*, 702 F.2d 1022 (Fed. Cir. 1983).



tributed them.<sup>13</sup> Therefore, it was not enough that the marking be adequate to notify the track of the foreign origin of the umbrellas; the marking must notify the patrons as well.<sup>14</sup>

•Manufacturers of frozen concentrated orange juice or reconstituted orange juice do not substantially transform imported manufacturing grade orange juice concentrate, and therefore are not the ultimate purchasers. Country of origin marking requirements, accordingly, apply to the repacked products that contain foreign manufacturing concentrate.<sup>15</sup>

### C. Rules of Preference

The Generalized System of Preferences ("GSP"), established in 1974,<sup>16</sup> and the Caribbean Basin Initiative ("CBI"), begun in 1983,<sup>17</sup> provide duty-free treatment to imports of

13. *Pabrini, Inc. v. United States*, 630 F. Supp. 360 (Ct. Int'l Trade 1986).

14. *Id.*

15. *National Juice Prods. Ass'n v. United States*, 7 I.T.R.D. (BNA) 1921 (Ct. Int'l Trade 1986). These court decisions reflect instances in which private parties protested the administrative rulings of the Customs Service or its parent agency, the Department of the Treasury. Numerous administrative rulings have not been appealed. Some examples will fill in more of the picture:

•Steel coils from Japan are not substantially transformed in Canada by being slit in width or flattened and slit into plates or sheets; consequently, the product, when imported from Canada into the United States, must be marked "Japan." C.S.D. 79-206, 13 Cust. B. & Dec. 1279 (1978).

•A manufacturer of ceiling fans does not substantially transform imported components by assembling and combining them into fans, and therefore the fans must be marked with the name of the foreign country of origin. C.S.D. 80-111, 14 Cust. B. & Dec. 898 (1979).

•Pre-cut leather from the United States is substantially transformed when assembled into leather harnesses in Haiti; therefore, the harnesses must be marked with Haiti as the country of origin. C.S.D. 80-113, 14 Cust. B. & Dec. 901 (1979).

•A manufacturer of asbestos cement pipe for water and sewer applications substantially transforms imported raw asbestos cement tubes, and, therefore, is the ultimate purchaser of the imported product. C.S.D. 80-114, 14 Cust. B. & Dec. 904 (1979).

•Silver plating substantially transforms imported steel cutlery. C.S.D. 80-237, 14 Cust. B. & Dec. 1150 (1980).

•Assembly in the United States of integrated circuits from imported semiconductor chips constitutes a substantial transformation. C.S.D. 80-227, 14 Cust. B. & Dec. 1133 (1980).

•Programming an EPROM (erasable programmable read only memory) semiconductor substantially transforms the article into a product of the country where the programming takes place. C.S.D. 84-85, 18 Cust. B. & Dec. 1044 (1984).

16. Trade Act of 1974, Pub. L. No. 93-618, tit. V, 88 Stat. 1978, 2066-71 (codified as amended at 19 U.S.C.A. §§ 2461-2466 (West 1980 & Supp. 1987)).

17. Caribbean Basin Economic Recovery Act, Pub. L. No. 98-67, tit. II, subtit. A,

products from developing countries when the preferential criteria of the laws are met. To determine whether an article is a product of an eligible developing country, a country of origin determination must be made. When an article is totally the product of the developing country, the determination presents no problem. But when an article is produced in a developing country from imported raw material, the rules of preference require more than a substantial transformation. They require, in addition, that a minimum amount of economic activity occur in the developing country before the preference will be granted. Thus, if a producer in a developing country substantially transforms imported raw material, the finished article is a product of that country for purposes of country of origin marking. However, the article does not qualify for the preference unless the process of substantial transformation involved the required amount of economic activity in the developing country. Similar rules apply in the case of the two other preferences, that conferred upon the insular possessions of the United States, and that granted to products of Israel pursuant to the Free Trade Area between Israel and the United States.

### 1. Generalized System of Preferences

To be eligible for duty-free treatment under GSP, an article must be imported directly from the beneficiary developing country ("BDC"), and the sum of the cost of materials produced in the BDC plus the direct cost of processing there must equal at least 35% of the appraised value of the article at the time of its entry into the United States.<sup>18</sup> This statutory requirement—that the sum of the costs of the materials plus the costs of processing must total at least 35% of the article's value—applies in addition to the requirement that imported raw materials be substantially transformed in the BDC. Substantial transformation can occur, Congress recognized, as a result of processing that adds less than 35% to the value of an article. The 35% minimum is required, Congress said, "to assure that, to the maximum extent possible, the preferences provide benefits to developing countries without stimulating

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97 Stat. 369, 384-95 (codified as amended at 19 U.S.C.A. §§ 2701-2706 (West Supp. 1987)).

18. 19 U.S.C. § 2463(b) (1982 & Supp. III 1985).

the development of 'pass-through' operations the major benefit of which accrues to enterprises in developed countries."<sup>19</sup> The presence of the 35% requirement has led to the development of a "dual substantial transformation" test that may assist BDCs in obtaining eligibility for the preference.

The term "dual substantial transformation" refers to an intermediate step in the processing of raw material imported into the BDC. If the imported raw material is substantially transformed in the BDC into an intermediate product that is itself a new article, and if that new article in turn is substantially transformed into the eligible article, the intermediate product becomes a product of the BDC by virtue of its substantial transformation in the BDC — and its total value is counted toward the required 35%.<sup>20</sup>

An example will illustrate how dual substantial transformation works. In *Torrington Co. v. United States*,<sup>21</sup> sewing machine needles, an eligible article, were exported to the United States from Portugal, then a BDC. The needles were manufactured in Portugal from imported wire. Therefore, the value of the wire—a non-Portuguese product—could not count toward the 35% requirement. The processing operations in Portugal added less than 35% to the value of the exported needles. Thus, at first glance, it would seem that the sum of Portuguese materials (zero) plus Portuguese processing totalled less than the required 35%.

But GSP eligibility was granted because the court found a dual substantial transformation: the first was the processing of the imported wire into "needle blanks"; the second was the processing of the needle blanks into needles. Because the needle blanks were produced in Portugal by the substantial transformation of imported wire, they were considered to be Portuguese materials—and the total value of the needle blanks was included in determining the value of the needles produced in Portugal. By this analysis, the sum of the costs of Portuguese materials (needle blanks) plus their Portuguese processing into needles equalled 100% of the value of the needles.

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19. H.R. REP. No. 571, 93d Cong., 1st Sess. 87 (1973).

20. See 19 C.F.R. § 10.177(a)(2) (1987).

21. 596 F. Supp. 1083 (Ct. Int'l Trade 1984), *aff'd*, 764 F.2d 1563 (Fed. Cir. 1985).

Since both courts in *Torrington* in fact found two substantial transformations, their results legally are correct. The major dispute in the case centered on the processes and products themselves, and not on the law. However, the opinions of both the Court of International Trade ("CIT") and the Court of Appeals for the Federal Circuit ("CAFC") contain dicta that are misleading, if not erroneous. They imply that a dual substantial transformation is required in every case if duty-free treatment is to be granted. Thus, they would appear to deny eligibility in a situation where a single substantial transformation occurs in a process that adds at least 35% to the value of the article. In such a case, by definition, the sum of BDC materials (0%) plus processing (35%) equals 35%. If the process which adds 35% to the value of the article also involves a substantial transformation, the statutory requirements for eligibility are met.<sup>22</sup> Dual transformation is needed only if the value of the materials is required to meet the 35% test—which was the case in *Torrington*.<sup>23</sup> Yet the CIT stated:

[A]bsent such a dual requirement, the GSP's goal of industrialization, diversification, and economic progression for underdeveloped nations could be frustrated. For example, a BDC could import eligible items, merely decorate or assemble these items and thereby satisfy the 35 percent value-added requirement since these direct costs of processing operations would be includable in the calculation. In this manner, BDC's could become mere conduits for the merchandise of developed countries.<sup>24</sup>

In this analysis, the court completely ignored the fact that, in addition to adding at least 35% to the value of the article, the processing in the BDC substantially transforms the imported raw materials into a new and different article of commerce. If decoration or assembly does not amount to a sub-

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22. See 19 U.S.C. § 2463(b)(2), which provides, in relevant part, that duty-free treatment shall be provided:

If the sum of (A) the cost or value of the materials produced in the beneficiary developing country . . . plus (B) the direct costs of processing operations performed in such beneficiary developing country . . . is not less than 35 percent of the appraised value of such article at the time of its entry into the customs territory of the United States.

*Id.*

23. See 596 F. Supp. at 1085.

24. *Id.* at 1086.

stantial transformation, then it would not matter how much value is added by the process. The CAFC, unfortunately, fell into the same trap:

In the absence of a dual transformation requirement, developed countries could establish a BDC as a base to complete manufacture of goods which have already undergone extensive processing. The single substantial transformation would qualify the resulting article for GSP treatment, with the non-BDC country reaping the benefit of duty-free treatment for goods which it essentially produced.<sup>25</sup>

Here, too, the court overlooked the fact that so long as imported raw materials are substantially transformed by an operation that adds 35% or more to their value, for GSP purposes they no longer are goods that a non-BDC country "essentially produced." Indeed, the CAFC's reasoning turns the statute's 35% requirement into a 100% requirement. This follows because, of course, all of the relevant processing—100% of it—occurs in the BDC. Assuming that this processing effects a substantial transformation, the question is whether it alone amounts to 35% of the value of the article. To require in addition that the raw materials be a product of the BDC, either by origin or by substantial transformation, is to require that 100% of the article—materials plus processing—be attributable to the BDC. What role then does the 35% requirement play? The dicta of both courts would read the 35% requirement out of the law, ignoring the statutory scheme that permits up to 65% of the value of an eligible article to be attributable to a non-BDC country. That both courts misconstrued this point is made clear not only from the language and logic of the GSP, but also from the legislative history of the Caribbean Basin Initiative.

## 2. Caribbean Basin Initiative

The Caribbean Basin Initiative was implemented by the Caribbean Basin Economic Recovery Act, which authorized the President to designate twenty-seven Central American and Caribbean nations as eligible to receive duty-free treatment for their exports to the United States through September 30,

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25. 764 F.2d at 1568.

1995.<sup>26</sup> The CBI rule of origin is comparable but not identical to the GSP rule of origin. The differences, however, do not affect the question of dual substantial transformation.

Under CBI, as under GSP, no problem arises when an article is totally the product of a CBI country. Under CBI, as under GSP, the 35% test is employed when imported raw materials are substantially transformed in the CBI country; however, the 35% test for CBI is slightly different from the 35% test for GSP. While CBI permits the cumulation of value added among all CBI beneficiary countries to reach the required 35 percent,<sup>27</sup> GSP permits cumulation only among members of a free trade association such as the ASEAN nations.<sup>28</sup> Value added in Puerto Rico and in the U.S. Virgin Islands counts as value added by a beneficiary country under CBI, but not under GSP.<sup>29</sup> Finally, if U.S. raw materials are substantially transformed in a CBI country, up to 20% of their value may be included in determining whether the 35% requirement is met;<sup>30</sup> there is no such provision in GSP.

Another important difference between GSP and CBI is related to the permitted cumulation of value added by eligible countries other than the country from which the product is exported: this is the "direct export" requirement. Under GSP, in order to qualify for the preference, the eligible article must be imported directly from the BDC for which the preference is granted.<sup>31</sup> Limited exceptions apply only to well-documented transshipment through third countries and to narrowly defined free trade zone operations.<sup>32</sup> And, of course, the 35% value must be satisfied totally from the materials and processing attributable to the single BDC.<sup>33</sup> Under CBI, the article may be

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26. *See supra* note 17.

27. 19 U.S.C.A. § 2703(a)(1)(West Supp. 1987).

28. 19 U.S.C. § 2463(b)(2). ASEAN, the Association of South East Asian Nations, consists of Brunei, Indonesia, Malaysia, Philippines, Singapore and Thailand. 19 U.S.C. § 1202 gen. headnote 3(e)(v)(A) (Supp. III 1985). Other associations of countries treated as one for GSP purposes are the members of the Cartagena Agreement (Andean Group), consisting of Bolivia, Colombia, Ecuador, Peru and Venezuela; and the thirteen member countries of the Caribbean Common Market (CARICOM). *Id.*

29. 19 U.S.C.A. § 2703(a)(1).

30. *Id.*

31. 19 U.S.C. § 2463(b)(1)-(2).

32. *See* 19 C.F.R. § 10.175 (1987).

33. 19 U.S.C. § 2463(b)(2).

imported directly from *any* beneficiary country, not necessarily the one for which the benefit is granted.<sup>34</sup> This difference facilitates the cumulation of value among countries eligible for CBI benefits.

The CBI regulations explicitly provide—contrary to the dicta of the *Torrington* cases—that a single substantial transformation will suffice, if the direct costs attributable to that transformation represent at least 35% of the appraised value of the imported article.<sup>35</sup> The legislative history makes clear that the country of origin criteria of the CBI parallel those intended, but not made explicit, for GSP: “Section 103(a) [19 U.S.C. § 2703(a)] expressly defines rules of origin and conforms them to the GSP system . . . . This language was not included in the GSP legislation, but was understood in this manner and has been consistently so interpreted.”<sup>36</sup>

Moreover, in summarizing the eligibility requirements of CBI, the House Report leaves no doubt that a single substantial transformation that adds at least 35% to the value of the transformed article will suffice.<sup>37</sup> In sum, the dicta of the two *Torrington* courts notwithstanding, it seems clear that a single substantial transformation that adds at least 35% to the value of an article should be sufficient to permit duty-free treatment for purposes of both GSP and CBI.

34. 19 U.S.C. § 2703(a)(1).

35. 19 C.F.R. § 10.196(a) (1987). Example 2 to this regulation provides:

A raw, perishable skin of an animal grown in a non-beneficiary country is sent to a beneficiary country where it is tanned to create nonperishable “crust leather.” The tanned skin is then imported directly into the U.S. Although the tanned skin represents a new or different article of commerce produced in a beneficiary country within the meaning of § 10.195(a), the cost or value of the raw skin may not be counted toward the 35 percent value requirement because (1) the tanned material of which the imported article is composed is not wholly the growth, product, or manufacture of a beneficiary country and (2) the tanning operation creates the imported article itself rather than [an] intermediate article which is then used in the beneficiary country in the production or manufacture of an article imported into the U.S. *The tanned skin would be eligible for duty-free treatment only if the direct costs attributable to the tanning operation represent at least 35 percent of the appraised value of the imported article.*

19 C.F.R. § 10.196(a) example 2 (emphasis added).

36. H.R. REP. No. 266, 98th Cong., 1st Sess. 13 (1983).

37. “To be eligible for duty-free treatment under CBI, an article must meet three basic tests under the rule-of-origin requirements: (1) direct importation; (2) 35 percent minimum local content; and (3) a product wholly of the country or ‘substantially transformed’ into a new or different article.” *Id.* at 12.

## 3. Products of the Insular Possessions

The United States has traditionally granted preferential treatment to imports from its insular possessions.<sup>38</sup> Prior to the CBI, products of the insular possessions were admitted duty-free if no more than 50% of their value was attributable to foreign content.<sup>39</sup> To maintain the preference, the CBI modified the preferential rules of origin that apply to the insular possessions.<sup>40</sup> Thus, for the insular possessions too, substantial transformation alone is not enough. As with GSP and CBI, specified value must be added.

The CBI relaxes this preferential rule of origin in two ways: first, it provides that articles imported from the insular possessions are afforded duty treatment "no less favorable" than the treatment afforded articles from Caribbean countries under the CBI, thereby placing the insular possessions at least on a par with the CBI countries;<sup>41</sup> second, it provides that the 50%-foreign-content-permitted rule of origin will be modified to a 70%-foreign-content-permitted rule for articles eligible for duty-free treatment under CBI, thereby giving the insular possessions an overall 5% advantage compared to CBI countries.<sup>42</sup> For articles not eligible for duty-free treatment under the CBI, the insular possessions retain their entitlement to

38. 19 U.S.C. § 1202 gen. headnote 3(a) (Supp. III 1985). The insular possessions include Guam, Wake Island, Midway Islands, Kingman Reef, Johnston Island, and American Samoa. 19 C.F.R. § 7.8 n.5 (1987). They also include the Commonwealth of the Northern Mariana Islands. See *infra* notes 121-25 and accompanying text.

39. Watches and watch movements were admitted duty free if their foreign content did not exceed 70%. 19 U.S.C. § 1202 gen. headnote 3(a) (Supp. III 1985).

40. H.R. REP. NO. 266, *supra* note 36, at 22-24; SENATE COMM. ON FINANCE, 98TH CONG., 1ST SESS., EXPLANATION OF COMMITTEE AMENDMENT TO H.R. 2973, at 33 (Comm. Print 1983) [hereinafter H.R. 2973 SENATE FINANCE EXPLANATION].

41. General Headnote 3(a) of the Tariff Schedules of the United States provides:

(iv) Subject to the provisions in Section 213 of the Caribbean Basin Economic Recovery Act, articles which are imported from insular possessions of the United States shall receive duty treatment no less favorable than the treatment afforded such articles when they are imported from a beneficiary country under such Act.

19 U.S.C. § 1202 gen. headnote 3(a)(iv) (Supp. III 1985) (citations omitted). The General Headnotes and Rules of Interpretation of the Tariff Schedules are no longer carried in the United States Code Annotated. See 19 U.S.C.A. § 2702(d) (West Supp. 1987).

42. 19 U.S.C. § 1202 gen. headnote 3(a)(i) (Supp. III 1985).



duty-free treatment under the 50% rule.<sup>43</sup>

#### 4. United States-Israel Free Trade Area

In 1985, Congress implemented the United States-Israel Free Trade Area, which provides for duty-free treatment in each country for the products of the other.<sup>44</sup> The rules of origin for this duty-free treatment parallel those of the CBI: in order for the United States to grant duty-free treatment, the sum of the cost of the materials produced in Israel, plus the direct cost of processing operations performed there, may not be less than 35% of the appraised value of the merchandise at the time it is entered in the United States.<sup>45</sup> The cost or value of materials produced in the United States may account for up to 15% of the appraised value of the merchandise.<sup>46</sup> To qualify for the duty-free preference, articles must be imported directly from Israel.<sup>47</sup>

#### D. Most-Favored-Nation Tariff Rates

Determination of the country of origin of an article imported into the United States is necessary to determine the applicable rate of duty. The Tariff Schedules of the United States provide for two rates of duty, the "Column 1" and the "Column 2" rates. Column 1 rates are applied generally to imports from countries that receive most-favored-nation ("MFN") treatment from the United States, while Column 2 rates are extended to countries that do not receive MFN treatment.<sup>48</sup> Column 2 represents the statutory rate enacted by the Smoot-Hawley Tariff of 1930,<sup>49</sup> the highest in the history of the

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43. *Id.* gen. headnote 3(a).

44. United States-Israel Free Trade Area Implementation Act of 1985, Pub. L. No. 99-47, 99 Stat. 82 (codified in scattered sections of 19 U.S.C.), reprinted in 19 U.S.C. § 2112 note (Supp. III 1985). Negotiation of the Free Trade Area was authorized in title IV of the Trade and Tariff Act of 1984, Pub. L. No. 98-573, §§ 401-406, 98 Stat. 2948, 3013-18. See Palmeto, *The Trade and Tariff Act of 1984: From the Customs Treatment of Manhole Covers to the Return of Goods from Outer Space*, 11 SYRACUSE J. INT'L L. & COM. 487, 532 (1984).

45. Trade and Tariff Act of 1984, *supra* note 44, § 402.

46. *Id.*

47. *Id.*

48. 19 U.S.C. § 1202 gen. headnote 3(d) (Supp. III 1985).

49. Act of June 17, 1930, ch. 497, 46 Stat. 590 (codified as amended in scattered sections of 18 U.S.C., 19 U.S.C., and 28 U.S.C.).

United States.<sup>50</sup> The rate in Column 1 reflects the reductions in the Column 2 rates that have resulted from various rounds of tariff-cutting trade negotiations.<sup>51</sup>

Once again, the origin situation is clear when an article is totally the product of a single country, and once again, the test should be "substantial transformation" when more than one country is involved. But this has been confused by the Customs Service. In a recent ruling, Customs posed the issue in these unsurprising terms: "whether the cutting process producing the instant merchandise constitutes a substantial transformation thereby entitling the merchandise to entry . . . under column 1 . . . . [I]f the merchandise has not been substantially transformed, it is dutiable under column 2 . . . ." <sup>52</sup> But this ruling does not even mention a highly relevant prior decision by the Treasury Department, the parent agency of Customs.<sup>53</sup> Probably this omission is just as well.

The question answered by Treasury in that prior decision was whether linen piece goods manufactured in Czechoslovakia, further processed in Belgium or West Germany, and then exported to the United States, were dutiable as the product of Czechoslovakia or as the product of Belgium or West Germany. Treasury stated:

[T]he term "substantial transformation" has no direct applicability to the determination required pursuant to General Headnote 3[(d)] . . . .<sup>54</sup>

This puzzling statement is followed by one that approaches the amazing:

[T]his issue is to be determined not on the question of whether the "loomstate" linen piece goods underwent a "substantial transformation" in either Belgium or West Germany, but rather whether the printing and finishing operations accomplished in these countries result in a new and different article possessing a distinctive name, character, or use substantially different from that which it possessed

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50. See generally HOUSE COMM. ON WAYS AND MEANS, 100TH CONG., 1ST SESS., OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES 4-5 (Comm. Print 1987); see also J. DOBSON, TWO CENTURIES OF TARIFFS 34 (1976).

51. *Id.*

52. C.S.D. 84-17, 18 Cust. B. & Dec. 433 (1983).

53. T.D. 78-202, 12 Cust. B. & Dec. 433 (1977).

54. *Id.*

before printing and finishing.<sup>55</sup>

Perhaps Treasury was attempting to deal with the “some-substantial-transformations-are-more-‘substantial’-than-others” problem, as it stated that “each situation must be determined on a case-by-case basis and cases involving ‘substantial transformation’ for other purposes under the tariff laws (*e.g.*, marking, drawback . . . ) are valuable only as extrinsic aids in making such determinations.”<sup>56</sup> But even this possibility is far from clear, for Treasury states that the issue is *not* substantial transformation, but whether the process results “in a new and different article possessing a distinctive name, character or use substantially different from that which it possessed before.” What is the difference? And what does Treasury mean by citing the *Anheuser-Busch* case as its only authority for this remarkable statement? *Anheuser-Busch*—the landmark substantial transformation case—defines the required transformation as one in which “a new and different article must emerge.”<sup>57</sup> How is it authority for the proposition that “substantial transformation” and “new and different article” are not the same? Moreover, *Anheuser-Busch* is a drawback case, precisely the kind of case, according to the same ruling, that is “valuable only” as an “extrinsic” aid in making determinations. Fortunately, this ruling seems to have been given a well-deserved burial.

#### E. *Tariff Provisions—American Goods Returned*

When United States merchandise is exported and subsequently re-imported, it is fully dutiable, as if it were a totally foreign product, unless it falls into one of four specified exemptions.<sup>58</sup> Products of the United States exported and returned without having been advanced in value or improved in

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55. *Id.* (citing *Anheuser-Busch Brewing Ass'n v. United States*, 207 U.S. 556 (1908)).

56. *Id.*

57. *Anheuser-Busch Brewing Ass'n v. United States*, 207 U.S. 556, 562 (1908).

58. The basic exemptions are set out in the Tariff Schedules:

products of the United States exported and returned without having been advanced in value or improved in condition abroad. TSUSA Item 800.00/HS 9801.00.10.

articles exported for repairs or alterations and returned. TSUSA Item 806.20/HS 9802.00.40.

articles of metal (except precious metal) manufactured in the United States, or subject to a process of manufacture in the United States, exported

condition are free of duty. In the case of articles returned after repair, alteration, or processing, only the value added by the foreign operation is subject to duty. For articles returned after assembly, the value of the U.S. components is deducted from the total value to arrive at dutiable value. Country of origin issues arise in connection with these tariff items both as to the United States origin of the product returned and as to the extent to which foreign operations substantially—or otherwise—transform the article.

### 1. American Goods Not Advanced in Value

This item has commercial significance because limited processes may be applied to articles in another country without advancing their value or improving their condition.<sup>59</sup> To be eligible for duty-free treatment, the returned article must be a product of the United States.<sup>60</sup> The substantial transformation test is used to make this determination.<sup>61</sup> Previously imported articles, on which duty has been paid, may also receive duty-free treatment upon re-importation, but with limitations that do not apply to products of the United States.<sup>62</sup>

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for processing and returned for further processing. TSUSA Item 806.30/HS 9802.00.60.

articles assembled abroad from components produced in the United States. TSUSA Item 807.00./HS 9802.00.80

A proposed Harmonized System (HS) is scheduled to replace the TSUSA on January 1, 1988. When this occurs, HS numbers will replace TSUSA numbers. HS numbers given in this article are taken from Trade Policy Staff Committee, *Conversion of the Tariff Schedules of the United States into the Nomenclature Structure of the Harmonized System, Revised, Showing Administrative Changes Approved by the Trade Policy Staff Committee* (Oct. 1986).

59. For example, fishhooks exported in bulk, assembled and placed in retail packages abroad, were held not to be advanced in value or improved in condition abroad, and were, therefore, entitled to duty-free entry. *United States v. John V. Carr & Son, Inc.*, 496 F.2d 1225 (C.C.P.A. 1974). Similarly, tomatoes grown in the United States, exported for sorting, grading and retail packaging, were eligible for duty-free treatment upon their return. *Border Brokerage Co. v. United States*, 65 Cust. Ct. 50, 314 F. Supp. 788 (1970).

60. TSUSA Item 800.00/HS 9801.00.10 provides, in part: "Products of the United States when returned after having been exported . . ."

61. See UNITED STATES INT'L TRADE COMM'N, PUB. NO. 1695, *THE IMPACT OF RULES OF ORIGIN ON U.S. IMPORTS AND EXPORTS* 34 (1985) [hereinafter USITC PUB. No. 1695].

62. See TSUSA Item 801.10/HS 9801.00.25.

## 2. American Goods Repaired or Altered Abroad

Substantial transformation is the key issue here. Articles exported for repair or alteration are dutiable only on the value of the repair or alteration.<sup>63</sup> But if the foreign processing goes beyond repair or alteration, a substantial transformation occurs, and the article is dutiable on its full value.<sup>64</sup>

Repairs and alterations are distinguished from finishing operations by the fact that they are made to completed articles. Thus, the coating of glass beads for costume jewelry was held to be an alteration of the completed uncoated beads with which they were used interchangeably,<sup>65</sup> but the cutting of nonwoven fabrics to customer specifications constituted not an alteration but the final step in the manufacturing process.<sup>66</sup> Similarly, the redyeing of an already-dyed fabric is an alteration,<sup>67</sup> but the dyeing and finishing of greige goods is not.<sup>68</sup> This, in fact, was held to produce a "new and different article."<sup>69</sup>

This subject may be concluded with the saga of the dogs exported to Canada to be trained as hunting dogs and re-imported after training. "Because such training constitutes an alteration which advances the value and improves the condition of the exported animals," the Customs Service ruled, "the dogs are dutiable only on the value of their training."<sup>70</sup> For customs purposes, therefore, not all canine alterations are substantial transformations.

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63. TSUSA Item 806.20/HS 9802.00.40; see 19 C.F.R. § 10.8 (1987).

64. Conversion of steel ingots into steel slabs was found to be more than an alteration. See *Burstrom v. United States*, 44 C.C.P.A. 27 (1956). So too was the tempering of annealed glass for use in patio doors, which was held to transform the product into a new and different commercial article. See *Guardian Indus. Corp. v. United States*, 3 Ct. Int'l Trade 9 (1982).

65. See *Royal Bead Novelty Co. v. United States*, 68 Cust. Ct. 154, 342 F. Supp. 1394, 1400 (1972).

66. U.S. Customs Internal Advice Ruling 40/85, CLA-2 CO:R:VC:G 076861 JAS (Oct. 31, 1986).

67. *Amity Fabrics, Inc. v. United States*, 43 Cust. Ct. 64 (1959).

68. *Dolliff & Co. v. United States*, 81 Cust. Ct. 1, 455 F. Supp. 618 (1978), *aff'd*, 599 F.2d 1015 (C.C.P.A. 1979).

69. *Dolliff*, 81 Cust. Ct. at 5, 455 F. Supp. at 622.

70. T.D. 66-7(1), 101 Treas. Dec. 12, 13 (1966).

### 3. American Metal Articles Processed Abroad

A special rule exists for a metal article that is exported for processing and returned.<sup>71</sup> It must be "manufactured in the United States or subject to a process of manufacture in the United States" if it is to be dutiable only on the foreign value added.<sup>72</sup> An important requirement is that the exported article, as processed outside the United States, or that results from that processing, must be subject to still further processing after its return to the United States.<sup>73</sup>

### 4. American Components Assembled Abroad

The value of components that are the product of the United States may be deducted from the dutiable value of qualified imported articles.<sup>74</sup> A "product of the United States," according to the regulations of the Customs Service, is an article manufactured within the Customs territory of the United States. It may consist wholly of United States components or materials, of United States and foreign components or materials, or wholly of foreign components or materials. "If the article consists wholly or partially of foreign components or materials, the manufacturing process must be such that the foreign components or materials have been *substantially transformed into a new and different article*, or have been merged into a new and different article."<sup>75</sup>

In addition to the requirement that the components assembled abroad be products of the United States, eligibility for U.S. component treatment depends upon whether the components were exported in a condition ready for assembly without further fabrication, whether they lost their physical identity in the assembled article by a change in form, shape, or otherwise, and whether they were advanced in value or improved in condition while abroad. Assembly and operations incidental to the assembly process such as cleaning, lubricating, and paint-

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71. TSUSA Item 806.30/HS 9802.00.60.

72. *Id.*

73. *Id.*; see 19 C.F.R. § 10.9(a) (1987).

74. TSUSA Item 807.00/HS 9802.00.80 provides for "A duty upon the full value of the imported article, less the cost or value of such products of the United States . . . ."

75. 19 C.F.R. § 10.12(e) (1987) (emphasis added).

ing are not counted in the calculation of improved condition.<sup>76</sup> Customs defines “substantial transformation” in its regulations dealing with this item:

Substantial transformation occurs when, as a result of manufacturing processes, *a new and different article emerges*, having a *distinctive name, character or use*, which is different from that originally possessed by the article or material before being subject to the manufacturing process. The mere finishing or modification of a partially or nearly complete foreign product in the United States will not result in the substantial transformation of such product and it remains the product of a foreign country.<sup>77</sup>

Compare this language with the wording included in the definition of “ultimate purchaser” for country of origin marking purposes: the ultimate purchaser is one who “subjects the imported article to a process which results in a *substantial transformation* of the article, *even though the process may not result in a new or different article.*”<sup>78</sup>

Thus, for purposes of one Customs regulation, a substantial transformation occurs when “a new and different article emerges,” and for purposes of another, a substantial transformation may occur “even though the process may not result in a new or different article.”

All of this is even more confusing in light of the language of T.D. 78-202,<sup>79</sup> which tells us—perhaps consistently with the ultimate purchaser regulation—that a substantial transformation can occur without the emergence of a new and different article. Yet the ruling cites only *Anheuser-Busch* as authority when that case specifically requires that “a new and different article must emerge.”<sup>80</sup>

#### F. Drawback

*Anheuser-Busch*, as we have noted, was a drawback case.<sup>81</sup> The term “drawback” refers to the refund of duties paid on imported merchandise that has been used in the manufacture

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76. TSUS Item 807.00/HS 9802.00.80.

77. 19 C.F.R. § 10.14(b) (1987) (emphasis added).

78. 19 C.F.R. § 134.1(d)(1) (emphasis added).

79. 12 Cust. B. & Dec. 433 (1977); see *supra* notes 53-56 and accompanying text.

80. *Anheuser-Busch*, 207 U.S. at 562.

81. See *supra* note 7 and accompanying text.

or production of an article in the United States when that article is later exported.<sup>82</sup> "The theory underlying the granting of drawback . . . is and always has been that it would encourage the development in the United States of the making of articles for export, thus increasing our foreign commerce and aiding domestic industry and labor."<sup>83</sup>

Although the substantial transformation test derives from a drawback case, the term itself is absent both from the drawback law and from the drawback regulations. The latter simply define a "drawback product" as "a finished or partially finished product manufactured in the United States under a drawback contract."<sup>84</sup> Given the theory underlying the granting of drawback, it would make sense for the law and the regulations not to require a substantial transformation to determine whether an article is "manufactured or produced" in the United States for drawback purposes. Yet there is the *Anheuser-Busch* language, and its requirement that "a new and different article must emerge," a requirement that, as noted, is absent from the country of origin marking regulation implementing a law intended to inform consumers of the origin of their purchases.<sup>85</sup> Comparing the language of the *Anheuser-Busch* test with that of the marking regulation, a greater degree of transformation seems to be required before drawback will be granted than is required before a consumer no longer need be notified of the foreign origin of an article. Given the stated purpose of the two laws, this seems to be the reverse of the way it should be. Customs, by its drawback regulation, seems to have corrected the anomaly, albeit perhaps by winking at some old Supreme Court language that it appears to find useful to employ in contexts other than the one in which the words arose.

### G. *Government Procurement*

#### The Buy American Act requires the Federal Government

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82. "Upon the exportation of *articles manufactured or produced in the United States* with the use of imported merchandise, the full amount of the duties paid upon the merchandise so used shall be refunded as drawback, less 1 per centum of such duties . . . ." 19 U.S.C. § 1313(a) (1982) (emphasis added).

83. *United States v. International Paint Co.*, 35 C.C.P.A. 87, 90 (1948).

84. 19 C.F.R. § 191.2(g) (1987).

85. See *supra* notes 6-8 and accompanying text.



to give preference to American-made goods in its purchases.<sup>86</sup> A country of origin determination is required to determine what is and what is not "American" for purposes of the Buy American Act.<sup>87</sup> A second country of origin determination is required to learn whether the Buy American preference may be waived in accordance with the terms of the international Agreement on Government Procurement, which provides for non-discriminatory treatment for products of signatory countries.<sup>88</sup>

To determine if a product originates in a country that is a signatory to the Agreement, and is therefore eligible for waiver of the Buy American preference, the substantial transformation test is used:

An article is a product of a country or instrumentality only if (i) it is wholly the growth, product, or manufacture of that country or instrumentality, or (ii) in the case of an article which consists in whole or in part of materials from another country or instrumentality, it has been substantially transformed into a new and different article of commerce with a name, character, or use distinct from that of the article or articles from which it was so transformed.<sup>89</sup>

This formulation of the "substantial transformation" test differs slightly from those contained in the court decisions and in

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86. 41 U.S.C. §§ 10a-10d (1982).

87. Unfortunately, the Buy American Act employs terminology to define U.S. merchandise that differs even further from that used in the customs context. The Act refers to ". . . only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States . . ." *Id.* § 10a. The Federal Acquisition Regulations refer to a "domestic end product" which "means (a) an unmanufactured end product mined or produced in the United States, or (b) an end product manufactured in the United States, if the cost of its components mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components." 48 C.F.R. § 25.101 (1986).

88. See General Agreement on Tariffs and Trade, Multilateral Trade Negotiations, Agreement on Government Procurement, Apr. 11, 1979, *reprinted in AGREEMENTS REACHED IN THE TOKYO ROUND OF THE MULTILATERAL TRADE NEGOTIATIONS*, H.R. Doc. No. 153, 96th Cong., 1st Sess. pt. 1, at 67-189 (1979). For the authoritative commentary on the Agreement on Government Procurement, see Pomeranz, *Toward a New International Order in Government Procurement*, 11 *LAW & POL'Y INT'L BUS.* 1263 (1979).

89. 19 U.S.C. § 2518(4)(B) (1982).

the regulations we have examined. Whether the difference is significant, or whether it is mere linguistic trivia, remains to be seen.

## II. "SUBSTANTIAL TRANSFORMATION" AND "SUBSTANTIAL MANUFACTURING"

Whether a substantial transformation has occurred has depended historically upon the nature of the article emerging from a particular process—as compared to the nature of the article that entered the process—and not on the nature of the process itself.<sup>90</sup> To be sure, the process is a relevant factor in the determination, and typically it is set forth in the decisions.<sup>91</sup> But the question has continually arisen whether an article has been substantially transformed—by whatever process—into a new and different article having, in the words of *Anheuser-Busch*, "a distinctive name, character or use."<sup>92</sup>

Substantial transformation can occur—a new and different article can be produced—by means of an "insubstantial" process. Congress recognized this fact when, for example, it enacted the rule of origin requirements that apply to both GSP and CBI.<sup>93</sup> These preferential duty schemes require both a

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90. "There must be transformation; a new and different article must emerge, 'having a distinctive name, character or use.'" *Anheuser-Busch Brewing Ass'n v. United States*, 207 U.S. 556, 562. "Just how complex the operation was does not appear, but we do not think that is important . . ." *United States v. International Paint Co.*, 35 C.C.P.A. 87, 95 (1948). "Slabs . . . are clearly not the same articles as ingots and differ therefrom in name, value, appearance, size, shape and use." *Burstrom v. United States*, 44 C.C.P.A. 27, 29 (1956). "We do not deem it necessary to determine whether or not the processes employed at the plaintiff's Tube Line plant in the conversion of the imported articles into flanges and fittings are generally prevalent throughout any segment of the industry in the United States . . . [t]he end result of the manufacturing processes to which the imported articles are subjected in plaintiff's Tube Line plant is the transformation of such imported articles into different articles having a new name, character and use." *Midwood Indus., Inc. v. United States*, 64 Cust. Ct. 499, 507 (1970). "[W]here, as here, foreign processing of an export article, to whatever degree, produces such changes in the performance characteristics of the exported article as to alter its subsequent handling and uses over that which earlier prevailed, the resultant product is of necessity a new and different article." *Dolliff & Co., Inc. v. United States*, 81 Cust. Ct. 1, 5, 455 F. Supp. 618, 622 (1978) (emphasis added), *aff'd*, 599 F.2d 1015 (C.C.P.A. 1979).

91. *Anheuser-Busch*, 207 U.S. at 559 n.1; *Burstrom*, 44 C.C.P.A. at 29; *International Paint*, 35 C.C.P.A. at 89-90; *Dolliff & Co., Inc.*, 81 Cust. Ct. at 2, 455 F. Supp. at 619; *Midwood Industries*, 64 Cust. Ct. at 504.

92. *Anheuser-Busch*, 207 U.S. at 562.

93. See *supra* notes 16-37 and accompanying text.

substantial transformation and a contribution of at least 35% to the appraised value of the new and different article. Implicit in this 35% requirement is the fact that a substantial transformation can occur with less than 35%: "These specific rules are designed to preclude the possibility of the beneficiary countries serving as mere conduits for articles that in reality originate outside the region."<sup>94</sup> Indeed, the President originally proposed a 25% minimum for CBI, thereby recognizing that a process which left untouched as much as 75% of the value of an article nevertheless could transform it substantially.<sup>95</sup> But even while the Administration and the Congress were acknowledging that operations "serving as mere conduits" could effect a substantial transformation,<sup>96</sup> the Court of International Trade, in *Uniroyal, Inc. v. United States*,<sup>97</sup> was undermining this doctrine and was providing the rationale for a new and more restrictive test: "substantial transformation" plus "substantial manufacturing."

The issue presented in *Uniroyal* was whether footwear uppers, consisting of complete shoes except for the outsoles, were substantially transformed by the attachment of the outsoles. The court held that they were not. The imported uppers underwent no physical change whatsoever, being subject only to finishing by addition of the outsoles. The court drew an analogy to "attaching buttons to a man's dress shirt or attaching handles to a finished piece of luggage."<sup>98</sup> The imported upper, "the very essence of the finished shoe,"<sup>99</sup> retained its identity throughout the process: it was a shoe when the process began, and it was a shoe when the process ended.

There appears to be no reason to quarrel with this holding. However, in reaching it, the court relied in part upon a comparison of the process that produced the shoe uppers with the process that attached the outsoles. The court found the process of attaching the outsoles less time consuming and less costly than the process of producing the uppers, and it found that more highly-skilled labor was needed to produce the up-

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94. H.R. 2973 SENATE FINANCE EXPLANATION, *supra* note 40, at 34.

95. H.R. REP. NO. 266, *supra* note 36, at 12.

96. See *supra* note 94 and accompanying text.

97. 3 Ct. Int'l Trade 220, 542 F. Supp. 1026 (1982).

98. *Id.* at 224, 542 F. Supp. at 1030.

99. *Id.* at 225, 542 F. Supp. at 1030.

pers than to attach the outsoles.<sup>100</sup> The attachment of the outsoles, the court said, "is a minor assembly operation which requires only a small fraction of the time and cost involved in producing the uppers."<sup>101</sup>

Where *Uniroyal* broke new ground—and where it went astray—was not in finding the attachment of the outsoles to be a "minor assembly operation," but in holding relevant the magnitude of this operation as compared to the magnitude of the processes that produced the uppers. A "minor assembly operation" that does not change the identity of a product does not substantially transform that product, regardless of whether it involves a small or a large fraction of the time and the cost involved in producing the original article. On the other hand, a substantial transformation can occur even though the process that transforms the article is of smaller magnitude than that which produced it.<sup>102</sup>

*Uniroyal's* dictum that a substantial transformation cannot occur without substantial manufacturing, as we have seen, flies in the face of the Congressional understanding as exemplified by the "substantial transformation plus value added" criteria of the GSP and the CBI. It flies in the face of the cases from *Anheuser-Busch* forward. It was unnecessary to the result of the *Uniroyal* case, which seems correctly decided on its facts. But it offered a protectionist straw that has been grasped by the Customs Service to fashion highly restrictive special rules of origin for textile and apparel imports and for an increasingly restrictionist series of origin rulings for steel products as well.

#### A. Textiles

Action to change the rules of origin for textiles and textile products began—as many actions that affect these industries begin—in an election year.<sup>103</sup> In response to industry complaints that textiles and textile products were being imported

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100. *Id.* at 222-23, 542 F. Supp. at 1028.

101. *Id.* at 224, 542 F. Supp. at 1030.

102. This appears to have been the situation in *Burstrom v. United States*, 44 C.C.P.A. 27 (1956). See generally *supra* notes 64, 90-92 and accompanying text (discussing *Burstrom* and other cases).

103. Giesse & Lewin, *The Multifiber Arrangement: "Temporary" Protection Run Amuck*, 19 LAW & POL'Y INT'L BUS. 51, 93 (1987).

in circumvention of existing quotas,<sup>104</sup> President Reagan, on May 9, 1984, directed the Secretary of the Treasury to issue new country of origin regulations for textiles and apparel.<sup>105</sup> Interim regulations were published in August 1984,<sup>106</sup> and final regulations in March 1985.<sup>107</sup> They provide:

A textile or textile product will be considered to have undergone a *substantial transformation* if it has been transformed by means of *substantial manufacturing* or processing operations into a new and different article of commerce.<sup>108</sup>

Criteria for determining country of origin are given, with the qualification that they are not exhaustive, that one or any combination may be determinative. Additional factors that may be considered are:

(1) A new and different article of commerce will usually result from a manufacturing or processing operation if there is a change in:

- (i) Commercial designation or identity,
- (ii) Fundamental character or
- (iii) Commercial use.

(2) In determining whether merchandise has been subjected to substantial manufacturing or processing operations, the following will be considered:

- (i) The physical change in the material or article as a result of the manufacturing or processing operations in each foreign territory or country, or insular possession of the U.S.
- (ii) The time involved in the manufacturing or processing operations in each foreign territory or country, or insular possession of the U.S.
- (iii) The complexity of the manufacturing or processing operations in each foreign territory or country, or insular possession of the U.S.
- (iv) The level or degree of skill and/or technology required in the manufacturing or processing operations in each foreign territory or country, or insular possession of the U.S.

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104. *Id.* at 129-42.

105. Exec. Order No. 12,475, 3 C.F.R. 203 (1985), *reprinted in* 7 U.S.C. § 1854 note, at 363-64 (Supp. III 1985).

106. T.D. 84-171, 18 Cust. B. & Dec. 480 (1984).

107. T.D. 85-38, 19 Cust. B. & Dec. 1 (1985); 19 C.F.R. § 12.130 (1987).

108. 19 C.F.R. § 12.130(b) (emphasis added).

- (v) The value added to the article or material in each foreign territory or country, or insular possession of the U.S., compared to its value when imported into the U.S.<sup>109</sup>

The regulations follow with specific examples of operations that usually will, or will not, confer origin.<sup>110</sup>

The textile rules of origin have one purpose and one purpose only: to restrict imports of textiles and textile products. "Because of the nature of textile and apparel products and current conditions of international trade in these products," the

109. *Id.* § 12.130(d).

110. *See id.* § 12.130(e), which reads:

(e) Manufacturing or processing operations. (1) An article or material usually will be a product of a particular foreign territory or country, or insular possession of the U.S., when it has undergone prior to importation into the U.S. in that foreign territory or country, or insular possession any of the following:

(i) Dyeing of fabric and printing when accompanied by two or more of the following finishing operations: bleaching, shrinking, fulling, napping, decating, permanent stiffening, weighting, permanent embossing, or moireing;

(ii) Spinning fibers into yarn;

(iii) Weaving, knitting or otherwise forming fabric;

(iv) Cutting of fabric into parts and the assembly of those parts into the completed article; or

(v) Substantial assembly by sewing and/or tailoring of all cut pieces of apparel articles which have been cut from fabric in another foreign territory or country, or insular possession, into a completed garment (*e.g.* the complete assembly and tailoring of all cut pieces of suit-type jackets, suits, and shirts).

(2) An article or material usually will not be considered to be a product of a particular foreign territory or country, or insular possession of the U.S. by virtue of merely having undergone any of the following:

(i) Simple combining operations, labeling, pressing, cleaning or dry cleaning, or packaging operations, or any combination thereof;

(ii) Cutting to length or width and hemming or overlocking fabrics which are readily identifiable as being intended for a particular commercial use;

(iii) Trimming and/or joining together by sewing, looping, linking, or other means of attaching otherwise completed knit-to-shape component parts produced in a single country, even when accompanied by other processes (*e.g.* washing, drying, mending, etc.) normally incident to the assembly process;

(iv) One or more finishing operations on yarns, fabrics, or other textile articles, such as showerproofing, superwashing, bleaching, decating, fulling, shrinking, mercerizing, or similar operations; or

(v) Dyeing and/or printing of fabrics or yarns.

U.S. International Trade Commission reported, "rules of origin have a particularly significant impact."<sup>111</sup> The Commission explained that textiles and textile products undergo a sequence of processes, and may be traded at any point along this sequence:

[A] finished apparel item may be the end result of a process that began with production of the raw fiber and continued through spinning of the yarn, weaving the fabric, dyeing and finishing the fabric, cutting the fabric into pieces according to pattern, sewing or otherwise assembling the pieces, adding buttons, zippers, pockets, linings, and ornamentation, and labeling and packaging the end product. Products in any of these stages may be shipped to another country for further processing.<sup>112</sup>

By changing the rules for established trade patterns for products already governed by country-specific quotas, Customs was able to alter the charging of an imported product from one country quota to another; if the new country of origin has no quota for the product, the import will be excluded. This is precisely what occurred in trade involving China and Hong Kong, two of the largest suppliers to the United States.<sup>113</sup> The Commission explained:

Previously products processed in Hong Kong using intermediate materials from China qualified as products of Hong Kong and entered the U.S. under Hong Kong's quotas. Under the new regulations, some of these products will be classified as products of China rather than of Hong Kong. Since China has fully utilized its quotas in the past, this will have the effect of reducing China's exports of intermediate materials to Hong Kong for reexport to the United States.<sup>114</sup>

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111. USITC Pub. No. 1695, *supra* note 61, at 79.

112. *Id.* The purely protective motivation for the new rules is shown in their different treatment of knit-to-shape and cut-apparel components. Importers tend to utilize the first, U.S. producers with overseas operations the latter; thus Customs determined that the final assembly of knit-to-shape components would not confer origin, but that the final assembly of cut-apparel components would do so. Giesse & Lewin, *supra* note 103, at 140-41.

113. Giesse & Lewin, *supra* note 103, at 135.

114. *Id.* at 135. But attempts to contort rules of origin for protectionist purposes may have unintended consequences. Customs has been compelled to rule, in conformity with the new rules of origin, that when sweater parts knitted by machine in the United Kingdom are combined and finished in China, the country of origin of

The regulations have withstood judicial challenge,<sup>115</sup> but present interesting, unresolved legal questions nonetheless. Their authority was not drawn from the Tariff Act and its marking statute,<sup>116</sup> but rather from section 204 of the Agricultural Act of 1956, which authorizes the President to negotiate agreements with foreign governments limiting exports of textiles and textile products to the United States.<sup>117</sup> However, the textile rules were not intended to have any impact on the rules of origin as they are applied under the different laws in which origin determinations are relevant:

Customs believes that Congress, by using similar language in statutes dealing with the origin of merchandise, clearly intended that there should be only one rule for determining the country of origin of merchandise without regard to the particular statute requiring that determination. Therefore, it is believed that *Congress did not intend for Customs to apply one rule of origin for duty and marking purposes and a different rule of origin for the purposes of Section 204.*<sup>118</sup>

Yet it is clear that the textile rules of origin change the rules that apply for marking purposes. Indeed, because the marking statute—until *Uniroyal*—had been read judicially as not requiring substantial manufacturing to accomplish a substantial transformation,<sup>119</sup> it can be argued that Customs, in its textile rules, contravenes the marking law. To the contrary, Customs would contend, for *Uniroyal* changed things:

[I]t is Customs' view that the origin rules in section 12.130 are derived from Customs' interpretation of various court cases, most particularly *Uniroyal*. Therefore, the principles of origin contained in section 12.130 are applicable to merchandise for all purposes, including duty and marking.<sup>120</sup>

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the completed sweater is the United Kingdom—a country whose exports of textiles to the United States were not, at the time of the ruling, subject to quota. C.S. Priv. Ltr. Rul. 079,844 (Apr. 16, 1987).

115. See *Mast Indus., Inc. v. Regan*, 8 Ct. Int'l Trade 214, 596 F. Supp. 1567 (1984). This was a challenge to the interim regulations in which, *inter alia*, an injunction was sought.

116. 19 U.S.C. § 1304(a) (1982).

117. 7 U.S.C. § 1854 (1982).

118. T.D. 85-38, 19 Cust. B. & Dec. at 64-65, 50 Fed. Reg. at 8713 (emphasis added).

119. See *United States v. Gibson-Thomsen Co.*, 27 C.C.P.A. 267 (1940); *Midwood Indus., Inc. v. United States*, 64 Cust. Ct. 499 (1970).

120. T.D. 85-38, 19 Cust. B. & Dec. at 68, 50 Fed. Reg. at 8714.



This brings us to *Yuri Fashions Co. v. United States*,<sup>121</sup> a case in which Customs denied entry to sweaters from the Commonwealth of the Northern Mariana Islands ("CNMI"), maintaining that, under the textile rules, the sweaters were a product of Korea, and, therefore were subject to the quota applicable to sweaters from Korea.<sup>122</sup> Plaintiff argued that the sweaters met the criteria necessary to qualify for duty-free treatment as a product of an insular possession, but to no avail, the Court agreeing with Customs:

In effect, the country of origin of the merchandise was Korea for textile restraint purposes, and may have been the CNMI for duty and marking purposes. This situation may be awkward, but there is no violation . . . .<sup>123</sup>

Reconcile one country of origin for textile restraint purposes and another for duty and marking purposes with "Congress did not intend for Customs to apply one rule of origin for duty and marking purposes and a different rule of origin for the purposes of Section 204."<sup>124</sup> Clearly, the positions cannot be reconciled.

Has Customs, then, abandoned its "one rule of origin" position? It depends. A year after the March 1986 *Yuri Fashions* decision, the agency issued yet another restrictive ruling on sweaters. Previously, Customs had held New Zealand to be the country of origin of sweaters sewn and finished there from parts knitted in China, the parts being made from yarn produced in New Zealand from wool grown in New Zealand. No longer, said Customs. China—with its already-filled quota—is the country of origin of these sweaters as well. In the course of delivering yet one more restrictionist ruling, Customs opined:

Although section 12.130 was specifically promulgated for quota, visa, and export license purposes, the principles of origin contained therein were derived from recent judicial decisions (e.g., *Uniroyal v. United States*) and represent the law, as Customs understands it, to be applied in all country of origin decisions.<sup>125</sup>

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121. 632 F. Supp. 41 (Ct. Int'l Trade 1986).

122. *Id.* at 43.

123. *Id.* at 47 (footnote omitted). Since the merchandise was denied entry, duty was not assessed and the question of marking was mooted.

124. See *supra* note 118 and accompanying text.

125. T.D. 87-29, 21 Cust. B. & Dec. adv. sheet no. 12, at 1, 9, 52 Fed. Reg. 7825,

This situation indeed is "awkward." This awkwardness extends to the other industry that is the special object of Customs (and Congressional) solicitude—the steel industry.

### B. *Steel*

For two decades, trade in steel and steel products has been, together with trade in textiles and textile products, a major trade policy issue in the United States. We have had the "voluntary" export restraints of the 1960s, the Trigger Price Mechanism of the 1970s, and scores of antidumping and countervailing duty cases in the early 1980s.<sup>126</sup> We now have a series of bilateral agreements with major steel exporters, authorized by the Steel Import Stabilization Act, that limit United States imports of steel and steel products.<sup>127</sup> As is the case with textiles, the country-specific import quotas that result from the bilateral agreements bring country of origin issues to the fore. And, as is the case with textiles, the response of the Customs Service to this situation is, on the whole, restrictionist. This restrictionist response is discernible as yet only from a few specific cases, but it seems well established. There are so far no comprehensive rules of origin for steel, as there are for textiles; steel issues currently are being decided case-by-case.

Some earlier steel rulings offer a perspective on the restrictionist trend that is developing in the contemporary steel rulings. For example, Customs ruled in 1965 that steel plate of United States origin, exported for simple tempering and quenching (heat treatment), was not eligible upon its reimport for favorable duty treatment as returned American goods because the tempering and quenching imparted new characteris-

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7828 (Mar. 13, 1987). These rulings bring to mind the remark of Justice Potter Stewart that the sole consistency he could find in a line of antitrust cases was that "the Government always wins." *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1965). In recent Customs rulings, particularly textile and steel rulings, the only consistency seems to be that the restrictionists always win.

126. See Horlick & Savage, *Steel Trade Wars, 1968-84, How Washington Became the Center of U.S. Steel Trade*, *WORLD L.*, July-Aug. 1984, at 5.

127. The United States has negotiated bilateral steel restraint agreements with eighteen countries and the European Communities (excluding Portugal and Spain with which there are separate agreements). UNITED STATES INT'L TRADE COMM'N, PUB. NO. 1984, MONTHLY REPORTS ON THE STATUS OF THE STEEL INDUSTRY vi (1987). The Steel Import Stabilization Act was enacted as title VIII of the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948, 3043-47.

tics to the steel that went beyond alteration.<sup>128</sup> By clear implication the steel had undergone substantial transformation because a finished article, advanced in value but not altered by the advance, must be transformed; there is no third category in the law. A decade later in 1975, Customs ruled that when un-machined castings for hose couplings were machined, drilled, threaded, plated, and assembled, they too were substantially transformed.<sup>129</sup>

Three years later, this ruling was cited as authority, along with *Midwood Industries Inc. v. United States*,<sup>130</sup> for a determination that the simple threading of stainless-steel pipe fittings constituted a substantial transformation: “[W]e are of the opinion that the end result of the threading process is the transformation of the fittings into new and different articles of commerce. Threading, in this case, is a substantial manufacturing process.”<sup>131</sup>

This is a somewhat surprising ruling because it involved only threading, while the ruling upon which it relied involved machining, drilling, plating, and assembly in addition to threading, and *Midwood* itself involved, plating, machining, drilling, and painting in addition to threading. To the more cynical, however, the ruling is not totally surprising: its consequence was to confer country of origin status on Japan, not on Taiwan, and thereby to deny the product duty-free treatment under the GSP. A decade later, when it was realized that this ruling could permit the establishment of threading operations in countries without bilateral restraint agreements, thereby permitting “circumvention” of the steel quotas, Customs reversed itself: “[T]he threading operation does not so transform the unthreaded fitting as to cause its identity to be lost in the finished product.”<sup>132</sup> Citing *Uniroyal*, Customs observed that “the nature of the threading operation is insubstantial in relation to the nature of the operations required to manufacture the fitting.”<sup>133</sup>

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128. T.D. 56,545(1), 100 Treas. Dec. 868 (1965).

129. T.D. 75-199, 9 Cust. B. & Dec. 435 (1975).

130. 64 Cust. Ct. 499 (1970).

131. C.S.D. 79-437, 13 Cust. B. & Dec. 1666 (1978).

132. T.D. 87-46, 21 Cust. B. & Dec. adv. sheet no. 16, at 4, 52 Fed. Reg. 11,217 (Apr. 8, 1987).

133. *Id.* at 4, 52 Fed. Reg. at 11,217.

This later ruling in fact is probably correct, totally apart from its unnecessary reliance on *Uniroyal's* dictum as to the comparative magnitude of the processes. The simple threading of an already completed casting is akin to adding buttons to a shirt or handles to luggage, to use *Uniroyal's* examples, if not its rationale.<sup>134</sup> The steel fitting remains a steel fitting—it simply has undergone a finishing operation, not a substantial transformation into a new and different article of commerce.<sup>135</sup>

Yet, in spite of its apparent embrace of the *Uniroyal* dictum, Customs stated, in a still later ruling involving wire produced from imported wire rod:

The relative simplicity of the process does not change the fact that the character of the resulting product may be significantly different.<sup>136</sup>

This sentence is a perfect statement of the law that existed from *Anheuser-Busch* until *Uniroyal's* confusing "compare the processes" dictum, and it is a perfect statement of the law if *Uniroyal's* holding, not its dictum, is followed. Yet, inexplicably, this sentence is preceded by one that conveys just the opposite message:

The processing of wire rod into wire involves operations and equipment which, when compared to the operations and equipment necessary to produce the wire rod, are relatively simple and inexpensive.<sup>137</sup>

Since the drawing process accounted for only 11% of the value of the wire, Customs accordingly found the "substantial processing" standard that evolved from the *Uniroyal* dictum "not satisfied."<sup>138</sup>

134. See 3 Ct. Int'l Trade at 224, 542 F. Supp. at 1030.

135. As in *Uniroyal*, the shoe remained a shoe, and as in *Anheuser-Busch*: "A cork put through the claimant's process is still a cork." 207 U.S. at 562.

136. C.S. Priv. Ltr. Rul. 075,923, at 2 (Mar. 18, 1987).

137. *Id.*

138. *Id.* at 3. Elsewhere, the government has argued successfully that wire is a very different product from wire rod. See *United States v. Kanthal Corp.*, 554 F.2d 456 (C.C.P.A. 1977). The apparently contradictory language of Letter Ruling 075,923 suggests internal disagreement as to the outcome. It reads very much as if a negative conclusion were superimposed upon a ruling that found substantial transformation. The request for this ruling was made on March 22, 1985. See C.S. Priv. Ltr. Rul. 075,923. The fact that Customs required nearly two years to rule only confirms the suggestion of internal disagreement. Enforcement of this ruling preliminarily was enjoined by the Court of International Trade but the injunction was lifted

Eleven percent does not, therefore, satisfy the "substantial processing" requirement; neither, it appears, does 50%, for Customs also has ruled that the conversion of black plain-end pipe into electrical conduit by means of cutting, threading, hot-dip galvanizing, chromating, varnishing, and assembly, adding "approximately 50 percent of the value of the completed conduit," is not substantial transformation.<sup>139</sup> In addition to adding 50% to the value, this process alters the tariff classification of the article from "Metals, Their Alloys, and Their Basic Shapes and Forms" to "Electrical Machinery and Equipment." Not even the ruling that reversed the previous "threading-is-substantial-transformation" determination, not even *Uniroyal*, would seem to justify this result.

Yet Customs was not through. On March 13, 1986, the agency published in the Federal Register its ruling changing the country of origin of wool sweaters from New Zealand to China.<sup>140</sup> This change was justified, Customs said, because there is but one law "to be applied in all country of origin decisions."<sup>141</sup>

On the day before this ruling was published, the Court of International Trade concluded a trial concerning another New Zealand product—steel sheet that had been annealed and galvanized in New Zealand using cold-rolled sheet from Japan.<sup>142</sup> At issue in that trial was an earlier Customs ruling that the processing in New Zealand did not substantially transform the Japanese product, and that the imported product, therefore, was subject to the quota that applied to Japan, and could not

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and the Customs ruling ultimately was upheld. *Superior Wire v. United States*, Slip Op. No. 87-98 (Ct. Int'l Trade Aug. 21, 1987). The court in *Superior Wire* cited *Kanthal* simply for the proposition that a change in tariff classification is not dispositive of the issue of substantial transformation. But in *Kanthal* the issue was more than simple classification; it was whether wire rod and drawn wire were the same product. The court said no, because "the manufacturer had drawn the product once, making it 'wire,' and had completed all of the processing steps necessary for the product to be imported, sold, and used as wire." 554 F.2d at 461. While the issue was not described as substantial transformation, the analysis certainly sounds a lot like it.

139. C.S. Priv. Ltr. Rul. 076,950 (Feb. 24, 1986).

140. T.D. 87-29, 21 Cust. B. & Dec. adv. sheet no. 12, at 1, 52 Fed. Reg. 7825 (Mar. 13, 1987); see *supra* note 125 and accompanying text.

141. T.D. 87-29, 21 Cust. B. & Dec. adv. sheet no. 12, at 9, 52 Fed. Reg. at 7825 (Mar. 13, 1987).

142. *Ferrostaal Metals Corp. v. United States*, Slip Op. No. 87-76, at 4 (Ct. Int'l Trade June 26, 1987).

enter quota-free as a product of New Zealand.<sup>143</sup> The court described the argument made on behalf of the Customs Service:

[E]ven though changes have occurred which would ordinarily result in a finding of substantial transformation, a different result may be found in the context of an agreement designed to restrict imports, where the Court may apply different criteria requiring more substantial changes in the imported product.<sup>144</sup>

A “different result in the context of an agreement designed to restrict imports”? “Different criteria requiring more substantial changes”? What ever happened to the law “to be applied in *all* country of origin decisions”?<sup>145</sup> How could a federal agency present such an argument to a federal court when virtually simultaneously it was pontificating to the contrary in the Federal Register?

The court, fortunately, would have none of it. It refused to “depart from policy-neutral rules governing substantial transformation in order to achieve wider import restrictions in particular cases.”<sup>146</sup> It found that the processing in New Zea-

143. C.S. Priv. Ltr. Rul. 077,578 (Aug. 25, 1986).

144. *Ferrostaal Metals*, Slip Op. No. 87-76, at 8.

145. T.D. 87-29, 21 Cust. B. & Dec. adv. sheet no. 12, at 9, 52 Fed. Reg. at 7825 (Mar. 13, 1987) (emphasis added).

146. *Ferrostaal Metals*, Slip Op. No. 87-76, at 10. It is of interest to note that Judge Dominick L. Di Carlo was the author of *Mast Industries*, *supra* note 115, *Yuri Fashions*, *supra* note 121, and *Ferrostaal*, *supra*. *Mast Industries* upheld the textile regulations, in the preamble to which Customs expressed the view that only one rule of origin applied for all purposes. In *Yuri Fashions* Judge Di Carlo held that, however awkward, there could be one rule of origin for textile quotas and another for other purposes, 632 F. Supp. 41, 47 (Ct. Int'l Trade 1986), while in *Ferrostaal*, he rejected the position advocated on behalf of Customs that there could be one rule of origin for steel quota purposes and another for other purposes. *Ferrostaal*, *supra*, at 10. Despite the apparent conflict between *Yuri Fashions* and *Ferrostaal*, Customs, and not Judge Di Carlo, is being inconsistent. *Mast Industries* simply upheld textile regulations that determine origin for quota purposes based on section 204 of the Agricultural Act of 1956; the issue of origin for other purposes was not presented. *Yuri Fashions* did present the issue and Judge Di Carlo there held that, “awkward” though it might be, one rule could apply for section 204 quota purposes and another for marking purposes—despite the assertions of Customs to the contrary in the preamble to those regulations. In *Ferrostaal*, there were no competing regulations issued pursuant to another statute. This is the crucial distinction between *Yuri* and *Ferrostaal*.

In addition, the court in *Superior Wire*, *supra* note 138, even while agreeing with Customs on the question of substantial transformation, rejected the argument that a

land did effect a substantial transformation, and it held that the steel was, therefore, a product not of Japan, but of New Zealand.<sup>147</sup>

That restriction of imports is the paramount factor in the steel rulings of Customs seems clear. The processing involved in the few affirmative determinations that have been made is, by any definition, "substantial," and, therefore, compels a conclusion of substantial transformation under the most extreme definition of the term.<sup>148</sup> Still, reports circulate concerning possible new steel rules to match the textile rules.<sup>149</sup> Congress has not been silent. Both the House of Representatives and the Senate have passed bills authorizing the President to treat steel imports from countries that do not have bilateral restraint agreements as the product of a country with an agreement, if the steel from which the import is made was "melted and poured" in a country with an agreement.<sup>150</sup> Under these bills, steel sheet from Japan (a country with an agreement) galvanized in New Zealand (a country without an agreement)

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different substantial transformation test should be employed because a bilateral steel agreement was involved.

147. *Ferrostaal Metals*, *supra* note 142, at 22. The Court in *Ferrostaal* seemed to move away from the *Uniroyal* analysis, with its emphasis on "substantial manufacturing" as well as "substantial transformation." *Ferrostaal* turned on the traditional criteria of change in name, character and use, as well as tariff nomenclature. To be sure, the court in *Ferrostaal* found that the processing in New Zealand substantially added to the value of the finished product. *Id.* at 16. In so doing, however, the court did not compare the complexity and costs of the processes performed in Japan to those performed in New Zealand. Nor, despite the fact that it is mentioned three times in *Ferrostaal*, was *Uniroyal* cited by the court while discussing value. The court found that the Japanese product accounted for about \$350 of the final product's \$550 to \$630 value, about 55 to 65%. In these terms, there is an implicit departure from *Uniroyal* as New Zealand clearly accounted for less than half of the final value of the product.

148. Customs determined that the hot-dip galvanizing process, when combined with surface coating with plastic laminates, is substantial transformation. In addition, Customs found a dual substantial transformation—and, accordingly, CBI duty-free eligibility—in the case of oil country tubular goods produced in Panama, a beneficiary country, from steel coils imported from a non-beneficiary country. See C.S. Priv. Ltr. Rul. 553,739 (Nov. 21, 1985). However, this ruling is being reviewed in response to an allegation that only a single transformation occurs. 51 Fed. Reg. 39,396 (Oct. 28, 1986).

149. See, e.g., *Administration Drafting New Standard to Prevent Transshipments of Steel*, INSIDE U.S. TRADE, June 5, 1987, at 1.

150. See H.R. REP. NO. 40, pt. 1, 100th Cong., 1st Sess. 181 (1987) and Section 323(b) of H.R. 3 as amended and passed by S.1420, 133 Cong. Rec. S10370, S10372 (July 21, 1987).

could be treated as Japanese for quota purposes despite a substantial transformation in New Zealand. Under the terms of the bills, however, if the second country also has an agreement, for example, Mexico, the normal rules of origin would apply. In this case, the sheet would be Mexican, not Japanese. Thus, we would have one rule of origin for marking purposes and another rule for quota purposes—depending not on the transformation that has occurred, nor even on the magnitude of the processes involved, but simply on the bilateral agreement status of the countries involved.

Another awkward situation.<sup>151</sup>

### III. MARKING REQUIREMENTS

#### A. General

Rules of origin are used to determine whether an article must be marked with the name of a foreign country and, if so, with which country's name. The marking requirements of Section 304 of the Tariff Act<sup>152</sup> determine how the marking is to be done, and under what circumstances exceptions will be made. The general requirement of Section 304 is that every article (or, in certain circumstances its container) be marked with the English name of its country of origin "in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit . . ."<sup>153</sup>

#### 1. The Name of the Country

Although the statute calls for the English name of the country of origin, abbreviations and variant spellings are ap-

151. See *supra* note 123 and accompanying text.

152. Act of June 17, 1930, ch. 497, § 304, 46 Stat. 590, 687 (codified as amended at 19 U.S.C.A. § 1304 (West Supp. 1987)).

153. 19 U.S.C. § 1304(a) (1982). This section provides in part:

Except as hereinafter provided, every article of foreign origin (or its container, as provided in subsection (b) hereof) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article.

*Id.* For an extended discussion of the marking requirement, together with its history and examples of older decisions, see Note, *United States Country of Origin Marking Requirements: The Application of a Nontariff Trade Barrier*, 6 *LAW & POL'Y INT'L BUS.* 485 (1974).



proved, for example, "Gt. Britain" for Great Britain and "Luxemb." for Luxembourg.<sup>154</sup> Similarly, "Brasil" is acceptable for Brazil, "Italie" for Italy,<sup>155</sup> and "Danmark" for Denmark;<sup>156</sup> however, "Fabrication Suisse" is not acceptable for Switzerland,<sup>157</sup> nor is "Can." or "Cana." for Canada,<sup>158</sup> nor "Philip" for the Philippines.<sup>159</sup> Goods imported from the French Indian Ocean islands of Amsterdam, St. Paul, and Kerguelen must be marked with a legend such as "Product of Amsterdam Island (France)" because the names of the islands are not sufficiently well-known in the United States to permit their use without the word "France."<sup>160</sup>

If the words "United States," "American," "U.S.A.," or a variant of them appears on an imported article, the name of the country of origin, preceded by the phrase "Made in" or "Product of" or words of similar meaning, must appear in close proximity in letters of comparable size.<sup>161</sup> The same is true if the name of a city or locality in the United States, or the name of a foreign country or locality other than the one in which the article was produced, appears.<sup>162</sup> However, when the letters "USA" are used as a symbol or decoration, and would not reasonably be construed as an indication of country of origin, this requirement does not apply.<sup>163</sup>

## 2. In a Conspicuous Place

This self-explanatory requirement has engendered few disputes. Customs has ruled that marking on the underside of the handle of a shut-off valve is not conspicuous,<sup>164</sup> but that marking of a sheathed knife blade is adequate when the sheath normally would be removed before purchase.<sup>165</sup>

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154. 19 C.F.R. § 134.45(b) (1987).

155. *Id.*

156. T.D. 74-42, 8 Cust. B. & Dec. 78 (1974).

157. O.R.R. Ruling 720,289 (Aug. 25, 1972). This same ruling approved marking with the term "IMPRIME EN FRANCE."

158. C.S.D. 80-52, 14 Cust. B. & Dec. 812 (1979).

159. C.S.D. 80-179, 14 Cust. B. & Dec. 1032 (1980).

160. T.D. 74-208, 8 Cust. B. & Dec. 373 (1974).

161. 19 C.F.R. § 134.46 (1987).

162. *Id.*

163. C.S. Priv. Ltr. Rul. 712,013 (Jan. 16, 1980).

164. C.S.D. 84-69, 18 Cust. B. & Dec. 1012, 1013 (1984).

165. C.S.D. 80-32, 14 Cust. B. & Dec. 777, 778 (1979).

### 3. Legibly, Indelibly, and Permanently

Customs recommends that this requirement be met by applying the mark during manufacture, suggesting that the country-of-origin mark on metal articles be die sunk, molded in, or etched; on earthenware or chinaware that it be glazed; and on paper articles that it be imprinted.<sup>166</sup> The regulations require a degree of permanence "sufficient to insure that in any reasonably foreseeable circumstance, the marking shall remain on the article (or its container) until it reaches the ultimate purchaser unless it is deliberately removed. The marking must survive normal distribution and store handling."<sup>167</sup> Paint stencilling of ships' anchors, for example, is not acceptable because weathering causes the paint to wear or become obscured by rust. Anchors must be marked by die stamping, raised lettering, or an equally permanent method.<sup>168</sup>

#### B. *Specific Products*

The Tariff Act prescribes specific methods of marking for certain articles, and authorizes Customs to prescribe specific methods by regulation.<sup>169</sup> Customs has exercised its authority to require that imported eyeglass and sunglass frames be marked by die stamping in a contrasting color, by raised lettering, by engraving, or by some other method producing a permanent mark; ink stamping and tagging with adhesive labels is not permitted.<sup>170</sup> Rotary cutting tools (drill bits) also must be marked by means of die stamping in a contrasting color, by raised lettering, by engraving, or by some other permanent method—with narrowly drawn exceptions.<sup>171</sup>

Broadly-based Congressionally-imposed marking requirements have not been without problems. A major problem occurred with enactment of the Trade and Tariff Act of 1984, which required, *inter alia*, specific forms of marking for pipe and tube, compressed gas cylinders, and manhole rings, frames, covers, and assemblies.<sup>172</sup>

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166. 19 C.F.R. § 134.41(a) (1987).

167. *Id.* § 134.41(b) (1987).

168. T.D. 81-162, 15 Cust. B. & Dec. 410 (1981).

169. 19 U.S.C. § 1304(a)(1).

170. T.D. 74-38, 8 Cust. B. & Dec. 71 (1974).

171. T.D. 84-214, 18 Cust. B. & Dec. 703 (1984).

172. Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 207, 98 Stat. 2948.

## 1. Pipe and Tube

Marking requirements for pipe and tube are an instance of Congressional irresponsibility being overcome by a laudable dose of sanity administered by the Customs Service. Section 207 of the Trade and Tariff Act of 1984 required that pipes and fittings of iron, steel, or stainless steel be marked with the name of the country of origin in English by means of "die stamping, cast-in-mold lettering, etching, or engraving."<sup>173</sup> This requirement presented a serious problem because, as Customs stated, many of these products "cannot be marked by any of the four prescribed methods without rendering such articles unfit for the purpose for which they are intended or violating industry standards for such articles."<sup>174</sup> Cast-in-mold lettering, of course, can be done only if pipe is cast, and most pipe is not cast. But the other permitted means of labelling—die stamping, etching, and engraving—all involve cutting into the wall of the pipe, thereby reducing its thickness and its ability to withstand pressure from liquid or gas.

Customs dealt with the problem by creative, if questionable, statutory construction:

Under the laws of statutory construction, section 207 and 19 U.S.C. 1304, which it amends, should be read in *pari materia*, so that pipe and pipe fittings which by their nature will not permit marking by any of the four prescribed methods will not be barred from entering the U.S. Such a construction would allow for alternative methods of marking, such as stencilling or tagging in bundles.<sup>175</sup>

Accordingly, the alternative methods were permitted, section 207's apparent requirement to the contrary notwithstanding.<sup>176</sup> In an obscure provision of the monumental Tax Reform Act of 1986, Congress ratified Customs' wisdom by amending section 207.<sup>177</sup>

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2976 (codified as amended at 19 U.S.C.A. § 1304(c)-(e) (West Supp. 1987)); Palmer, *supra* note 44, at 542.

173. Trade and Tariff Act of 1984 § 207, 19 U.S.C.A. § 1304(c) (West Supp. 1987).

174. 50 Fed. Reg. 1064-65 (1985) (approved Dec. 21, 1984).

175. T.D. 86-15, 20 Cust. B. & Dec. adv. sheet no. 7, at 3, 4, 51 Fed. Reg. 4559, 4560 (Jan. 22, 1986).

176. *Id.* at 4, 51 Fed. Reg. at 4560.

177. The amendment reads as follows:

## 2. Compressed Gas Cylinders

Section 207 of the Trade and Tariff Act imposed the same marking requirements on compressed gas cylinders as it did on pipe and tube.<sup>178</sup> The same technical problems apparently were not present, however, as the amendment essentially codified an existing ruling.<sup>179</sup>

## 3. Manhole Rings, Frames, Covers, and Assemblies

These somewhat pedestrian products also were included within section 207's scope,<sup>180</sup> presumably to aid them in their competition with imports.<sup>181</sup> The four permitted methods of marking apparently cause no technical problems.

## 4. Metal and Glass Instruments

The Tariff Act requires the familiar die stamping, cast-in-mold lettering, etching or engraving as the method of marking on articles such as knives, clippers, shears, safety razors, surgical instruments, scientific and laboratory instruments, pliers, pincers, and vacuum containers.<sup>182</sup>

## 5. Watch, Clock, and Timing Devices

Detailed marking requirements are contained in the Tariff Schedules for watch and clock movements, dials, and cases.<sup>183</sup>

If, because of the nature of an article, it is technically or commercially infeasible to mark it by one of the four methods specified in paragraph (1), the article may be marked by an equally permanent method of marking such as paint stenciling or, in the case of small diameter pipe, tube, and fittings, by tagging the containers or bundles.

Pub. L. No. 99-514, § 1888(1), 100 Stat. 2085, 2924 (codified at 19 U.S.C.A. § 1304(c) (West Supp. 1987)).

178. Trade and Tariff Act of 1984 § 207, 19 U.S.C. § 1304(d) (Supp. III 1985).

179. T.D. 81-268, 15 Cust. B. & Dec. 665 (1981).

180. Trade and Tariff Act of 1984 § 207, 19 U.S.C. § 1304(e) (Supp. III 1985).

181. See, e.g., *The Manhole Cover Is a Thing of Beauty to Howrah India—Alleyway Industrialists Seek Their Fortunes in Capping the Sewers of America*, Wall St. J., Nov. 29, 1984, at 1, col. 4.

182. See T.D. 77-236, 11 Cust. B. & Dec. 435 (1977); 19 C.F.R. § 134.43(a) (1987). Although section 134.43(a) states that this marking is "required by certain provisions of the Tariff Act of 1930," no provisions are cited, and none appear to be included in the current version of that Act, as amended. The point is academic, however, as the agency has clear authority to impose the requirements by regulation. See *supra* note 169 and accompanying text.

183. TSUSA Sched. 7, Part 2E, headnote 4.

Regulations require that compliance be "exact" before imports will be released by Customs.<sup>184</sup>

#### 6. Potted Plants, Traveler's Checks, and "Boogie Boards"

Examples of specific marking requirements are as varied as the huge variety of articles that are imported. This survey may conclude with three not altogether profound examples: imported potted plants are considered a single product for marking purposes (rather than a pot and a plant); "a stick planted securely in the soil of a potted plant bearing the legend 'Product of Canada' is considered to be an acceptable method of country of origin marking."<sup>185</sup> Traveler's Checks are not articles for marking purposes; like currency, they are intangible evidence of value.<sup>186</sup> And "Boogie Boards," which, we are told, "serve the same purpose as surf boards—to ride waves," may be marked "Handcrafted in Mexico" on the top surface.<sup>187</sup>

#### C. Exceptions and the "J-List"

A number of exceptions are permitted to the marking requirements of section 304, perhaps the chief exception being the one that exempts an article if the marking of its container "will reasonably indicate the origin" of the article to the ultimate purchaser.<sup>188</sup> Thus, plugs to be installed in vehicular engines, sold only in clearly marked containers, need not themselves be marked.<sup>189</sup> Similarly, price-marking labels and tags, packaged in reels for sale to stores, need not be marked provided the container in which they reach the stores is properly marked.<sup>190</sup>

The "J-List"—section 304(a)(3)(J)—exempts a specified group of articles from individual marking, provided their containers are marked. These articles were those that had been excluded from marking requirements in the two years following July 1, 1937, that also were imported in substantial quanti-

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184. 19 C.F.R. §§ 11.9, 134.43(b) (1987).

185. C.S. Priv. Ltr. Rul. 712,108 (Mar. 11, 1980).

186. C.S.D. 80-59, 14 Cust. B. & Dec. 820, 821 (1979).

187. C.S. Priv. Ltr. Rul. 712,210 (Mar. 20, 1980).

188. 19 U.S.C. § 1304(a)(3)(D).

189. C.S. Priv. Ltr. Rul. 712,409 (Feb. 26, 1980).

190. C.S.D. 80-115, 14 Cust. B. & Dec. 906 (1979).

ties in the five years prior to January 1, 1937.<sup>191</sup> They are set forth in the Customs Regulations, and range from "Art, works of" to "Wire, except barbed," with such products as buttons, playing cards, tuning pins, and sponges in between.<sup>192</sup>

Exceptions to the marking requirement also may be authorized for articles:

- that are incapable of being marked;<sup>193</sup>
- that cannot be marked prior to shipment without injury;<sup>194</sup>
- that cannot be marked except at an expense that prohibits their importation;<sup>195</sup>
- that are a crude substance;<sup>196</sup>
- that are imported for use by the importer and are not intended for resale;<sup>197</sup>
- that are to be processed by the importer for its own account in a way that necessarily would obliterate the mark by processing which is not utilized for the purpose of concealing origin;<sup>198</sup>
- whose country of origin necessarily is known to the ultimate purchaser;<sup>199</sup>
- that were produced more than twenty years before importation;<sup>200</sup>
- that cannot be marked after importation except at prohibitive expense, and failure to mark before importation was not an attempt to avoid compliance.<sup>201</sup>

191. 19 U.S.C. § 1304(a)(3)(J).

192. 19 C.F.R. § 134.33 (1987).

193. 19 U.S.C. § 1304(a)(3)(A). Thus, carburetor adjustment needles are too small to be marked; however, their containers must be marked. C.S. Priv. Ltr. Rul. 713,261 (Oct. 27, 1980).

194. 19 U.S.C. § 1304(a)(3)(B).

195. *Id.* § 1304(a)(3)(C).

196. *Id.* § 1304(a)(3)(E).

197. *Id.* § 1304(a)(3)(F).

198. *Id.* § 1304(a)(3)(G).

199. *Id.* § 1304(a)(3)(H).

200. *Id.* § 1304(a)(3)(I).

201. *Id.* § 1304(a)(3)(K). In addition, Customs by regulation exempts articles entered or withdrawn from warehouse for immediate exportation or for transportation and exportation; products of American fisheries which are duty free; products of possessions of the United States; products of the United States exported and returned; and personal articles exempt from duty. *See* 19 C.F.R. § 134.32 (j)-(n) (1987).

#### D. *Repackaged Imports*

Allegations of misleading repackaging of imported articles led Customs to amend its regulations in 1984 to require marking of articles that are repackaged after importation.<sup>202</sup> It was contended, for example, that properly marked imported hand tools had been repackaged in "blister packs" in the United States, with the marked side of the tool face down in the pack.<sup>203</sup>

To insure against this kind of practice, Customs added a regulation requiring the importer to certify, at the time of importation, that it will not obscure or conceal the mark upon repackaging and, if the article is to be sold or transferred to a subsequent repackager, the importer shall notify that person, in writing, of the marking requirements.<sup>204</sup> This regulation applies as well to articles, themselves exempt from marking, that are imported in properly marked bulk containers and are repackaged in retail containers.<sup>205</sup>

#### E. *Blended and Commingled Products*

A number of recent rulings have dealt with the question of the blending or commingling of products without substantial transformation after their importation. Blending and commingling do not exempt these products from the marking requirements, although a "major supplier" rule developed by Customs has ameliorated some of the practical problems that the requirement may pose.

The central case involves honey, which is imported in bulk from several countries and blended to achieve a high degree of uniformity in taste and appearance.<sup>206</sup> Foreign sources of honey for the blends change rapidly. A requirement that every country contributing to a blend be listed could have the effect of forcing importers to concentrate on larger, more consistent suppliers (to minimize proliferation of labels) and to halt im-

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202. T.D. 84-127, 18 Cust. B. & Dec. 324, 326 (1984).

203. *Id.* at 325; see also C.S.D. 83-77, 17 Cust. B. & Dec. 892 (1983); C.S.D. 83-78, 17 Cust. B. & Dec. 893 (1983); C.S.D. 83-79, 17 Cust. B. & Dec. 894 (1983).

204. 19 C.F.R. § 134.26 (1987).

205. C.S.D. 84-44, 18 Cust. B. & Dec. 946 (1984).

206. *Id.* In the case of honey, and the other products involved in this issue, the marking requirement applies to the container and not to the article itself, which, if it were capable of being marked, would avoid the issue.

ports from smaller, more sporadic suppliers. To avoid this result, Customs ruled that only the "major" foreign suppliers contributing to the blends need be listed. A similar policy has been adopted for orange juice produced from imported concentrate.<sup>207</sup> Similarly, containers of commingled imported nuts, bolts, and washers ("J-List" articles exempt from marking) may be labeled:

This package contains articles from one or more countries, including the following: (list of major source countries in order of percentage contribution to a distributor's overall stock) *or* (Japan, Taiwan, Canada, Korea, and China).<sup>208</sup>

#### *F. American Goods Returned*

Products of the United States exported and returned are exempt from the marking requirements of section 304.<sup>209</sup> This exception applies even if minor processing has occurred.<sup>210</sup> However, articles assembled abroad from American-made components<sup>211</sup> are considered products of the country of assembly for marking purposes, and must be marked "'Assembled in [name of country] from material of U.S. origin,' or a similar phrase."<sup>212</sup>

When a U.S. product is exported and returned after processing that does not amount to substantial transformation, the issue arises as to whether it may be marked "Made in (Foreign Country)" or "Made in U.S.A." The answer is neither. Because a substantial transformation has not taken place, it would be misleading to claim the foreign country as the country of origin. On the other hand, the Federal Trade Commission holds that the claim "Made in U.S.A." constitutes an af-

207. C.S. Priv. Ltr. Rul. 729,523 (May 1, 1986); C.S. Priv. Ltr. Rul. 729,410 (Mar. 19, 1986).

208. C.S.D. 84-56, 18 Cust. B. & Dec. 983, 985 (1984) (emphasis in original).

209. 19 C.F.R. § 134.32(M) (1987).

210. "Imported articles which consist solely of American-made components affixed in a minor assembly process in a foreign country that does not substantially transform the American-made components are excepted from marking requirements as American goods exported and returned." C.S.D. 79-381, 13 Cust. B. & Dec. 1570, 1571 (1979).

211. See *supra* notes 74-80 and accompanying text.

212. 19 C.F.R. § 10.22 (1987). Thus, automotive lamps assembled in Mexico from components of United States and Canadian or Taiwanese origin are, for marking purposes, of Mexican origin. C.S.D. 80-21, 14 Cust. B. & Dec. 758, 759 (1980).



firmative representation that the entire product is of domestic origin; thus, when a part of an article is of foreign origin, "it would be improper to mark a product 'Made in U.S.A.'" <sup>213</sup> Presumably, it would be permissible to label the goods as "Product of U.S.A., Processed in (Foreign Country)." This is similar to the required disclosure for articles assembled abroad from American-made components, is permitted in similar circumstances involving two foreign countries, and is consistent with the consumer-notification purpose of the law. <sup>214</sup>

### G. Failure to Mark and False Marking

A number of statutes are potentially applicable when merchandise is not marked or when it is falsely marked. Section 304 provides for an additional 10% duty for failure to mark in accordance with its requirements. <sup>215</sup> Improperly marked goods will not be delivered, and already released goods may be subject to notice of redelivery. <sup>216</sup> Alteration or removal of a country of origin marking is punishable by fine or imprisonment. <sup>217</sup>

False statements, or even negligently erroneous statements concerning origin, could subject an importer to the severe civil penalties of section 592 of the Tariff Act. <sup>218</sup> For fraud, the penalty may be equal to the total domestic value of

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213. C.S.D. 80-15, 14 Cust. B. & Dec. 749, 750 (1980): Surgical instruments exported for further manufacturing processes that do not amount to substantial transformation are, upon reimportation, exempt from marking as products of the United States exported and returned, but may not be marked "Made in U.S.A." contrary to FTC requirements. See also 77 F.T.C. 1760: "Made in U.S.A." affirmatively represents that a product was made in its entirety in the United States.

214. C.S. Priv. Ltr. Rul. 712,995 (June 27, 1980) ("Product of Mexico, Processed in Canada" acceptable where Canadian operations do not amount to substantial transformation).

215. 19 U.S.C. § 1304(f) (Supp. III 1985). Payment of the duty does not relieve the importer from the obligation to mark after importation; there is no option to pay the duty and avoid the marking. *Globemaster, Inc. v. United States*, 340 F. Supp. 974 (Cust. Ct. 1970); see Note, *The Tariff Law—No Option to Import Without Marking*, 12 COLUM. J. TRANSNAT'L L. 596 (1973).

216. 19 U.S.C. § 1304(g) (Supp. III 1985); 19 C.F.R. § 134.3 (1987).

217. 19 U.S.C. § 1304(h) (Supp. III 1985).

218. 19 U.S.C. § 1592 (1982). See Kennedy, *Civil Penalty Proceedings Under Section 592 of the Tariff Act of 1930*, 10 FORDHAM INT'L L.J. 147 (1987); Peterson, *Civil Customs Penalties Under Section 592 of the Tariff Act: Current Practice and the Need for Further Reform*, 18 VAND. J. TRANSNAT'L L. 679 (1985).

the merchandise,<sup>219</sup> while for gross negligence it may amount to 40%,<sup>220</sup> and for negligence 20%, of the domestic value of the merchandise.<sup>221</sup>

Traditional Customs policy in enforcing section 592 has been, "Shoot first, ask questions later," that is, seize and hold the entire shipment of merchandise, and then, in a more leisurely fashion, consider the monetary penalty. This policy became too much for Congress, which, in 1978, completely revamped section 592 and curbed many of Customs' powers.<sup>222</sup> Customs chafed under the new restraints, however, and was widely perceived as frustrating the intent of Congress in their implementation.<sup>223</sup>

Customs no longer needs to frustrate the intent of Congress in implementing section 592. It has a new weapon, which Congress clearly intended for other purposes, but which Customs intends to use more generally against importers. Section 3123(c) of the Anti-Drug Abuse Act of 1986 provides, "Any merchandise that is introduced or attempted to be introduced into the United States contrary to law (other than in violation of section 592) may be seized and forfeited."<sup>224</sup> The exclusion of section 592 matters from the ambit of the Anti-Drug Abuse Act seems clear, but Customs reads the provision differently. In a Directive to the ports, Customs Headquarters has stated that the section 592 exclusion will be read narrowly to cover primarily situations involving duty rates or appraised value.<sup>225</sup> For other matters—presumably including marking matters—the authority of the Anti-Drug Abuse Act will be used to seize "[m]erchandise introduced or attempted to be introduced into the United States contrary to any law enforced by Customs."<sup>226</sup> Thus, Customs can frustrate the intent of Con-

219. 19 U.S.C. § 1592(c)(1).

220. *Id.* § 1592(c)(2).

221. *Id.* § 1592(c)(3).

222. Customs Procedural Reform and Simplification Act of 1978, Pub. L. No. 95-410, § 110(a), 92 Stat. 888, 893-97 (codified as amended at 19 U.S.C. § 1592 (1982)).

223. *See, e.g.,* Kennedy, *supra* note 218; Peterson, *supra* note 218.

224. Pub. L. No. 99-570, § 3123, 100 Stat. 3207, 3207-87 (codified at 19 U.S.C.A. § 1595a(c) (West Supp. 1987)).

225. *Guidelines for Penalties and Seizures Under 19 U.S.C. 1592 and 19 U.S.C. 1595a*, Customs Directive No. 4400-03 (Mar. 27, 1987).

226. *Id.* at 3.

gress in implementing yet another statute, and, in the process, side-step entirely the substantive and procedural safeguards placed in section 592 by Congress in 1978.

### CONCLUSION

In its administration of the marking requirements of section 304, the Customs Service has imaginatively and properly discharged its responsibility of insuring adequate consumer notification without imposing impossible burdens on exporters and importers. Development of the "major supplier" rule for blended and commingled products is evidence of this, as are the pipe and tube marking requirements administered in the wake of those imposed by the Trade and Tariff Act of 1984.

But if Customs in its administration of the marking statute has served the cause of consumer protection well, the same cannot be said of its administration of other segments of the rules of origin. Its more recent country of origin determinations smack more of protectionism than of consumer protection, as the agency contorts, gyrates, and twists its way to one restrictive ruling after another. Thus, we are told, in the preamble to the textile rules of origin, that there should be only one rule for all purposes.<sup>227</sup> Then, in *Yuri Fashions*, Customs argued—successfully—that there may be one rule of origin for marking and another for quotas, "awkward" though that might be.<sup>228</sup> Next, in an administrative ruling restricting imports of sweaters from New Zealand, Customs informed us that there is but one law—"the law"—"to be applied in *all* country of origin decisions."<sup>229</sup> Simultaneously, the agency was arguing to the Court of International Trade that when a steel quota is involved, the transformation "must be more substantial than" otherwise.<sup>230</sup>

To this on-again and off-again jurisprudence, we must add such rulings as those holding that threading is substantial transformation if it means GSP benefits will be denied, but not if it means that a quota will be inapplicable,<sup>231</sup> and that wire is

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227. See *supra* note 118 and accompanying text.

228. See *supra* note 121 and accompanying text.

229. See *supra* note 125 and accompanying text.

230. See *Ferrostaal Metals Corp. v. United States*, Slip Op. No. 87-76, at 10 (Ct. Int'l Trade June 26, 1987).

231. See *supra* notes 131-35 and accompanying text.

very different from wire rod if a higher duty can be extracted, but not if the country of origin will change.<sup>232</sup>

This situation has developed because of the enormous stakes that can be at issue in country of origin rulings: from significant duty differentials if an article qualifies for GSP or CBI duty-free treatment or avoids Column 2 rates, to importation itself when quotas are applicable. These stakes have thrust the Customs Service into the spotlight in ways that simple marking rulings have not. The agency finds itself between exporters and importers who seek to qualify for favorable duty treatment and to avoid quotas and their domestic competitors who seek the opposite. The domestic competitors, however, have powerful congressional allies who are not shy in making their preferences known. The results of this congressional pressure, unfortunately, are reflected in the trend of the rulings in recent years. The pressure should be resisted by the agency, and—perhaps in a world more ideal than that in which we live—should not be applied by Congress in the first place. Rules of origin serve many legitimate and important purposes in our trade and customs laws. Protectionism is not one of them, nor should it be.

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232. See *supra* notes 136-39 and accompanying text.