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**THE COLLATERAL EFFECTS OF
SPECIAL TARIFFS ON TRADITIONAL
TRADE AND CUSTOMS ISSUES**

IN SEARCH OF SUBSTANTIAL TRANSFORMATION
ROUND UP THE USUAL SUSPECTS

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“Substantial transformation is a concept of major importance in administering Customs and trade law.” Judge DiCarlo, *Ferrostall Metals Corp. v. United States*, 11 CIT 470, 472, 664 F. Supp. 535 (1987).

“Major Strasser has been shot. [Pause] Round up the usual suspects.” Captain Renault, *Casablanca*, Warner Bros. 1942.

This note seeks to examine a sampling of cases relied on by the courts, U.S. Customs and Border Protection (“CBP”) and other agencies when faced with making a determination if substantial transformation has occurred.* In almost all cases or rulings, the earliest citation is to *Anheuser-Busch Brewing Association, Appt. v. United States*, 207 U.S. 556 (1909); however, there are among others, two cases which proceeded *Anheuser-Busch* and laid the groundwork for *Anheuser-Busch* and many of the succeeding decisions and rulings, ones that have become “the usual suspects.” Until recently, one element which resounds in all of the cases cited is that the facts of the particular process, manufacturing, combining, creating, etc., control the outcome, irrespective of the particular statute or regulation under which the proposed substantial transformation is considered. Given the time covered by these cases, more than 150 years, it is possible that your reading of these usual suspects may not agree with the decision reached by the court or an agency. What is clear, however, that in the current environment, one where

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additional duties arise as a result of trade enforcement actions or the imposition of additional duties pursuant to statutory or administrative action, substantial transformation will be in the forefront of the courts, CBP and other agency determinations for the foreseeable future. Perhaps some of these decisions will achieve “usual suspect” status. Now, on to the usual suspects.

Number one, step forward --

Lawrence v. Allen, 7 How. 785 (1849). In this action the court considered whether or not a manufacturing process occurred. The merchandise imported “certain boxes of India-rubber shoes” Id. 790, were claimed by the importer to be “exempt from duty” because the merchandise was “India rubber, in bottles or sheets, or otherwise unmanufactured.” Id. 791. The collector imposed duty at the rate of 30%. After considering the statute, the court simply framed the issue “Yet what constitutes a manufactured article?” Id. 793. Not unlike the current environment created by duties imposed under 232 and 301, the court observed “But in 1842, when the policy of the government again became adapted to protection no less than revenue, . . .” Id. 792, put into context the court’s recognition of the then current thinking. With this fact in mind and after reviewing the merchandise’s characteristics, the court considered whether or not the product was, in fact, manufactured and looked to former cases defining manufactured as “. . . made in a shape for use as a manufacture without being afterwards materially changed in form, and is designed to be so used, and hence comes in as a competitor with our own manufactures.” Id. 794. Sounds like an ITC determination.

The court focused on the changes necessary to turn a material, sheets of Indian rubber, into new shapes or forms, in this instance shoes. “. . . If these shoes had been made into their

present shape in order to worn as water-proof, when the purchasers pleased, and that it was customary so to wear them, they were within the meaning of the act of Congress on this subject, ‘manufactured’ and liable to pay a duty of thirty percent.” Id. 797. This case contains an early demonstration of a court considering a material and whether or not that material has been, in this case, manufactured into another product. As entered, the shoes were complete and thus did not meet the statutory requirement that the shoes were unmanufactured Indian rubber.

Almost forty years later in *Hartranft, Collector, etc. v. Wiegmann and Another*, 121 U.S. 609 (1887), the government sought classification of certain shells as a manufactured item dutiable at 35% *ad valorem*. The importer argued that the question was whether or not a manufacturing process had occurred.

The collector levied a duty upon the shells of 35 per centum. The circuit court held that they were exempt from duty. The question is whether cleaning off the outer layer of the shell by acid, and then grinding off the second layer by an emery wheel, so as to expose the brilliant inner layer, is a manufacturer of the shell; . . . Id. 613.

We are of the opinion that the shells in question here were not manufactured, and were not manufactures of shells, within the sense of the statute imposing a duty of 35 per centum upon such manufactures, but were shells not manufactured and fell under that designation in the free list. They were still shells. They had not been manufactured into a new and different article, having a distinctive name, character or use from that of the shell. The application of labor to an article either by hand or mechanism does not make the article necessarily a manufactured article, within the meaning of that term as used in the tariff laws. Id. 613. (Emphasis added)

It is instructive to note that as early as 1887 the courts were employing the mantra that to achieve substantial transformation there was a requirement for the article to have a change in name, character or use. Here the competing provision, “shells of every description, not

manufactured,” Id. 613 was a provision that the merchandise met. Simply put, even after the activities performed on the shells before exportation, they remained shells.

So for at least 132 years the use of the trio “name, character and use” has been in play.

Depending on what side you are on, an interesting piece of dicta appears at the close of this decision:

We are of the opinion that the decision of the circuit court is correct. But, if the question were one of doubt, the doubt would be resolved in favor of the importer, “as duties are never imposed on the citizen upon vague or doubtful interpretations” *Powers v. Barney*, 5 Blatchf. 202; *U.S. v. Isham*, 17 Wall. 496, 504; *Gurr v. Scudds*, 11 Exch. 190, 191; *Adams v. Bancroft*, 3 Sum. 384. Id. 615.

Twenty years later when faced with a drawback question relating to corks used for beer bottles, the Supreme Court decided *Anheuser-Busch Brewing Association, Appt. v. United States*, 207 U.S. 556. This case, decided on January 5, 1908, is one regularly relied on by the courts, CBP and agencies and qualifies as perhaps the granddaddy of all the usual suspects.

The corks in question were, after their importation, subject to a special treatment, which, it is contended, caused them to be articles manufactured in the United States of ‘imported materials’ within the meaning of § 25. Id. 556.

Considering whether or not the manufacturing process accomplished a change, the court relied on *Hartranft* and found that the corks in question did not undergo a transformation and that no new article emerged, having a distinctive name, character or use. Borrowing from *Hartranft*, and like the shells in *Hartranft*, the corks here were said to be subject to what has become an oft cited observation “A cork put through the claimant’s process is still a cork.” Id. 561. In relying on the lower court’s decision, the court found that “. . . the exportations are not

of corks or bottles, but of beer, and therefore not articles exported with the meaning of § 25, entitled to a drawback.” Id. 561.

It is a rare substantial transformation decision that does not start with a citation to *Anheuer-Busch*. Running neck and neck with *Anheuer-Busch* for the most often cited decision, by either side in a substantial transformation contest, is *United States v. Gibson-Thomsen, Co.*, 27 C.C.P.A. 267 (C.A.D. 98). Section 304(a)(2), Tariff Act of 1930, and the impact of that section on the desire to have the ultimate purchaser aware of the country of origin of the merchandise framed the issues. The imported merchandise, wood brush blocks and tooth brush handles, were clearly marked Japan; however, after entry the merchandise was subjected to a series of procedures which resulted in “the markings therein indicating the country of their origin will be obliterated by the bristles embedded therein.” Id. 269. The question posed was whether or not as a result of the processing in the United States “. . . the imported toothbrush handles and wood brush blocks [loose] their identity as such and become new articles having, respectively, a new name, character and use; . . .” Id. 270.

Article 528, Customs Regulations, 1937, as amended, T.D. 49658 included,

This regulation shall not apply to articles of a kind which are ordinarily so substantially changed in this country that the articles themselves become products of the United States. Id. 271.

The amendment affected by T.D. 49715 focused, in part, on combining an imported article with a U.S. article

. . . without any process of manufacture or production and in such a manner that their separate identities are maintained and they do not become integral parts of an article manufactured or produced in the United States. Imported watch movements and toothbrush handles, for example, are not within the purview of the

article, whereas bottles or other containers imported empty to be filled are within its purview. [Italics supplied]. Ibid.

The concept of the loss of identity is alive and well. One need only read the decision in *Energizer Battery, Inc. v. United States*, 190 F. Supp. 3d 1308 (2016). Slip Op. 16-116, which will be considered in detail, *infra*, to confirm this fact. In any case, there are a few, if any, CBP rulings relating to substantial transformation where this case does not appear as one of the usual suspects.

Texas Instruments, Inc. v. United States, 69 CCPA 151 (1982), 681 F.2d 778 (1982), presented substantial transformation in the context of GSP eligibility. “Appellant agreed that the goods were properly classified, but argued that they should have received duty-free treatment under the GSP in accordance with TSUS General Headnote 3(c).¹” Id. 153. (Footnote omitted).

The court framed the issue in a straight forward manner:

The Issue, therefore, is whether the IC’s and photodiodes found in the imported cue modules are “materials” which may be considered to have been “produced” in Taiwan. Was there such a “substantial transformation” on the parts and materials going to make up the IC’s and photodiodes that “a new and different article of commerce” was produced? Id. 155.

In reviewing the lower court’s decision, the court stated:

The question presented to us by the “substantial transformation” issue , not addressed by the court below, is a mixed question of technology and customs law, mostly the latter. In essence, the defendant’s position adopted by the court below, is that the making of the IC’s and photodiodes was mere assembly of prefabricated components. Id. 158.

The CCPA proceeded to review four specific reasons why substantial transformation occurred in Taiwan: 1). The merchandise imported into Taiwan was silicone slices which were “. . . an unfinished or unseparated and “unpackaged” form – had to be further manufactured before chips ready for “assembly” came into existence. Id. 158, 2) “What was imported were

punched or die-cut metal strips capable of later manufacture into lead frames, after the chips were mounted thereon and connected to the leads, by operations hereinafter described.” Id. 159, 3) “Wiring was a manufacturing operation involving a large number of steps (at least on the IC’s) and not a mere joining of two or more parts within the usual meaning of the term “assembly,” 4) With respect to the encapsulation of wired chips through the use of a molding compound, the court found “As a liquid, it [molding compound] was injected into the mold cavities to surround the chip or chips taking on an entirely new form.” Ibid.

Finally, the court quickly dealt with an argument raised by the government with respect to the purpose of the GSP arrangement, an argument sounding in seeking support for a position based on a perceived purpose or end of what the Congress intended in enacting GSP. The court quickly deflated the government’s trial balloon:

Given our holding that the IC’s and photodiodes were the result of extensive manufacturing operations in Taiwan which converted materials into articles, as distinguished from mere assembly, that there was “substantial transformation” to new and different articles of commerce, and granting that a statute must be so interpreted as to implement its legislative purpose, we conclude that our decision in the case is harmonious with the legislative purpose. The facts of record indicate that a number of employees were needed, and had to be technically trained in numerous skills to “convert materials into articles” in the manner we have described above, laying the ground work for acquisition of even higher skills and more self-sufficiency. Id. 160.

From time-to-time this argument will reappear in different guises, raised by either side, but for the most part courts have seemed to deflect this sort of approach holding that the underlying requirements of substantial transformation exist irrespective of alleged legislative or statutory intent. This stance may be eroding.

In the context of the cases already discussed, the decision in *Uniroyal, Inc. v. United States*, 3 CIT 220, 542 F. Supp. 1026 (1982) *aff'd* 702 F.2d 1022 (Fed. Cir. 1983), is one which illustrates the underlying, but perhaps unspoken observation, that it is in the eyes of the court or the agency as to whether or not the seemingly clear standard of name, character and use has been met. Here, imported footwear uppers used for the then well-known Stride-Rite brand, Sperry Top-siders, after entry in the U.S. had outsoles attached. The importer argued that substantial transformation occurred, thus not requiring “Made in Indonesia” marking to appear on the shoes. The court framed the question as “. . . whether Stride-Rite is the ultimate purchaser of the imported uppers so as to exempt them from the country of origin marking requirements. This in turn depends on whether the manufacturing processing in which Stride-Rite attaches the outsoles to the imported uppers effects a “substantial transformation” of the uppers. Id. 220.

The facts in this case are particularly critical and include:

. . . And having been “lasted” in Indonesia the upper has already obtained its ultimate shape, form and size.¹ In appearance, the upper resembles a moccasin² save that it has a stitched seam, and roughing on the bottom to facilitate the attachment of the outsole. Because of these latter characteristics, the upper is not marketable at retail as a complete shoe. Id. 222. (Footnotes omitted).

One could argue that there is a real difference between an upper, even one in this condition, and a finished shoe, one you would buy to use as footwear. In fact, the court said “. . . upper is not marketable at retail as a complete shoe.” Ibid. In spite of this admission, the court did not attach much significance to the relasting process “relasting, though convenient, is not necessary to the attachment of the outsole to the upper inasmuch as hand pressure alone is sufficient to press the upper and the outsole together to provide a temporary bond.” Id. 222.

Yes, this may be so, but what good is a temporary bond for finished footwear? The very nature of any style of footwear is the requirement that the upper must remain attached to the sole.

The Court considered the time used to complete certain processes:

Examining the facts in the present case, the conclusion is clear that a substantial transformation of the upper has *not* occurred since the attachment of the outsole to the upper is a minor manufacturing or combining process which leaves the identity of the upper intact. Thus the upper – which in its condition as imported is already a substantially complete shoe – is readily recognizable as a distinct item apart from the outsole to which it is attached. And the manufacturing process performed by Stride-Rite is a minor assembly operation which requires only a small fraction of the time and cost involved in producing the uppers. *Id.* 224. (Emphasis original).

To further emphasize its point, the court added “. . . To consider attachments of this kind to be ‘substantial transformation’ would open the door wide to frustration of the entire purpose of the marking statute” then went on to compare other attaching operations. *Ibid.* In contrast to the wooden toothbrush handles and brush blocks in *Gibson Thompson*, the court contrasted the facts here and held “on the contrary, as previously indicated, the imported upper was the very essence of the finished shoe.” *Id.* 225.

Returning to the underlying marking issue, “. . . the court holds that plaintiff is not the ultimate purchaser of the imported uppers since the operations performed in the United States do not constitute a substantial transformation thereof.” *Id.* 227.

This case is one of the most frequently employed usual suspects found particularly in CBP rulings. A careful reading of this case and an understanding of the manufacture of footwear could lead one to come to the conclusion that the court in this case significantly undermined the

name, character and use criteria which forms the four, or in this case three, corners of any substantial transformation consideration. Simply stated the facts do not support the court's position: name – upper v. Sperry Topsider; character – as imported, the upper has one purpose and one purpose only and that is to be used to finish the footwear, it cannot be used as footwear, the character of the finished footwear is totally different in looks and appearance. Use – the upper “use” is to be joined with a sole to create an item of footwear. The Sperry Top-sider was designed for use, among other places, on boats and other areas around water. It would be risky, at best, for a boater to try to use the uppers in their condition as imported, in place of the finished footwear. Therefore, it is difficult to see how the change is use test was not met by the importer.

The underlying statutory question presented in *Belcrest Linens v. United States*, 2 CCPA 105 (1984) 741 F.2d 1368 (Fed. Cir. 1984), was whether Section 5 of the Trade Agreement Extension Act of 1951, Presidential Proclamation 2935, 16 Fed. Reg. 7635 rendered the imported pillowcases a product of Hong Kong, dutiable at the rate of 34% *ad valorem* and not the product of China dutiable at the rate of 90% *ad valorem*. Again, critical to the understanding of this case is careful reading of the facts associated with the creation of the imported product.

Relying on case law interpreting Section 5 of the Trade Agreement Extension Act of 1951 and Presidential Proclamation 2935, 16 Fed. Reg. 7635, the predecessor provisions to General Headnote 3(e)¹ the trial court found that the imported merchandise was a product of Hong Kong. In reaching this conclusion, the court found that the processes performed in Hong Kong caused a change in the “character and identity” of the merchandise and that the pillowcases were articles “different in appearance, identity and use” from the bolt of cloth. Despite the government's arguments, the court found decisions construing the marking statute applying a “substantial transformation” test, and General Interpretative Rule 10(h) not to be controlling. The court, nevertheless, concluded that the change in identity and use of the subject merchandise as a result of its processing in Hong Kong, in fact, met the requirements of a substantial transformation test. Id. 107. (Footnote omitted).

The underlying context of this case was the government's position that the statute was intended to impose higher duty rates on Communist countries. Relying on *Anheuser-Busch* and other cases, the court agreed with the importer that the “. . . the processes performed in Hong Kong changed the character, appearance, identity, and use of the merchandise from a bolt of woven fabric into a pillowcase.” Id. 109.

A further argument raised by the Government was that the substantial transformation “. . . must have changed the article into one with a new tariff identity.” Id. 110. In response, the court stated: “First, we note that the Government cites no case which stands for the proposition that a change in tariff identity is the sole criterion for determining whether a substantial transformation has occurred.” Ibid.

Further, the court cited a Customs Service decision, 80-10, 14 Cust. Bull. 740 (1980), in support of its position that it was not necessary to have a change in tariff classification to achieve substantial transformation.

The Government's contention that mere assembly operations do not result in substantial transformation was also rejected by the court.

. . . We, however, do not agree, that the operations performed in Hong Kong were mere assembly operations. In determining whether the combining of parts or raw materials constitutes a substantial transformation, the issue has been the extent of the operations performed and whether the parts lose their identity and become an integral part of the new article. Id. 111. (Citations omitted.)

* * *

In the case of bar, as opposed to that of *Uniroyal*, the processes performed in Hong Kong were not minor assembly operations which left the identity of the merchandise imported from China intact. Id. 112.

Compare this conclusion with *Uniroyal*. Here the court simply brushed aside *Uniroyal* as being different because “. . . the process performed in Hong Kong were not minor assembly operations which left the identity of the merchandise imported from China intact.” Id. 112. It may not be that easy anymore.

Another prominent and regularly cited usual suspect is *National Juice Products Association v. United States*, 10 CIT 48, 628 F. Supp. 978 (1986), presenting a country of origin marking requirement as it applied to frozen concentrated orange juice and reconstituted orange juice. In a Customs determination, CSD 84-112, 18 Cust. Bull. 1106 (July 2, 1984), “Customs held that imported manufacturing concentrate is not substantially transformed in the process that converts the manufacturing concentrate into frozen concentrated orange juice or reconstituted orange juice.” Id. 50.

The Court examined each of the claims by plaintiff in support of its substantial transformation argument and found:

. . . The court agrees with Customs’ conclusion that these names, derived from the FDA’s standards of identity, “merely refer to the same product, orange juice, at different stages of production.¹⁵ [Sounds like a shell is a shell or a cork remains a cork] In any case, a chance in the name of a product is the weakest evidence of a substantial transformation. Id. 59. (Citation and footnote omitted).

In response to the plaintiff’s argument that there was a distinction between producers’ goods and consumers’ goods, the court again sided with Customs:

. . . As noted by Customs, however, the significance of this producers' good – consumers' good transformation in marking cases is diminished in light of this court's recent decision in *Uniroyal, Inc. v. United States*, 3 CIT 220, 542 F. Supp. 1026 (1982) *aff'd*, 702 F.2d 1022 (Fed. Cir. 1983) . . . Under recent precedents, the transition from producers' to consumers' goods is not determinative. Plaintiffs must demonstrate that the processing done in the United States substantially increases the value of the product or transforms the import so that it no longer is the essence of the final product. Id. 60. (Citation omitted.)

With respect to value, the court noted “Contrary to plaintiff's claim, however, the evidence offered indicates that the manufacturing concentrate constitutes the majority of the value of the end products.” Ibid.

“Considering the process as a whole, the court concludes that Customs could rationally determine that the major part of the end product, when measured by cost, value, or quantity, is manufacturing concentrate and that the processing in the United States is a minor manufacturing process.” Id. 61.

In the end the conclusion was simply, orange juice is orange juice. Again, the influence of some of the usual suspects is evident in this decision.

Superior Wire v. United States, 11 CIT 608 (1987), 669 F. Supp. 472. At issue here was whether or not wire made from wire rod produced in Spain was subject to a voluntary restraint agreement (VRA). To determine whether or not the product was subject to the VRA, the court had to determine whether or not the activities performed in Canada resulted in a substantial transformation of the Spanish wire rod. The defendant's position was “. . . operations performed in Canada were minor” and, therefore, the wire rod was properly subject of the VRA. Id. 611.

In considering the purpose of the VRA, the court noted that there was a lack of “. . . statutory language or legislative purpose which will directly guide the court.” Id. 613.

. . . The agreement being the product of negotiation, contains terms balancing various interests. The court has no way of attributing an overriding purpose to the VRA at issue in a manner that can guide the court’s decision here. The VRA has no terms which defines the standard applicable to a determination of whether the product imported is the product of the signatory country so as to trigger the requirement of the certificate. Thus, to the extent it is possible, this court must seek a neutral standard, unaffected by specialized statutory purpose, to determine the country of origin of the merchandise at issue. *C.F. Ferrostaal*, Slip Op 87-76 at 11 . . . Id. 613-614.

In reaching its decision, the court relied on the basic test cited in *Anheuser-Busch* and further noted “Cases giving rise to the most generally cited precedent are those involving country of origin for marking purposes, application of the GSP and drawback. In addition, the parties have cited two important restriction cases which apply the same basic test. See *C.F. Ferrostaal*, Slip Op 87-76 at 7; *Cardinal Glove*, 4 CIT at 45.⁵⁷” Id. 614. (Footnote omitted.)

The Court acknowledged that from time-to-time, the tests enunciated in *Anheuser-Busch* are often treated in a different manner, again, depending upon the particular facts of the case. “In recent years the courts have concentrated on change in use or character, finding various subsidiary tests appropriate depending on the situation at hand.” Id. 614.

Directing attention to the value added test, the court acknowledged that “A value added test has appeal in many situations because it brings the common sense approach to a fundamental test that may not be easily applied to some products.” Id. 615.

Perhaps the most succinct observation by the court was “Turning to past precedent, the court observes that cases dealing with substantial transformations are very product specific and are often distinguishable on that basis, rather than by their statutory underpinnings.” *Ibid.* This observation is spot on in that a review of the usual suspects and the CBP rulings, *supra*, all underscore the importance of specific factual underpinning. Beware, proceed with caution, this area is ripe for bad facts make bad law.

Contrasting the decision in *Torrington Co. v. United States*, 764 F.2d 1563 (1985), the court discussed the transformation from producers’ to consumers’ goods. Distinguishing *Torrington*, the court observed:

. . . Two factors distinguish this aspect [producers’ v. consumers’ goods] of *Torrington* from the case at hand. First, once the needle blanks were drawn they were fit only for one purpose; the raw material when then destined for one end use. . . . In contrast, the *Torrington* court stated, “the initial wire is a raw material and possesses nothing in its character which indicated either the swages [blanks] or the final product.”

The court found that “Here the wire rod dictates the final form of the finished wire.” *Id.* 616.

In finding for the defendant, the court succinctly summarized its position:

Here only the change in name test is clearly met, and such a change has rarely been dispositive. No transformation from producers’ to consumers’ goods took place; no change from a product suitable for many uses to one with more limited uses took place; no complicated or expensive processing occurred, and only relatively small value was added. *Id.* 617.

If one is considering mounting a substantial transformation argument or responding to one, this straight forward and concise statement may serve to frame the argument.

Ferrostall Metals Corp. v. United States, 11 CIT 470, 664 F. Supp. 535 (1987). This case arose as a result of a redelivery notice arising from a claim that the importer failed to provide the necessary export certificates required under a voluntary restraint argument. The Japanese material moved to New Zealand where certain operations were performed. The importer claimed activities there substantially transformed the merchandise into a product of New Zealand. In finding for the importer, the court held “. . . the merchandise is not covered by the Arrangement since the operations performed in New Zealand constituted a substantial transformation of the Japanese full hard cold rolled steel sheet.” Ibid.

The court addressed two issues raised by the government, the *Anheuser-Busch*, name, character and use tests arguing that consideration of the context of the action “. . . even 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 products.” Id. 473. The court repudiated the notion that an essence test had insinuated itself into this arena overriding the traditional name, character and use criteria and “that the Court should apply a more stringent test depending on the context in which the substantial transformation arises is similarly misplaced.” Id. 474.

* * *

. . . However none of the cases cited [by defendant] even remotely suggests that the Court depart from policy-neutral rules governing substantial transformation in order to achieve wider import restrictions in particular cases.

In this case, the bilateral agreement between the United States and Japan is designed to limit steel imports from Japan, not to limit imports of steel generally. Under these circumstances the standard rule for substantial transformation should be applied to determine whether steel is covered by the Arrangement. *Ibid.*

It is likely that some party will employ this argument relating to imposition of duties pursuant to Sections 232 or 301. *Ferrostall*, a true usual suspect, may be summoned for more duty.

The court enumerated the factual circumstances supporting its decision including a consideration of the variety of end uses to which the “. . . with very few exceptions, cold rolled steel is not put to end uses without some form of heat treatment. Tr, at 664-65. Such a change in the utility of the product is indicative of substantial transformation.” *Id.* 477. (Citations omitted.)

The name criteria was met “The witnesses for both parties testified that the processing of full hard cold-rolled steel sheet results in a product which is has different name, continuous hot-dipped galvanized steel sheet.” Tr. at 135, 612, *Id.* 478.

As for tariff classification change, the court found that the importer’s activity in New Zealand effected a tariff change. “Change in tariff classification may be considered as a factor in the substantial transformation analysis.” *Ibid.* (Citations omitted.)

In reaching its decision, the court stressed that it was a totality of evidence in that controlled its determination. Addressing the VRA argument, that is the existence of the VRA suggests that the court should take a more stringent view towards substantial transformation, the court found that the United States was always the intended market:

Defendant's theory was neither capable of constituting a factual finding nor necessary to the conclusion of the appropriate Customs official that redelivery notices should issue. Customs decision was based solely on a substantial transformation analysis. *Id.* 479.

Like other usual suspects, *Ferrostall* is frequently cited; however, as with any decision, careful attention must be paid to the controlling facts.

National Hand Tool Corp. v. United States, 16 CIT 308, *aff'd.*, 989 F.2d 1201 Fed. Cir. (1993), examined the importation of “. . . nine kinds of components of mechanics' hand tools which plaintiff further processed and assembled in the United States.” *Id.* 309. This usual suspect has become a go-to citation in substantial transformation cases. After thoughtfully reviewing the facts associated with the merchandise as it left Taiwan and the operations which occurred in the United States, unlike the decision in *Ferrostall*, “The Court found that pre-importation processing of coldforming and hot-forging required more complicated functions than post-importation processing.” *Id.* 310.

In support of its decision the court reviewed the name, character and use criteria and found that “. . . the name of each of article as imported has the same name in the completed tool, . . . the character of the articles remained unchanged after heat treatment, electroplating and assembly The heating process changes the microstructure of the material, but there was no

change in the chemical composition of the material. . . . The use of the imported articles was predetermined at the time of importation.” Id. 311.

In a final effort to prevail, the court rejected plaintiff’s notion “. . . that all its costs plus profits should be considered as the value added to the imported product. This could lead to inconsistent marking requirements for importers who perform exactly the same process an imported merchandise but sell at different prices.” Id. 312.

A comparison of the decisions in *Ferrostall*, 1987, and *National Hand Tool*, 1992, both issued by the same judge, have become a catechism or primer used by both sides to maneuver through the substantial transformation ticket.

In *Precision Specialty Metals, Inc. v. United States*, 24 CIT 1016, 116 F. Supp. 2d 1350 (2000), the underlying issue was whether the merchandise qualified for drawback under 19 U.S.C. 1313(b). “The court is thus called upon to determine whether stainless steel scrap is an ‘article,’ ‘manufactured’ or ‘produced’ within the meaning of Section 1313(b).” Id. 1027.

In a detailed review of the facts and terms found in cases when the court and Customs considered the term, “manufacture,” “The courts, and the Customs Service, have had numerous occasion to construe these terms in various tariff contexts.¹²” Id.1028. (Footnote omitted.)

Addressing *Anheuser-Busch* and *Belcrest Linens*, the court observed:

Application of the *Anheuser-Busch* definition thus has evolved into a highly flexible “name, character or use” test, also known as the “substantial

transformation” test, which looks to whether the article in question has been subjected to a process which results in an article having a name, character or use different from that of the imported article. . . . In applying the “name, character or use” test, courts have focused primarily on changes in use or character of the item,¹³ turning to various subsidiary tests depending on the situation. Id. 1029. (Citations and footnote omitted.)

This succinct paragraph is a useful starting point for any party considering the use of substantial transformation argument to support its position. The court cited several Customs Service Decisions, and noted “While those decisions have no precedential value for this court, they help to illustrate the proper application of the ‘substantial transformation’ or ‘name, character or use’ test.” Id. 1034.

In conclusion, the court outlined its position, one that is both useful and precise:

The definitions set forth above, as expounded upon by numerous decisions, can be summarized to yield the following standards. To prevail on a claim that its merchandise is an article manufactured or produced within the meaning of Section 1313(b), a plaintiff must satisfy the “substantial transformation” or “name, character or use” test. The court will look to whether a “new and different article” has emerged – whether the exported merchandise is fitted for a distinctive use for which the imported merchandise was not, or whether it is suitable for a more specialized range of uses than the imported merchandise, or whether it is interchangeable, commercially or otherwise, with the imported merchandise. A transitional product may not be sufficient under this criteria. The court will weigh the costs incurred by subjecting the merchandise to a processes at issue, andt will also look for proof regarding the amount and percentage of value added by these processes. The court will consider changes to the character of the merchandise – whether there are changes in chemical composition of the material or its physical properties, and whether those changes are irreversible. Finally, the court will consider whether there was a change in the name of the merchandise, and whether there is a change in its tariff classification. No one among these criteria is controlling. Id. 1036-1037.

This paragraph says it all. It should be read by any party considering a substantial transformation offense or defense and considered a starting point for consideration as to whether or not your claim has a chance of success.

The newest usual suspect in town is *Energizer Battery, Inc. v. United States*, 190 F. Supp. 3d. 1308 (2016). Slip Op. 16-116. This case provided that first opportunity for the court to consider substantial transformation in the context of the Trade Agreements Act of 1975, 1979, 19 U.S.C. §§ 2511-2518, the “Buy America Act.” This action was brought pursuant to 28 U.S.C. § 1581(e). Like other substantial transformation cases, the Buy America Act includes a definition of substantial transformation.

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 of from that of the article or articles from which it was so transformed. 19 U.S.C. § 2518(4)(B). *Id.* 9.

For the purposes of the Buy America Act, the critical question is whether or not the finished article will be considered to be of U.S. origin and, therefore, eligible for Buy America Act benefits. Considering CBP’s determination, the court found:

CBP’s Final Determination, regardless of its ultimate conclusion, does not apply the substantial transformation test with clarity. The statute and regulations require that, in order for a product to be substantially transformed, it must be 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.” 19 U.S.C. § 2518(4)(B). *Id.* 12-13.

Embarking on its own determination of whether or not substantial transformation had occurred, the court observed “Regardless of the applicable statutory provision, substantial

transformation analysis is fact-specific and cases that are analogous in terms of the nature of post-importation processing are particularly useful to the court’s analysis.” Id. 15. The court cited many of the usual suspects: *Anheuser-Busch*; *Precision Specialty Metals*; *Belcrest Linens*; *Superior Wire*; *Uniroyal*, *National Hand Tool Corp.* and *Ferrostal Metals*.

For the court that the real focus of this case was an evaluation of the activities performed in the Vermont:

In addition to name, character and use, courts have also considered subsidiary or additional factors, such as the extent and nature of operations performed, value added during post-importation processing, a change from producer to consumer goods or a shift in tariff provisions.¹⁴ Id. 20, (Footnote omitted.)

After reviewing decisions regarding pre and post importation processing the court found:

. . . While courts consider the nature of post-importation processing in their substantial transformation analysis, there is no bright line rule on the number of components required or the minimum amount of time is spent on assembly before an assembly process is no longer considered “simple assembly” or “combining operations” and is, instead, considered substantial transformation.

Based upon the application of the above guidance to the undisputed facts of this case, the court finds that the assembly operations at the Vermont facility do not result in a substantial transformation of the imported components. Id. 23.

In support of its position, the court observed “. . . there is no change in character as a result of Energizer’s assembly operations.¹⁸” Ibid. (Footnote omitted.) “Plaintiff’s imported components do not undergo a change in name when they are assembled into a flashlight at the Vermont facility.” Id. 25.

. . . The issue is not whether Plaintiff imported approximately fifty “flashlights,” but rather whether the Plaintiff’s imported components retained their names after they were assembled into the Generation II flashlight. Thus, the proper query would be whether the “lens ring with overmold” or the “switch lever” or the “TIR

lens” or any of the LEDs or any other components would still be called by their pre-importation name after assembly into the finished flashlight, or whether they would be indistinguishable and name from the finished product. The constitutive components of the Generation II flashlight do not lose their individual names as a result of the post-importation assembly. The court finds, based on the undisputed facts presented that no such name change occurred. Id. 25.

Further, the court found that the components “also do not undergo a change in use as a result of the post-importation processing at its Vermont facility.” Ibid.

The court employed a concept that distinguishes this case in some respects.

. . . The proper query for this case is not whether the components as imported have the form and function of the final product, but whether the components of pre-determined end-use at the time of importation. When articles are imported in prefabricated form with a pre-determined use, the assembly of those articles into the final product, without more, may not rise to the level of substantial transformation. See, e.g. *Uniroyal*, 3 CIT at 226, 542 F. Supp. At 1031. Id. 26.

In *Uniroyal* the court was strongly influence by the fact that a “. . . complex manufacturing process occurred in Indonesia where the imported uppers were produced.” *Uniroyal, Inc. v. United States*, 3 CIT 226, 542 F. Supp. 1026, 1031, *aff’d*, 702 F.2d 1022 (Fed. Cir. 1983). In this decision, the court appears to liken the activities in China used to create the various parts to a “complex manufacturing process.” This is a factual issue, one that could vary depending on the processes or activities in question.

Both Plaintiff and Defendant agree that the number of screws, washers or nuts is not outcome determinative and that the court should instead focus on the complexity and meaningfulness of the operations performed. . . . the high proportion of such connective parts relative to other components supports the court’s finding that the imported components do not undergo a change in

character and, instead, are simply held together as an aggregate product after assembly. Id. 28.

Even after reviewing all of the activities performed in Vermont the court simply stated “None of these factors suggest an assembly process that is complex.” Id. 29.

Unlike the facts presented in *Carlson Furniture Industries v. United States*, 65 Cust. Ct. 474 (1970) and *Belcrest Linens*, the court simply observed “. . . Energizer does no further work on the importer components except assemble them together.”²¹ Id. 31. (Footnote omitted.)

In a final thrust to prevail, plaintiff argued that its cost of labor and parts should have an impact of the decision. The court deftly parried “Regardless of the exact numbers, when U.S. costs are attributed to approximately seven minutes of labor, the court will not accord undue weight to the value of that labor for the purposes of its substantial transformation analysis.” Id. 32.

Does *Energizer* create a new, slippery slope for those seeking to argue for substantial transformation? Yes, there were lots of named parts, but in the end, unlike corks or orange juice, the parts did not remain or function as parts, the finished product was a flashlight. What happened to a shell is a shell, a cork is a cork or orange juice is orange juice?

On July 26, 2019, CBP issued HQ H3028221, which considered both marking and “301 measures.” At issue were Volvo passenger vehicles assembled “in Sweden as part of a breakdown operation.” P. 1 After calling to arms *National Hand Tools*, *Belcrest* and *Uniroyal*, CBP honed in on *Energizer*.

In reaching its decision in *Energizer*, the court expressed the question as one of whether the imported components retained their names after they were assembled into the finished Generation II flashlights. The court found “[t]he constitutive components of the Generation II flashlight do not lose their individual names as a result [of] the post-importation assembly.” The court also found that the components had a pre-determined end-use as parts and components of Generation II flashlight at the time of importation and did not undergo a change in use due to the post-importation assembly process. Finally, the court did not find the assembly process to be sufficiently complex as to constitute a substantial transformation. Thus, the court found that *Energizer’s* imported components did not undergo a change in name, character, or use as a result of the post-importation assembly of the components into a finished Generation II flashlight. The court determined that China, the source of all but two components, was the correct country of origin of the finished Generation II flashlights under the government procurement provision of the TAA. P. 4.

It is difficult to accept the premise that what was done in *Energizer* corresponds or supports CBP’s position here. Where will the line be drawn? CBP’s final words are not encouraging.

In the instant case, five subassemblies are manufactured in China from components from various countries. The five subassemblies and other components from China with exception of high voltage cables and wheels from Europe will then be assembled into the passenger vehicles in Sweden. Unlike the situation in HQ H155115, HQ H118435, and HQ H022169, in this case, the complex assembly process occurs when producing the subassemblies in China. With respect to the final assembly, we find the manufacturing processes of the five subassemblies in Sweden do not rise to the level of complex processes necessary for a substantial transformation to occur. Further, the five subassemblies from China have pre-determined the end-use and do not undergo a change in use due to the assembly process in Sweden. Accordingly, we find that based on the information provided, the subassemblies and the foreign parts that are imported to Sweden are not substantially transformed as a result of the assembly operations performed in Sweden.

This decision made the Volvos subject to 301 duties.

In a recent decision, *Trendium Pull Products, Inc. v. United States*, ___ CIT ___, Slip Op. 19-113 (August 20, 2019), the Court addressed *Trendium's* request for “. . . a scope inquiry clarifying that its pool products, partially made from corrosion resistant steel (“CORES”) from Italy and The People’s Republic of (‘China’), did not fall within the antidumping duty order for CORES from subject countries, including Italy and China. Ibid. Relating to the scope of the order, the court, observed: “Commerce also fails to address, and the Government does not sufficiently explain, why the pool products were merely processed as opposed to substantially transform all, as Trendium contends. . . . First, as discussed above, the processing that the CORES components undergo here essentially transforms them into a specific pool product.” Id. 13.

Finding that it did not have to address the question of substantial transformation, the Court concluded “because the court finds that *Trendium's* products are unambiguously outside the scope of the Order, the Court need not address the substantial transformation test nor consider the (k)(2) criteria in its analysis.” Id. 16. (Emphasis original.)

CBP has issued scores of rulings relating to substantial transformation. These rulings are available on CBP’s website and are likely to be familiar to most readers. Not surprisingly it is a rare ruling when one or more of the usual suspects does not make an appearance. Recently, there have been rulings relating to Presidential Proclamation 9704 and 9705, including: HQ H302250 (February 27, 2019), N3E02192 (March 11, 2019), N302747 (March 12, 2019), N304304 (June 7, 2019), N305106 (July 29, 2019). This case should be cited as support for a substantial transformation examination in a trade remedies action.

On March 4, 2019, in N302526 application of substantial transformation in a Section 301 trade remedy case was considered and in support of its ruling, CBP cited, *Gibson-Thomsen, National Hand Tool, Anheuser-Busch, and Ferrostell*.

There are a number of recent CBP rulings relating to country of origin marking where substantial transformation cases provide the basis for CBP's decision. These include: N301213 (November 13, 2018), N301460 (November 26, 2018), N303420 (April 12, 2019), N304716 (June 24, 2019), N304821 (June 26, 2019), N305277 (August 1, 2019), N305378 (August 1, 2019). In each instance CBP found that there was no substantial transformation.

A sampling of decisions where CBP found substantial transformation include: HQ H259326 (April 13, 2015), N302617 (February 15, 2019), N293792 (February 16, 2018), N303777 (April 26, 2019), N304016 (May 8, 2019).

There is a final group of decisions relating to marking, again not in any way a total review, but a representative sample including: HQ734214 (November 18, 1991), HQ H035441 (September 11, 2008), N288397 (August 18, 2017), HQ H298148 (July 13, 2018), N302289 (February 5, 2019).

The tide appears to be pulling strongly against finding substantial transformation. The name, character and use criteria seem to have lost some of their clarity. The old test is being viewed through a new prism, one that focuses on the intended use of the components. The use of

imposition 301 duties has altered the landscape. Under the harsh light of trade disputes with a number of countries, but primarily China, classification of products have become subject to a new look one implemented to be sure all 301 duties are collected . As part of such consideration, substantial transformation arguments will face a more rigorous and, in some instances a changed series of tests. One thing is sure, the usual suspects are not going anywhere – they will continue to populate decisions and rulings.

Maybe Rick and Louie were right to get out of Casablanca and lay low in Brazzaville till the war's tide shifted. Let someone else deal with the usual suspects!