1-1-1988

National Juice Products Association v. United States: A Substantial Transformation of the Country-of-Origin Substantial Transformation Test?

Edward H. Davis Jr.

NATIONAL JUICE PRODUCTS ASSOCIATION V. UNITED STATES: A SUBSTANTIAL TRANSFORMATION OF THE COUNTRY-OF-ORIGIN SUBSTANTIAL TRANSFORMATION TEST?

I. INTRODUCTION

On September 4, 1985 the U.S. Customs Service issued a binding ruling which held that orange juice concentrate imported for manufacturing is not substantially transformed by the process that converts the concentrate into reconstituted frozen orange juice or frozen concentrated orange juice.[1] This ruling overruled a 1979

1. C.S.D. 85-47, 19 Cust. B. & Dec. 21 (Sept. 4, 1985).

Customs Service ruling which had determined that the reconstitution of orange juice concentrate was a substantial transformation for country-of-origin marking purposes.[2] Consequently, final repackaged orange juice products which contain foreign manufacturing concentrate may not claim the United States as the country-of-origin, and are now subject to country-of-origin marking requirements.[3]

The 1985 decision was purportedly based on a 1984 Customs Service ruling which held that imported repackaged honey which was processed and blended with domestic honey in the United States was not substantially transformed, and therefore subject to the country-of-origin marking requirements.[4] The 1984 precedent had also been followed by a ruling which held that the mere roasting, salting and coloring of pistachio nuts imported from Iran did not result in the substantial transformation of the imported raw nuts.[5]

The manufacturing process at issue in this case is the making and use of orange juice manufacturing concentrate. The manufacturing concentrate is made from fresh oranges which are reduced approximately eight-six percent (86%) in volume through the use of an extractor and an evaporator, cooled, and shipped to the United States in large drums marked with the country-of-origin. The U.S. importer then blends the concentrate with other ingredients, including water, orange essence, orange oil and fresh juice, in order to reconstitute the concentrate into orange juice. The final product is packed in either frozen or liquid form and shipped to the retail market. The second half of the process, largely the addition of water, is the subject of the Customs Service ruling in question.

The ruling was challenged by the National Juice Products Association (NJPA) and individual members of the NJPA. The challenge was based on a belief that the disclosure of foreign content

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2. C.S.D. 80-88, 14 Cust. B. & Dec. 865 (Aug. 17, 1979).

3. The country-of-origin marking requirement is statutorily mandated by § 304(A) of the Tariff Act of 1930, 19 U.S.C. § 1304(A) (1987), which provides in pertinent part ". . . every article of foreign origin. . .imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article. . .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." (emphasis added).

4. C.S.D. 84-112, 18 Cust. B. & Dec. 83 (July 2, 1984).

5. T.D. 85-153, Country-of-Origin Marking of Pistachio Nuts, 50 Fed. Reg. 37,842 (1985).

will affect the demand for or price of the retail juice product.[6] The United States Court of International Trade, *held*, affirmed: The Custom Service's ruling, that manufacturing concentrate is not substantially transformed when it is processed into retail orange juice products, was not arbitrary and capricious, and was in accordance with applicable law. *National Juice Products Association v. United States*, 628 F. Supp. 978 (Ct. Int'l Trade 1986).[7]

This Note will show that the Court of International Trade is struggling with the concept of substantial transformation in the *National Juice Products* opinion. This opinion has prompted a previous law review comment which also attempts to determine, through an analysis of the case, where the CIT is headed with regard to the substantial transformation debate.[8] In addition, the issue with which this case dealt was the subject of a request by the Chairman of the Ways and Means Committee of the U.S. House of Representatives to study the country-of-origin and substantial transformation concerns and to attempt to standardize country-of-origin determinations.[9] The importance of this opinion is indicated by what it does not say, as well as by what it purports to espouse as a new definition of substantial transformation in the country-of-origin marking context.

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6. *See generally* Note, *United States Country of Origin Marking Requirements: The Application of a Nontariff Trade Barrier*, 6 LAW & POL'Y INT'L BUS. 485 (1974).

7. The court also held: 1) that it had jurisdiction to hear this case pursuant to 28 U.S.C. § 1581(h) (1982); 2) that it would not issue a preliminary injunction to restrain the Customs Service from implementing the ruling on the grounds that it lacked authority under 38 U.S.C. § 1581(h); 3) that the failure of the Customs Service to publish a notice of change as required by 19 C.F.R. § 177.10(c)(2) (1985) was harmless error because it resulted in no prejudicial effect against the plaintiffs; and 4) that the Customs Service must reconsider the commercial impact of the ruling due to its prior failure to consider the commercial impact of the ruling pursuant to 19 C.F.R. § 177.10(c)(2). This Note deals only with the substantive substantial transformation issue.

8. *See* Note, *National Juice Products Association v. United States: A Narrower Approach to Substantial Transformation Determinations for Country-of-Origin Marking*, 18 LAW & POL'Y INT'L BUS. 671 (1986). The 1986 Note does not distinguish between the different uses of the substantial transformation concept in other customs and trade law areas. Instead it simply adopts the standard method of analysis in the area by borrowing cases decided under other statutes. The instant Note can be distinguished by a new method of analysis of the *Gibson-Thomsen* test. Additionally, the previous Note narrowly limits its conclusion to country-of-origin marking requirements for food products. That author indicates that the CIT is moving toward a narrower approach in deciding the substantial transformation issue in the country-of-origin context.

9. *See* Letter from Congressman Dan Rostenkowski in The Standardization of Rules of Origin: Import Investigation No. 332-239, 51 Fed. Reg. 39,595 (1986).

II. The Historical Development of the Country-of-Origin Marking and the Substantial Transformation Test

A. Substantial Transformation

The "substantial transformation" concept is one of the most important in the customs and trade law area.[10] It seeks to "fix" the country from which a product emanates. The purposes of this concept and the larger country-of-origin issue have been stated as follows: (1) to facilitate origin determinations to permit the granting of customs duty and trade preferences; (2) to allow the determination of trade and production in individual countries and to examine these trends in the location and extent of such production; (3) to allow the calculation of balances of trade and payments in the international trade arena; (4) to allow the quantification of trade in certain articles in order to restrict entry of those articles pursuant to a policy determination; and (5) to allow the implementation of health, safety, taxation and other standards.[11] A substantial transformation determination characteristically involves the analysis of: the type of article of commerce, its component parts or the raw materials involved in its manufacture, the process of manufacture, and in some cases, the amount of value added to the final product. This determination can be easy, for example, when the raw materials or components of a particular article of commerce are grown or manufactured in the country of export. The substan-

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10. The limited scope of this note deals only with the leading cases decided under the country-of-origin statute. It is significant, however, that the *National Juice* court, 628 F. Supp. at 988, n. 14, noted many of the different applications of the substantial transformation language, and may have opened a Pandora's box for itself and for international trade law practioners. Some of those other areas of international trade regulation which depend upon variations of substantial transformation interpretation include: 1) the application of the "drawback" statute (*See* § 313 of the Tariff Act of 1930, 19 U.S.C. § 1303(A) (1987). *See also* 19 C.F.R. § 191.2(A) (1987); United States v. International Paint Co. Inc., 35 CCPA 87 (1948); Anheuser-Busch Brewing Associations v. United States, 207 U.S. 556 (1908)); 2) the determination of country of exportation for the purposes of applying tariff duties and quotas to goods from communist countries (*See* Coastal States v. Marketing Inc., 646 F. Supp. 255 (Ct. Int'l Trade 1986); Belcrest Linens v. United States, 741 F.2d 1368 (Fed Cir. 1984); 3) the duty-free treatment under the Generalized System of Preferences (GSP) (*See* §§ 501-506 of the Trade Act of 1974, U.S.C. §§ 2461-2466 (1987); 19 C.F.R. §10.177(A) (1987). *See also* Torrington Company v. United States, 764 F.2d 1563 (Fed. Cir. 1985); Texas Instruments Inc. v. United States, 681 F.2d 778 (CCPA 1982); United States v. Murray, 621 F.2d 1163, (1st Cir. 1980)); and 4) the Caribbean Basin Economic Recovery Act (*See* 19 U.S.C. §§ 2701-2706 (1987); 19 C.F.R. § 10.191(3) (1987).

11. The Standardization of Rules of Origin, USITC Pub. 1976, Inv. No. 332-239, pp. 9-10 (May 1987)[hereinafter *Standardization*].

tial transformation issue begins to become metaphysical when the country of export is an intermediary between the country of growth or manufacture and the importing country, for example: gloves made in Jamaica out of Argentine cowhides which were tanned in Venezuela.

The U.S. Customs Service defines an "article substantially changed by manufacture" as one which is used in the United States for manufacturing purposes which results in the production of an article having a name, character or use different from that of the imported article.[12] The substantial transformation test is especially significant for country-of-origin marking concerns because it determines the "ultimate purchaser" of the commodity.[13] A manufacturer may be the ultimate purchaser "if he subjects the imported article to a process which results in a substantial transformaton of the article, even though the process may not result in a new or different article." On the other hand, the consumer is the ultimate purchaser when the manufacturing process is "merely a minor one which leaves the identity of the imported article intact."[14] Only the latter scenario is subject to the country-of-origin marking requirements.

The seminal case interpreting the substantial transformation requirement of the country-of-origin marking statute and regulations promulgated thereunder is *United States v. Gibson-Thomsen Co., Inc.*[15] This case involved the importation of handles for toothbrushes and blocks for military hairbrushes. The handles and blocks were stamped with the legend "Japan" on the flat side. The U.S. importer/manufacturer bored holes in the flat side and inserted and trimmed the bristles, thereby creating the finished natural product. Pursuant to the country-of-origin marking statute the finished brushes would have to be marked with the legend "Japan" unless the U.S. importer/manufacturer could be construed as the "ultimate purchaser."[16] The Treasury Department had previously issued regulations interpreting the marking requirement and stated that "[t]his regulation shall not apply to articles of a kind which are ordinarily so substantially changed in this country that

12. 19 C.F.R. § 134.35 (1985).

13. 19 C.F.R. § 134.1(d) (1986) defines the "ultimate purchaser" as ". . .generally the last person in the United States who will receive the article in the form in which it is imported. . . ."

14. 16 C.F.R. § 134.1(d)(1) & (2) (1985).

15. 27 CCPA 267 (1940).

16. *See supra* note 3 and accompanying text.

the articles themselves become products of the United States."[17]

The importer/manufacturer argued that the above-mentioned process substantially transformed the imported article, thereby making the final product a product of the United States and the U.S. importer the ultimate purchaser. The importer emphasized that § 304 of the Tariff Act of 1930 had been recently modified by an amendment which added the "ultimate purchaser" language to the statute.[18] The government countered that this language was meant to refer to the domestic retail customer and that all products containing foreign content should be so marked.

The court held that the legislative history did not support the conclusion that an article should be marked with more than one country-of-origin, stating:

> We find nothing in the statute nor in its legislative history to warrant a holding that the Congress intended to require that an imported article, which is to be used in the United States as material in the manufacture of a new article *having a new name, character, and use*, and which, when so used, becomes an integral part of the new article, be so marked as to indicate to the retail purchaser of the new article that such imported article or material was produced in a foreign country. On the contrary, we are of the opinion that the Congress intended, by its provisions of section 304(a)(2),. . . to cover only such imported articles as do not lose their identity as such when combined with other articles.[19]

The court noted that any other interpretation could result in multiple markings on a retail product and could lead to confusion, thereby defeating the purpose of the statute which was intended to provide a method by which the domestic consumer is clearly notified of the foreign manufacture of a product.[20] The court concluded that Congress must have contemplated something more than the retail consumer when it used the phrase "ultimate purchaser."[21] The above quoted language came to be known as the "name, character and use" or *Gibson-Thomsen* test and has been cited in every case applying the country-of-origin marking statute as the dominant test to be used in determining whether a substan-

17. Customs Reg., Art. 528(h) (1937, as amended).
18. § 3 of the Customs Administration Act of 1938, 19 U.S.C. § 1304(A) (1987).
19. *Gibson-Thomsen*, 27 CCPA at 272.
20. *See* Globemaster, Inc. v. United States, 340 F. Supp. 974 (Cust. Ct. 1972).
21. *Gibson-Thomsen*, 27 CCPA at 272.

tial transformation has occurred. The *Gibson-Thomsen* test, stated in the conjunctive, required the satisfaction of all three prongs before a substantial transformation has occured. The three prongs: the "name" prong, the "character" prong and the "use" prong, are the basis of classification in this note and will be referred to repeatedly as interpreted and applied by the various courts that have been confronted with this issue. This method of analysis of the *Gibson-Thomsen* test has, to the author's knowledge, never before been proposed or argued. While not radical, it does offer a new method by which to parse the time-worn test in an attempt to discern if it ever was or can continue to be an effective method of determining whether a substantial transformation has taken place. It will be shown that all of the cases decided under this statute, which are cited in this Note, fall within at least one of the three "prongs" of the test.

B. The "Name, Character or Use" Test

The *Gibson-Thomsen* test was modified thirty years later in *Midwood Industries, Inc. v. United States.*[22] This case involved the country-of-origin marking of steel flange forgings imported from several European countries. The U.S. importer/manufacturer subjected the flange forgings to an extensive process of conversion and adaptation for use in the domestic oil industry. The process included cleaning, trimming, machining and beveling the ends of the fittings, threading the bore, and drilling holes compatible with U.S. fittings and painting. After this process was complete, the original counrty-of-origin marking was obliterated and the finished flanges were marked with the U.S. manufacturer's name.

The *Gibson-Thomsen* test was applied in order to determine whether a substantial transformation had occurred, thereby making the importer/manufacturer the ultimate purchaser. The *Midwood* court, however, stated the test in the disjunctive as the "name, character *or* use" test.[23] This variation was highly significant because it allowed the court to determine that a finished article which satisfied at least one of the three prongs was thereby substantially transformed and not subject to country of origin marking requirements. This modified disjunctive *Gibson-Thomsen* test has since been accepted as the root test from which all sub-

22. 313 F. Supp. 951 (Cust. Ct. 1970).
23. *Id.* at 956.

tests spring. There has been, however, no dispositive definition created by the courts (or otherwise) which distinguishes the three prongs of this test.

1. The Use Prong: The "Producers' goods - Consumers' goods" Test

The *Midwood* court was responsible for determining whether the manufacturing process used on the imported rough flanges constituted a substantial transformation. The court could not find that the finished flanges had a new name because the parties had conceeded as much in their description of the product during the proceedings before the Customs Service. Nor could the court find that the article had a new character regardless of the fact that it had been modified, because it was still a flange fitting used to connect pipes, albeit U.S. instead of European pipes.

The court ultimately decided the case under the "use" prong of the *Gibson-Thomsen* test, reasoning that:

> The evidence clearly shows that the imported articles, referred to by most of the witnesses and by the invoices as well as 'forgings' of one kind or another, are *produeers'* goods which are not in fact used by the consumer in such a state of manufacture and are not capable of use by the consumer in that state.[24]

The court concluded that the "use" prong of the modified test had been met, because the flanges had been converted from "producers' " goods to "consumers' " goods.[25] This holding was not based on any country-of-origin case-marking precedent, but instead relied largely on a case which considered the substantial transformation test as it applied to the drawback statute.[26] That case required only that the manufacturing process produce a "new and different article of commerce."[27] The determination significantly modified the "use prong" of the *Gibson-Thomsen* test for substantial transformation country-of-origin marking purposes and

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24. *Id.* Producers' goods are those which need further manufacture or adaptation. Consumers' goods are those already converted by the producer into "end use" products. As the *Uniroyal* court recognized, *infra* note 30, this test seems to raise more questions than answers.

25. *Id.*

26. *See International Paint*, *supra* note 10.

27. *Id.*

seemed to facilitate a commercial importer/manufacturer's compliance with the substantial transformation requirement by requiring only a simple transformation from the state of "producers' " to that of "consumers' good."

2. The Name Prong: The "New Identity" Test

The "name" prong of the *Gibson-Thomsen* test was refined in *Uniroyal, Inc. v. United States*.[28] This case involved the importation of pre-formed and pre-sewn leather footwear uppers manufactured by Uniroyal, Inc. in Indonesia. The uppers were not marked individually, but were shipped in boxes marked "Product of Indonesia" and then sold to the Stride-Rite company. The Stride-Rite company then attached these uppers to the pre-formed and preshaped outsoles and sold the completed shoes as "Sperry Topsiders." The issue presented was whether the attachment of the outsoles caused a substantial transformation of the uppers, making Stride-Rite the ultimate purchaser and thereby exempting the uppers from the marking requirements. The Uniroyal company was responsible for litigating the issue because it was the actual importer and would be liable for improper marking by the Stride-Rite company.[29]

The *Uniroyal* court did not attempt to decide the case on the "use" prong of the *Gibson-Thomsen* test. Nor did the court try to fashion a test under the "character" prong of the *Gibson-Thomsen* test. The court completely ignored the "producers' goods-consumers' goods" test developed in *Midwood* and instead explained that each case in this area of the law ". . . must be decided on its own particular facts."[30]

The "name" prong of the *Gibson-Thomsen* test was called into question in the disposition of this particular case. The conversion of the article from an upper to a finished shoe clearly resulted in a name change of the imported article. The claim that the uppers obtained a new identity and thereby a new name by becoming merged with the outsole was expressly rejected by the court. The

28. 542 F. Supp. 1026 (Ct. Int'l Trade 1982), *aff'd* 702 F.2d 1022 (Fed. Cir. 1983).

29. Normally, the importer is responsible for making declarations regarding country-of-origin marking even if it is selling to the actual ultimate purchaser. 19 C.F.R. § 10.173(c) (1986).

30. *Uniroyal*, 542 F. Supp. at 1020, citing Grafton Spools Ltd. v. United States, 45 Cust. Ct. 16 (1960).

court determined that ". . . a substantial transformation of the upper has not occurred since the attachment of the outsoles to the uppers was merely a minor manufacturing or combining process, which left the identity of the uppers intact."[31] The manufacturing process was analogized to ". . . attaching buttons to a man's dress shirt or attaching handles to a piece of finished luggage."[32] In so holding, the court relied on new Customs Service regulations which incorporated the *Gibson-Thomsen* test as modified in *Midwood*.[33] The *Uniroyal* court's most noticeable contribution to the substantial transformation analysis was the carving out of a sub-test for the "name" prong of the substantial transformation test by requiring that the article obtain a "new identity."[34]

III. Analysis of *National Juice Products Association v. United States*

A. Application of the "Name" and "Use" Prongs

The *National Juice* court considered whether the process of combining the manufacturing concentrate with water and other ingredients could qualify as a substantial transformation under the "name" prong of the *Gibson-Thomsen* test as it was defined in *Uniroyal*.[35] The plaintiffs argued that the change of the name "concentrated orange juice for manufacturing" to "frozen concentrated orange juice" constituted a sufficient change to satisfy the "name" prong of the *Gibson-Thomsen* test.[36] The court rejected that contention, stating that "In any case, a change in the name of a product is the weakest evidence of a substantial transformation."[37] The holding would seem to send to its grave the "name"

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31. *Id.* at 1029.

32. *Id.* at 1030.

33. 19 C.F.R. § 134.35 (1986).

34. The basis for the "New identity" test appears to rest on the question of whether the imported good is "mere material" involved in the manufacture of a product. *See Uniroyal, supra* note 28, at 1030. This test has also been referred to as the "lost identity" test. *See* J. Simpson, Speech before the Fourth Annual Judicial Conference of the U.S. Court of Appeals for the Federal Circuit—International Trade Breakout Session, 112 F.R.D. 522, 527 (April 23, 1986) [hereinafter *Int'l Trade Breakout Session*].

35. *Uniroyal, supra* note 28, at 1029.

36. National Juice Prods. Ass'n v. United States, 628 F. Supp. 978 (Ct. Int'l Trade 1986).

37. *Id.* In footnote 15 the court explained that the underlying policy of the country-of-origin marking statute is to "facilitate consumer purchasing decisions and to protect American industry." To allow a simple name change would frustrate this policy.

prong method of determining substantial transformation. The Court's disdain for the "name analysis" was somewhat predictable in that it would be too easy for an importer/manufacturer to claim that the article was recognized in the industry as a different and distinct item, thereby exempting it from the country-of-origin marking statute.

The court next summarily dismissed the "use" test (as defined in *Midwood*) and called into question the continued validity of that sub-test. The court remarked, "Under recent precedents, the transition from producers' to consumers' goods is not determinative."[38] This would seem to put the *Midwood* interpretation of the "use" prong to rest also.

B. Application of the "Character" Prong: The Essence of the "Final Product" Test

The NJPA's only remaining argument was that the process of combining the orange juice manufacturing concentrate with water, *inter alia*, caused a substantial transformation sufficient to satisfy the "character" prong of the *Gibson-Thomsen* test.[39] This had long been the silent prong, and the *National Juice* court therefore was faced with the challenge of formulating a new sub-test for this prong. The court chose instead to follow the time honored practice of borrowing the analysis developed by another court under a different and purportedly analogous statute. That reasoning seems somewhat anomalous, however, in light of the court's footnote seemingly objecting to the cross-hybridization between substantial transformation tests developed under different statutes.[40]

The court initiated its "character prong" analysis by emphasizing that, "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 is no longer the essence of the final product."[41] The court relied on the reasoning in *United States v. Murray*,[42] a case decided under the GSP statute.[43] In *Murray* the Customs Service brought criminal charges against an

38. *National Juice*, 628 F. Supp. at 990.
39. *Id.*
40. *See supra* note 10 and accompanying text.
41. *National Juice*, 628 F. Supp. at 990.
42. 621 F.2d 1163 (1st Cir. 1980).
43. *See supra* note 8 re: GSP.

importer for falsely stating an import's country-of-origin for GSP duty purposes. The importer was convicted of blending Chinese glue with Dutch glue and then classifying the product as Dutch glue. The *Murray* court had to determine whether the combination of glues was a substantial transformation resulting in a new final product of Holland. That court set forth an exhaustive analysis of the phrase "substantial transformation" including an examination of the etymology of the individual words,[44] and held that:

> . . . the sub-term 'substantial transformation' means a fundamental change in the form, appearance, nature, or character of an article which *adds to the value* of the article an amount or percentage which is *significant in comparison* with the value which the article had when exported from the country in which it was first manufactured, produced or grown.[45] (emphasis added)

Based upon this authority, the *National Juice Products* court unveiled its new quantitative value-based country-of-origin substantial transformation test.[46] The court considered the evidence proferred by the NJPA and found that the addition of the materials to the manufacturing concentrate in the United States only constituted a mere additional 6.68% to 7.57% of the value of the retail product.[47] The court also rejected the NJPA's attempt to argue that the costs of repackaging the retail product should be included in the valuation consideration,[48] on the basis that the plaintiffs cited no authority for the proposition.[49] The court concluded its analysis by declaring that ". . . the imported product is the 'very essence' of the retail product . . . . The addition of water, orange essences, and oils to the concentrate, while making it suitable for retail sale does not change the fundamental character of the product, it is still essentially the product of the juice of oranges . . . . The orange juice processors are not the ultimate purchasers of the imported product because consumers are the last purchasers to receive the product in essentially the form in which it is imported."[50] Although not formally denominated as such, this test could be called the "essence of the final product" sub-test under

44. *See Murray, supra* note 45, at 1168.
45. *Id.* at 1169.
46. *See National Juice*, 628 F. Supp. at 990.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*

the "character" prong of the *Gibson-Thomsen* test. The adoption of this test indicates that the court may be moving away from qualitative tests to a more quantitative test. It is significant that this test is stated in the negative — i.e., if the test is met, then the article is *not* substantially transformed for the country-of-origin marking purposes.

IV. · Conclusion

The Court of International Trade has significantly altered the *Gibson-Thomsen* substantial transformation test in *National Juice Products*. The CIT may be providing some insight as to how it will deal in the future with the substantial transformation issue in the country-of-origin marking context. It may also be providing insight into how it will apply the test in other contexts.[51]

The court repudiated both the *Uniroyal* "name" prong sub-test[52] and the *Midwood* "use" prong sub-test,[53] declaring that both were weak and unworkable. The court then went on to provide the "very essence of the final product" sub-test.[54] In effect, the court replaced two fairly subjective, qualitatively-based sub-tests with what appears to be an objective, quantitatively-based test. The only means of justification of such sweeping language and the rejection of the two established sub-tests might be if the replacement test provided greater predictability for the importer, the practitioner, the Customs Service, or the court itself. Upon closer scrutiny, however, it appears that this new test is just as elusive and empty as its predecessors. Such a quantitative test can also be quite weak and unworkable. For instance: how much value must be added before the article is deemed to be *not* the "very essence of the final product"?; does this test change from product to product?; what costs are included in the calculation? Additionally, the test is also subject to manipulation by the inflation of prices of component costs.

As the CIT and other courts struggle with the definition of the substantial transformation concept, deeper questions arise. This opinion suggests that there exist gaping holes in the "name, character, or use" modification of the *Gibson-Thomsen* test. Because

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51. *See supra* note 10.
52. *See supra* note 37.
53. *See supra* note 24.
54. *See supra* note 50.

this test has historically been the magic incantation applied to the substantial transformation issue, the evisceration of the test leaves practitioners, and more importantly importers and exporters, with only one viable test "prong" upon which to rely when attempting to predict the outcome of a substantial transformation question.

It becomes rapidly apparent that this empty test, when coupled with the mild standard of review exercised by the courts in these cases,[55] leaves the Customs Service with almost unfettered discretion in making these very important substantial transformation decisions. If the administration wanted to impose a well camouflaged non-economic trade barrier, all it need do is order the Customs Service to "tighten up" its working definition of what it requires to sanction a substantial transformation.[56] The inability to formulate a lasting definition that lends to predictable results under the *Gibson-Thomsen* framework and the obvious hazard of this course mandate an alternate resolution.

This alternative may possibly result from a recent study and report of the U.S. International Trade Commission on the standardization of the rules of origin.[57] The goal of this study was to ". . . develop a single and fundamentally reliable standard (thereby possibly avoiding the current proliferation of multiple standards). . . ."[58] The commission identified in this report that "[I]n the case of substantial transformation, . . . deficiencies include unpredictability of the result and complexity of application, in large part because of the language of the rule permits wide interpretation."[59] This report concludes that it may be necessary to move toward the development of a standardized origin code which would be composed of ". . . an enumeration of industry processes covering various product sectors that, if performed, would be deemed to confer origin of the situs country."[60] It may be that this code of processes is the answer to the proliferation of varying interpretations of the substantial transformation criteria. There is serious doubt, however, that this proposed code could ever be com-

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55. *See National Juice*, 628 F. Supp. at 939. The court stated that it uses an "arbitrary and capricious" standard of review when reviewing decisions of the Customs Service in this area.

56. *See generally The Impact of Rules of Origin on U.S. Imports and Exports: Report to the President*, U.S.I.T.C. Pub. 1695, Inv. No. 332-192 (May 1985).

57. *Standardization*, *supra* note 11, at v.

58. *Id.*

59. *Id.* at vi.

60. *Id.*

prehensive enough to provide the answers for the many substantial transformation decisions that must be made with regard to the huge volume of trade between the United States and its trading partners.

EDWARD H. DAVIS, JR.