

## Wanted Clarity Absent In CIT's New Country-Of-Origin Opinion

By Jennifer Doherty

*Law360 (March 2, 2023, 9:41 PM EST)* -- The latest U.S. Court of International Trade decision to address age-old questions around complex products' country of origin marked a return to the court's traditional approach to the issue, but it stopped short of providing the additional clarity importers had hoped to gain.

The case turned on whether Cyber Power Systems, a U.S.-based purveyor of backup power supplies and surge protectors, could demonstrate that parts manufactured in China underwent significant-enough changes at the company's factory in the Philippines to justify replacing the "Made in China" label with "Product of the Philippines" for U.S. customs purposes, a benchmark known as substantial transformation.

One of the most significant recent CIT decisions on the subject, 2016's *Energizer Battery v. United States*, further complicated that challenge for importers by affirming a U.S. Customs and Border Protection decision relating to military-grade flashlights assembled from Chinese parts. The court backed the idea that simply throwing together parts, especially parts made to create a given end product, was not enough to qualify as substantial transformation.

Attorneys for importers had told Law360 ahead of Monday's ruling in the Cyber Power Systems case that they hoped CIT Judge Leo M. Gordon would offer a clearer definition of what kind of complex assembly was required to achieve a substantial transformation. Instead, weighed down by the company's failure to produce certain evidence, his opinion made only a glancing reference to the weight of the assembly process in substantial transformation decisions.

"[Energizer] is not mentioned by name, but the opinion does state that, while the intended use of components may provide some insight into whether a change occurs that would affect a substantial transformation, that's only one factor for consideration and as part of the totality of the circumstances analysis, which is pretty instructive," Morgan Lewis & Bockius LLP attorney Casey Weaver told Law360.

The *Energizer* court made its pronouncement on the importance of complex assembly as part of an established, three-pronged test for determining whether substantial transformation has occurred.

Since 1908, federal courts have relied on the deceptively simple "name, character or use" test, which holds substantial transformation may have occurred if one of those three factors changed as parts were assembled into the finished product.

In practice, it's a standard Cassidy Levy Kent LLP partner Yohai Baisburd compared to U.S. Supreme Court Justice Potter Stewart's famous approach to identifying obscenity: "I know it when I see it."

While clear guidelines for what constitutes a complex assembly process that can satisfy the "name, character or use" test would have been helpful to importers, Baisburd was unsurprised the court declined to put new parameters on it.

"The name, character, use test is incredibly flexible," he told Law360. "It can be applied sort of across the board, but it's not well-suited for clear dividing lines."

The same flexibility that bugged importers trying to prove their products were not made in countries subject to heavy tariffs served as a feature for the government in making fact-specific country-of-origin determinations, according to Baisburd.

While Judge Gordon didn't wade into what "complex assembly" means in the Cyber Power Systems case, he did address recent evolutions of the name, character or use test.

For the second time, the judge rejected the government's position that substantial transformation could be determined either by examining just one all-important component of a finished good or by focusing exclusively on the intended use of the parts that make up a product.

Those approaches have found some support elsewhere on the CIT bench, but Judge Gordon's call to stick to a broader examination amounted to "a reset," according to Weaver of Morgan Lewis.

Barnes Richardson & Colburn LLP partner Lawrence Friedman likewise called the judge's preference for the traditional test "a significant development in clarifying the approach that customs should be taking," looking at both the parts prior to assembly and the product that results afterward.

Judge Gordon's opinion handed Cyber Power Systems a win on one of six products the company argued were made in the Philippines. For the remaining five, he said the company failed to produce enough records or testimony to establish how and where its products came together.

For the one model of uninterruptible power supply Judge Gordon did free from China tariffs, Cyber Power was able to show that critical parts, including its main circuit board, were produced at its Philippines facility.

But even for that product, the company did not offer a clear view of how those parts were assembled into the final product shipped overseas for sale in the U.S.

Judge Gordon's acknowledgment of that shortcoming provided an interesting wrinkle in Monday's opinion, according to Friedman.

"What he's saying is that by comparing the input products to the finished product, the change itself in name, character, and use is so significant that he didn't even need to look at detailed evidence describing the assembly," Friedman told Law360.

On the flip side, Weaver of Morgan Lewis found a lesson to be learned from the five products that failed to establish their provenance in the Philippines.

"It really highlights for companies the types of documentation that they're going to need to maintain and in what form," she said.

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