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CBP's recent ruling concerning "country of origin" suggests the *Energizer Battery* decision has long lasting effects notwithstanding the *Cyber Power Systems* case

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Importers in the United States must continue to carefully navigate numerous court decisions and customs rulings, which sometimes appear to be in conflict, when making "country of origin" determinations, particularly in the context of applying the punitive Section 301 tariffs on Chinese-origin goods as high as 25 percent.

In one of its first rulings since the U.S. Court of International Trade's ("CIT") February 2023 opinion in *Cyber Power Systems (USA) Inc. v. United States*, Slip-Op. 23-24 (February 27, 2023), U.S. Customs and Border Protection ("CBP") continues to place an emphasis on the "predetermined end-use" of components that are critical, or essential, to the functionality of the imported finished good to determine whether the good has substantially transformed in a particular country. In *Cyber Power Systems,* the CIT, preferring a "totality of the evidence" approach, seemingly rejected an "essential component" based approach. However, in keeping with the CIT's seminal decision in *Energizer Battery v. United States*, 190 F. Supp. 3d 1308 (Ct. Intl. Trade 2016), CBP made clear in its subsequent Headquarters ("HQ") decision concerning an Application for Further Review of a Protest (HQ H322161 (March 14, 2023)) that, in its view, *Cyber Power Systems* did not overrule *Energizer Battery*. Rather, CBP cautioned that "these were one of the many factors in a substantial transformation analysis."

Background

Generally speaking, for U.S. customs purposes, if further work or materials are added to an article in another country, that process must effect a *substantial transformation* in order to render the other country the "country of origin" of an imported good.[1] For over a century, courts have further clarified that a new and different article must emerge from the production process "having a distinctive *name, character, or use*."[2] More recently, in 2016, CIT determined in the *Energizer Battery* case that "in order for a product to be substantially transformed, it must

[1] 19 U.S.C. § 1304; 19 C.F.R. § 134.1

[2] Anheuser-Busch Brewing Ass'n v. United States, 207 U.S. 556 (1908).

become 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." Effectively, the CIT adopted a "component-by-component" approach that considered whether each discrete component had undergone a change in *name, character, or use* as the result of the assembly operation. In that case, the CIT found that because the components were prefabricated with a predetermined end-use, there was no change in name, character, or use resulting from the assembly operations. While a pre-determined end-use of individual components has not always precluded a finding of a substantial transformation, that has been a recent trend in CBP decisions following *Energizer Battery.*

However, in 2023, while acknowledging the difficulty in applying the substantial transformation test, the CIT in *Cyber Power Systems* rejected a "component-by-component" based approach, particularly if it looked only to whether the essential or critical component of a product had been substantially transformed. This brings us to HQ H322161, issued after the *Cyber Power Systems* decision.

CBP HQ H322161 (March 14, 2023)

In HQ H322161 (March 14, 2023), CBP considered the country of origin of an actuator cable assembly produced in Mexico and classified as "electric motors and generators" of heading 8501, Harmonized Tariff Schedule of the United States ("HTSUS"). The product imported into the United States was described as:

> [A] remotely powered electromechanical system featured in the second row seating of sports utility vehicles. The actuator assembly operates by having customers push a remote push-button that sends an electric signal to a printed circuit board assembly ("PCBA") to power up and instruct a motor to pull a cable with a specific amount of force to activate certain functions in the vehicle. The functions performed by the actuator assembly consist of changing the seat arrangement in a vehicle by folding a seat, tumbling a seat, and retracting the headrest of a seat.
>
> The actuator cable assembly is an electrical motor from China equipped with the following additional components: a PCBA assembled in Mexico; a cable subassembly and housing subassemblies manufactured in Mexico; gear components including face gear and composite gear, shaft, pinion gear, pulley gear, return spring and label from the United States; and enclosure screws, motor attachment screws and mounting fasteners from Taiwan. The PCBA communicates with the motor, directs which mechanism to activate, and manages the motor speed, run-time, and current. The motor generates power to rotate the gears and pull the cable. The face gear, composite gear, pulley gear, and pinion gear transfer the power generated from the motor into a pull force that pulls and moves the cable. The cable subassembly manufacturing process includes cutting cable and conduit materials to length, and assembling these components with plastic fittings molded in Mexico. The housing subassemblies are manufactured by injection molding with use of resin and colorant materials.

The assembly operation in Mexico involved installing all the individual components together into a final actuator cable assembly. The final assembly consisted of 11 assembly stages and at least 106 individual steps, including:

- Installing the shaft and mounting fasteners into the housing
- Assembling the spring into the pulley gear and installing the pulley gear into the housing
- Installing the cable subassembly into the pulley gear
- Placing the motor into a fixture nest and installing the pinion gear into the motor
- Rotating the pinion gear for proper orientation on the motor, and verifying proper installation with various sensors
- Installing the motor and pinion into the plastic housing, and automated verification that the assembly was done correctly
- Installing the composite gear and face gear into the housing

- Placing the cover into a fixture and inserting the brass inserts into the cover
- Configuring the PCBA to the motor within the housing and installing the cover onto the housing
- Placing the components on a fixture sensor
- Installing the cover to the housing with screws
- Verifying that the assembly was done correctly and placing the completely assembled actuator into the end-of-line tester ("EOLT")
- Labeling and packaging the actuator

Despite the multi-staged assembly operations in Mexico, CBP's Consumer Products and Mass Merchandising Center of Excellence and Expertise ("CEE") concluded that the electric motor from China, which was a key component of the actuator cable assembly, had a predetermined end-use and was not substantially transformed as a result of the assembly in Mexico. Thus, the imported finished product, the actuator cable assembly, "remained a product of China" for U.S. customs purposes.

On Application for Further Review of the CEE's decision, CBP Headquarters explained in HQ H322161 that the *substantial transformation* standard for determining the country of origin of imported goods considers whether an article emerges from a process with a new name, character, or use different from that possessed by the article prior to processing. The determination is based on the totality of the evidence and CBP considers factors such as the nature of the operation, including the number of components assembled, and the number of different operations involved. However, "[w]hen the manufacturing or combining process is a minor one, which leaves the identity of the article intact, a substantial transformation does not occur…."

The U.S. importer argued that the actuator cable assembly was a product of Mexico, for purposes of avoiding paying Section 301 tariffs on Chinese origin goods, because the foreign components were substantially transformed into a product of Mexico. In addition, the Chinese components, which included the motor, accounted for only approximately 33 percent of the material cost whereas the U.S.-origin components, including the gear, accounted for the majority of the components by quantity (at least 50 percent, and closer to 67 percent when considering the subassemblies manufactured in Mexico). Further, the importer argued that no single component, by itself, performed the function of the actuator and that the assembly in Mexico was complex and transformed the individual components into an actuator assembly of Mexican origin.

The importer also argued that under the CIT's summary judgment order in *Cyber Power Systems (USA) v. United States*, 560 F. Supp. 3d 1347 (Ct. Intl. Trade 2022), the totality of the evidence should be considered without applying the "essence" test because, according to the importer, the PCBA is more important than the motor and is the only component with a pre-determined function, and the separate major components need to be integrated to perform the function of the actuator. Generally, CBP and the courts have determined that when complex surface mount technology is used to load a raw printed circuit board with diodes, transistors, capacitors, memory chips, and task-specific integrated circuits, there is a substantial transformation of the components into the PCBA; and when the PCBA is considered the essential "brains" of the product, then it will typically confer origin on the finished product (however, if the PCBA merely provides a subsidiary enhancement to the functionality or use of the product, it will not).

In rejecting the importer's arguments, CBP noted that the CIT's summary judgment order in *Cyber Power Systems* did not overrule prior CIT decisions applying the "essence" and "pre-determined use" tests but instead cautioned that these were each one of several factors in a substantial transformation analysis. In citing to the CIT's decision, CBP stated that:

> [T]he CIT explained that "a change in name, character, or use turns on the nature of the potentially transformative processing, considered in the context of the particular kind of merchandise being manufactured." The court emphasized that determination of the resulting character and use of the

merchandise requires careful analysis of the material facts and the court would look at the totality of the evidence.

In deciding that the motor imparted origin to the entire assembly, CBP made the following additional points:

- The actuator assembly is classified as "electrical motors and generators" under heading 8501, HTSUS, and is an actual electric motor equipped with additional components.
- The PCBA, in this instance, was merely one of several additional components added to the motor and cannot individually perform the function of the actuator assembly. Without the motor, the PCBA is non-functional. Thus, the PCBA assembly did not determine the origin of the finished product in this case.
- "[T]he instant Chinese motor does not lose its separate identity and undergo a change in its pre-determined use as a result of the assembly in Mexico. The motor's character does not change either – the Chinese motor remains a motor after the PCBA subassembly, the housing subassembly, and the cable subassembly are attached to it in Mexico…"[3]

Based on this, CBP concluded that the "country of origin" of the imported actuator cable assembly was China.

Final Thoughts

As we previously surmised in an earlier article, the CIT's *Cyber Power Systems* opinion potentially muddies rather clarifies the application of the substantial transformation standard.[4] It did not distill any bright-line rules or a meaningful application for future analyses. Not surprisingly, CBP's decision in H322161 does not disturb the complexity or case-by-case approach to making "country of origin" determinations. Thus, importers should continue to monitor CBP's treatment of the *Cyber Power Systems* determination to glean potential changes in its application of the case; and should continue to document their origin analyses to demonstrate reasonable care. Importers should cautiously consider all factors in that analysis because, as CBP recognized in HQ H322161, *Cyber Power Systems* did not overrule the *Energizer Batteries* decision, and for the time being it appears the "essential component(s)" and "pre-determined end-use" tests keep going and going and going....

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[3] According to CBP, "[t]he motor converts electric energy into mechanical force while the additional components complement this function by directing the motor's force for specific automotive applications. The motor generates power to rotate the gears and pull the cable… The motor prompts the cable to activate the mechanism that folds and tumbles the vehicle seat, and retracts the headrest of the seat. Without the motor, the PCBA and the final assembly are both non-functional."

[4] Luis (Lou) Abad and Donald Hok, Is the CIT's recent Cyber Power Systems decision on customs "origin" substantially transformative? (Mar. 1, 2023).