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Robert L. McGeorge

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I. INTRODUCTION

Fierce policy disputes are inevitable whenever two basic, widely-accepted principles intersect in a situation where one must prevail and the other give way. In the maritime field, these disputes occur whenever a nation-state is forced to choose between promoting free and open trade in maritime services or protecting its domestic merchant marine.

The clash of these policies has generated vigorous debates in the United States on a wide variety of maritime issues (*e.g.*, cargo preference requirements, operating and construction differential subsidies, vessel construction loan guarantee programs and whether to retaliate against foreign countries' attempts to reserve import and export trades for their merchant marines). In one area, however, the advocates of a strong domestic merchant marine have routed the forces of free trade by reserving domestic maritime trades for national maritime fleets. The right of a nation to exclude foreign vessels from its domestic maritime trades is accepted without question in the international community; and most coastal nations, including the United States, have adopted cabotage laws

* Assistant Professor of Law, University of Nebraska College of Law; Executive Director, Center for International Trade Policy. Research for this article was made possible by a Ross McCollum Summer Research Grant.

to enforce that right.[1] The United States' maritime cabotage laws are contained in Section 27 of the Merchant Marine Act of 1920[2] — commonly referred to as the Jones Act.[3]

This article will challenge neither the United States' legal right to adopt cabotage laws, nor the Congressional choice to protect the United States merchant marine through the enactment of the Jones Act. Instead, this article analyzes recent Jones Act rulings, opinions and decisions[4] on the so-called "continuity of the voyage" issue (*i.e.*, whether the Act applies to the transportation of cargoes between two United States points if they are manufactured or processed at a foreign intermediate point).

This analysis leads to the conclusion that, by placing undue emphasis on the changes in the physical composition of merchandise during foreign processing operations and by ignoring more relevant criteria, the United States Customs Service currently administers the Jones Act in a manner that bears no reasonable or consistent relationship to the purposes of the Act, and unduly restricts international trade. Pursuant to these rulings, some industries (*e.g.*, the oil industry) freely substitute foreign flag vessels for competing (but higher-cost) United States coastwise-qualified vessels operating in nearby domestic routes, by engaging in minimal processing operations at a foreign point virtually enroute between their United States origin and destination points.[5] At the same time,

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1 Two concepts that will be discussed in greater detail should be mentioned at this point. First, the maritime trades that are reserved under United States cabotage laws involve transportation between two United States points, directly or via a foreign point. These trades are referred to as "coastwise" or "domestic" trades in this article. Second, the United States cabotage laws reserve coastwise trades for only a portion of all vessels that were built in the United States or are operated under the U.S. flag, *i.e.*, those vessels that are built without a federal subsidy and are documented as eligible to operate in the coastwise trades (hereinafter referred to as "coastwise-qualified vessels" or the "coastwise fleet").

2 46 U.S.C. § 883 (1989).

3 The term "Jones Act" is also used to refer to Section 33 of the Merchant Marine Act of 1920 (46 U.S.C. § 688), which provides for recovery for the injury or death of seamen. For purposes of this article, however, references to the "Jones Act" are limited to Section 27 of the Merchant Marine Act of 1920.

4 A number of different sources for interpretations of the Jones Act will be utilized in this article, including the federal courts and the United States Customs Service. Customs Service decisions and rulings include decisions concerning alleged violations, and prospective rulings providing guidance as to that agency's opinion on the applicability of the Jones Act to proposed transportation arrangements, which are issued pursuant to 19 C.F.R. §§ 4.80b, 177 (1989). The Customs Service selects some of its interpretive rulings for publication in the weekly *Customs Bulletin and Decisions* (*Customs B. & Dec.*) and the annual *Customs Bulletin* (*Customs Bull.*). All Customs Service interpretive rulings cited in this article which have not been selected for publication in either of those publications are published in microfiche form or are available upon request from the Customs Service.

5 For purposes of this article, the term "U.S. origin" or "U.S. destination" refers to the U.S.

other industries (*e.g.*, the seafood industry) that engage in substantial processing operations at foreign points located thousands of miles from the nearest domestic route served by a United States coastwise-qualified vessel are denied the opportunity to use foreign-flag or United States non-coastwise-qualified vessels serving those foreign trade routes, if it can be anticipated that any portion of the United States origin merchandise will return to the United States after processing.

II. BACKGROUND

A. Legislative History of the U.S. Cabotage Laws

The United States became a maritime power before it became a nation. The British Colonies in America were the world's leading shipbuilders, due primarily to the proximity of suitable timber to major port cities (although the British exercised substantial control over colonial maritime operations).[6] After the Revolutionary War, the United States maritime industry prospered as a result of its lower costs, and the status of its vessels as neutral ships during the late eighteenth and early nineteenth century European wars.[7]

From the early days of our history as a nation, the proposition that an adequate domestic merchant marine is essential to the defense and commercial welfare of the United States became a basic element of our national policy. As noted by the D.C. Circuit:

> It has long been recognized that an adequate merchant marine, with U.S.-flag ships and trained American sailors, is vital to both the national defense and the commercial welfare of our country. We require a sound merchant marine to protect foreign trade and to provide support for the armed forces in times of war or national emergency. We also require a modern, efficient shipbuilding industry capable of providing military vessels in times of stress.[8]

By the middle of the nineteenth century, however, as Clipper Ships were giving way to steamships, the United States began losing its comparative advantage in shipbuilding, and the U.S. merchant marine began to decline.[9] Today, the U.S. merchant marine is not competitive in the world

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port of origin or destination, rather than the ultimate inland origin or destination of the merchandise.

6 Hutchins, THE AMERICAN MARITIME INDUSTRIES AND PUBLIC POLICY, 1789 - 1914, 130-157 (1941); Bryant, THE SEA AND THE STATES 44 (1947).

7 Zeis, AMERICAN SHIPPING POLICY 4-5, n. 5 (1938).

8 Independent U.S. Tanker Owners Committee v. Lewis, 690 F.2d 908, 911 (D.C. Cir. 1982); *see also*, Marine Carriers Corporation v. Fowler, 429 F.2d 702, 708 (2nd Cir. 1970), *cert. den'd* 400 U.S. 1020 (1971).

9 Denison, AMERICA'S MARITIME HISTORY 85, 110-18 (1944); Fayle, A SHORT HISTORY OF THE WORLD'S SHIPPING INDUSTRY 226 (1933).

market due to relatively high wages and stringent safety standards in every aspect of the industry — from shipbuilding to vessel operations to insurance:[10] "As a result, the American shipping industry, left to its own resources, would have all of its ships built abroad, registered under foreign flags, and manned by foreign seamen."[11] To promote the national policy of maintaining an adequate merchant marine in spite of its noncompetitive cost structure, Congress has adopted two basic approaches — and in the process has created two separate fleets of United States flag vessels.

Historically, Congress's first intervention on behalf of the United States merchant marine was in the form of cabotage laws. Although little assistance was required by our merchant marine while the United States enjoyed a comparative advantage in the shipbuilding industry, after passage of the Constitution in 1789, the First Congress promptly exercised the sovereign powers of the United States to protect the United States merchant marine fleet from foreign flag competition in its domestic maritime trades. The third law passed by the new Congress imposed a tax on foreign vessels operating in the domestic trades at a rate that, as a practical matter, precluded them from competing with the domestic merchant marine in those trades.[12] In 1817, Congress expressly prohibited foreign vessels from operating in the coastwise trades.[13]

From 1817 to 1866, the U.S. maritime cabotage laws prohibited the transportation of merchandise "from one port of the United States to another port of the United States in a vessel belonging wholly or in part to a subject of any foreign power."[14] In 1866, when Congress was alerted to the possibility of evading the proscriptions of the United States cabotage laws by transshipping cargoes at nearby Canadian ports, it broadened the scope of the act to cover:

> merchandise . . . at any port in the United States on the northern, northeastern or northwestern frontiers thereof . . . laden upon any vessel belonging wholly or in part to a subject or subjects of a foreign country or countries, and . . . taken thence to a foreign port or place to be reladen and reshipped to any other port in the United States on said frontiers, either by the same or any other vessel, foreign or American, with the intent to evade the provisions relating to the [transportation of merchandise from one port of the United States to another port of the United States.][15]

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10 *See*, Independent United States Tanker Owners Committee v. Lewis, 690 F.2d 908, 911 (D.C. Cir. 1980) (citations omitted).

11 *Id.*

12 Chapter 2, § 5 of the Act of July 4, 1789, 1 Stat. 27 (1848).

13 Chapter 31, § 4 of the Act of March 1, 1817, 3 Stat. 351 (1850).

14 *Id.*

15 Chapter 201, § 20 of the Act of July 18, 1866, 22 Stat. 641 (1883).

Eventually, a hardware merchant tested the limits of the United States cabotage laws by shipping kegs of nails from New York City to Antwerp on a Belgian flag vessel, briefly discharging the cargo at Antwerp and promptly reloading it onto a British flag vessel bound for California. When the cargo arrived in California, the Collector of Customs brought a forfeiture action against the cargo owner for his violation of the United States cabotage laws. In its decision in *United States v. Two Hundred and Fifty Kegs of Nails*[16] the court of appeals found the prohibitions of the cabotage laws inapplicable to the situation at issue, because: "[I]n the plain and ordinary meaning of the words, 'to transport goods from one domestic port to another' means to carry goods in one continuous voyage . . . . It does not mean to carry them in two distinct and separate voyages, or in two distinct vessels . . . ."[17]

Congress promptly amended the cabotage laws in 1893 by prohibiting foreign flag transportation between two U.S. ports directly or indirectly "via a foreign port."[18] As the 1893 amendments have remained a part of the United States maritime cabotage statutes through numerous amendments, the Jones Act now provides in relevant part that:

> No merchandise shall be transported by water, or by land and water, on penalty of forfeiture of the merchandise (or a monetary amount up to the value thereof . . ., or the actual cost of the transportation, whichever is greater . . .), between points in the United States, including Districts, Territories, and possessions thereof embraced within the coastwise laws, either directly or via a foreign port, or for any part of the transportation, in any other vessel than a vessel built in and documented under the laws of the United States and owned by persons who are citizens of the United States . . . .[19]

Congress cannot legislate away competition in the foreign trades of the United States, however. Since all trading partners have similar interests in promoting their merchant marines and equal rights to have their cargoes transported by those merchant marines, no country has the right to reserve its import or export trades for its merchant marine. Accordingly, the United States has attempted to equalize foreign and domestic cost structures by granting various offsetting subsidies to United States shipbuilders and vessel operators competing in foreign trades.[20]

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16 61 F. 410 (9th Cir. 1894).

17 *Id.* at 411.

18 This language was added to the cabotage laws even before the court of appeals printed its decision in the *250 Kegs of Nails* case, Chapter 117 of the Act of February 15, 1893 (27 Stat. 455). It was adopted without revision when the Jones Act was passed in 1920, and remains unchanged to date.

19 46 U.S.C. § 883 (1989).

20 E.g., construction and operating differential subsidies pursuant to 46 U.S.C. §§ 1151 *et seq.*, 1171 *et seq.* (1989).

As a result of the different legislative approaches for protecting the United States merchant marine in the domestic and foreign trades, the United States merchant fleet is divided into two distinct segments. One segment consists of U.S. built vessels which were constructed without the benefit of construction differential subsidies, and operate in the coastwise trades without the benefit of operating differential subsidies. This segment of the fleet operates in the domestic trades of the United States where it is insulated from competition with lower-cost foreign built vessels and lower-paid foreign crews. The other segment consists of United States built vessels which were constructed with the benefit of construction differential subsidies.[21] This segment operates in the foreign trades of the United States, where it could not compete with lower-cost foreign built vessels in the absence of a construction differential subsidy.[22]

In fact, the segregation of the two segments of the United States merchant marine fleet into separate domestic and foreign trades is virtually complete. As a matter of law, subsidized United States built vessels may not be employed in the domestic trades. As a matter of economic reality, unsubsidized United States built vessels cannot compete in the foreign trades with lower-cost foreign vessels.[23]

B. The Blumenthal Case

The adoption of the 1893 amendments clearly eliminated the transshipment loophole that had been recognized in *250 Kegs of Nails*. Questions still remained, however, as to whether the expansion of the cabotage laws to cover transportation between two United States points, indirectly via a foreign point, included merchandise that was transformed at a foreign intermediate processing point.

Since at least 1938, the Customs Service had publicly taken the position that foreign processing[24] will break the continuity of a voyage between two U.S. points if it creates a new and different product;[25] but the landmark decision on this question was not issued until the D.C. Circuit rendered its decision in *American Maritime Association v. Blumenthal*[26] forty-one years later.

The *Blumenthal* case arose out of the discovery of crude oil at

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21 U.S. flag operators have been allowed to register foreign-built vessels for use in the foreign trades of the United States under certain limited circumstances that are not relevant to this issue.

22 Independent United States Tanker Owners Committee v. Lewis, 690 F.2d 908, 912 (D.C. Cir. 1980).

23 *Id.*

24 For purposes of this article, the term "processing" includes "manufacturing" or "processing."

25 *See,* Treas. Dec. 79-193, 13 *Customs Bull.* 573, 574 (1979).

26 590 F.2d 1156 (D.C. Cir. 1978); *cert. den'd* 441 U.S. 943 (1979).

Prudhoe Bay on the North Slope of Alaska. The United States maritime industry assumed that Alaskan North Slope crude oil would become a lucrative source of business for the United States coastwise fleet when its exportation was prohibited by legislation.[27] The possibility that it might be transported by foreign flag or United States non-coastwise-qualified vessels directly to ultimate foreign destinations was eliminated as a matter of law.[28] The possibility that the oil might be transported to an intermediate foreign processing facility was eliminated, as a matter of economics, by the absence of any foreign refineries enroute from Alaska to the natural United States points of entry on the West Coast.

By the time the Alaska oil pipeline was nearing completion, however, the economic assumptions that the United States merchant marine had relied upon changed significantly. Due to a glut of oil on the West Coast (and environmental opposition to the construction of new oil pipelines at Southern California ports), the market for North Slope oil on the West Coast disappeared.[29]

In 1969, Amerada Hess announced that it would refine its share of the North Slope crude oil at its St. Croix, Virgin Islands refinery before delivering the refined products to various U.S. Atlantic and Gulf Coast locations. Since the Virgin Islands are not considered a United States coastwise point for purposes of the Jones Act,[30] Hess adopted the position that the foreign processing would break the continuity of the voyages from Alaska to ultimate United States Atlantic and Gulf Coast destinations, thereby allowing it to use foreign-flag tankers.[31]

The Shipbuilders Council (one of the plaintiffs in the *Blumenthal* case) promptly requested a Customs Service[32] ruling affirming its position that Hess's transportation would be subject to the Jones Act. As noted in *Blumenthal*, the Commissioner of Customs replied by stating that:

> "[I]f the main purpose of the exportation was to have the merchandise thus processed and if the processing was not merely incidental to an intended transportation between American ports," then the prohibition of the Jones Act did not apply and the transportation could be by a foreign vessel . . . . [T]he Bureau of Customs ordinarily considered processing to be "substantial," and thus likely to be the main purpose" of the exportation, if it

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27 See, Treas. Dec. 79-193, 13 *Customs Bull.* 573, 574 (1979).

28 American Maritime Association v. Blumenthal, 590 F.2d 1156, 1158 (D.C. Cir. 1978).

29 Id.

30 Merchant Marine Act of 1920, § 21; 46 U.S.C. § 877 (1970).

31 American Maritime Association v. Blumenthal, 590 F.2d 1156 (D.C. Cir. 1978).

32 The U.S. Customs Service has operated under several different titles at various times in its history. For purposes of this article, the term "Customs Service" includes any previous titles or predecessor agencies.

> "changed the merchandise physically, improved its condition, and advanced it in value, so that after processing it was a new and different product."[33]

The Customs Service did not issue a formal ruling at that time; but the Shipbuilders Council renewed its request for a ruling favorable to its interests shortly before Hess's first scheduled voyage from Valdez to St. Croix in 1977. In response, the Customs Service issued a regulation, which now provides in relevant part that:

> [M]erchandise is not transported coastwise if at an intermediate port or place other than a coastwise point (that is at a foreign port or place, or at a port or place in a territory or possession of the United States not subject to the coastwise laws), it is manufactured or processed into a new and different product, and the new and different product thereafter is transported to a coastwise point.[34]

The day before Hess's first sailing, the American Maritime Association (and other representatives of United States shipbuilders and seamen) sought a temporary restraining order enjoining such transportation on non-coastwise-qualified vessels. The district court denied the TRO, and plaintiffs' motions for preliminary and final injunctions.[35] The court of appeals affirmed the lower court's decision, and in its opinion set out two tests for determining whether processing at an intermediate foreign point breaks the continuity of a voyage between a U.S. origin port and an ultimate U.S. destination.

One test focuses on the physical degree of alteration of the merchandise during the manufacturing or processing operation (hereinafter referred to as the "Physical Alteration Test.") After reviewing the evidence concerning the refining process in which crude oil was processed into eleven different petroleum products,[36] the court held:

> We agree with the trial court's conclusion [and the Customs Service's position] that "all the credible evidence of record conclusively demonstrates that the products of the Hess refinery are new and different merchandise from the Alaskan crude oil." It thus seems clear that the "merchandise," the language of the statute, transported between Valdez and St. Croix is one thing, crude oil, while the "merchandise" transported from St. Croix to the continental United States is a collection of quite different other things, *i.e.*, products which are physically, chemically, and usefully different from the original crude oil.[37]

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33 American Maritime Association v. Blumenthal, 590 F.2d 1156, 1160 (D.C. Cir. 1978).

34 19 C.F.R. § 4.80b (1988).

35 American Maritime Association v. Blumenthal, 590 F.2d 1156, 1160 (D.C. Cir. 1978).

36 Regular, premium and unleaded gasoline; number 2 and number 6 oil; jet fuel; benzene; toluene; xylene; paraxylene; and sulfur pellets. *Id.* at 1162

37 American Maritime Association v. Blumenthal, 590 F.2d 1156, 1162-63 (D.C. Cir. 1978) (citations omitted).

The court further found that the intent of Hess to ship its goods to a final destination in the United States did not bring the shipment within the scope of the Jones Act. The degree to which the goods were altered "in the course of commercial dealings," rather than the intent to ship them to a final destination in the United States, governed the application of the Jones Act to the situation in dispute.[38]

The court's second test for determining whether the intermediate foreign processing will be sufficient to break the continuity of the voyage focuses on the cargo owner's reasons for transporting the merchandise to a foreign intermediate point. In reviewing the legislative purpose underlying the 1893 amendments to the predecessor of the Jones Act, the court concluded that:

> No language in the statute indicates that the landing of the cargo in a foreign port *for the legitimate purpose of manufacture or processing of the goods* would not convert the goods to other merchandise or would not interrupt the continuity of the voyage. The words "either directly or via a foreign port" have reference only to the *Keg of Nails* situation, *i.e.*, the simple transshipment of the same goods in a foreign port, which under the amended statute does not break the continuity of the voyage.[39]

The *Blumenthal* Court did not elaborate on the factors to be considered in determining whether foreign processing is legitimate. It simply stated the obvious conclusion that Hess's refining operations in St. Croix were a "far different undertaking from simple transshipment of the same 'merchandise.'[40] By quoting the Commissioner's initial reply to the Shipbuilders Council, however, the court did include a thorough discussion of the relevant factors in its decision. If the main purpose for transporting goods from the United States to the foreign point is to have them processed, the processing is legitimate, and sufficient to break the continuity of a voyage between the United States origin and ultimate United States destination. Conversely, under this test, which will be referred to as the "Main Purpose Test," if processing at a foreign intermediate point is incidental to intended transportation between two U.S. points, it will

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[38] *Id.* at 1164. Thus, the intent to ship a portion of the merchandise to the United States is not relevant to a determination of whether foreign intermediate processing creates a new and different product. The shipper's intent to eventually ship merchandise which is not processed in the intermediate foreign country to the United States is highly relevant, however, to the issue of whether the continuity of a voyage is broken by the entry of the merchandise into the commerce or common stock of a foreign intermediate country. Indeed, that intent will maintain the continuity of the voyage when it would otherwise be broken by the entry of the merchandise into the commerce or common stock of the intermediate foreign country. *See*, T.D. 79-193, 13 *Customs Bull.* 573, 576 (1979); 34 Op. Atty. Gen. 355 (1924).

[39] American Maritime Association v. Blumenthal, 590 F.2d 1156, 1165 (D.C. Cir. 1978).

[40] Id.

not break the continuity of the voyage.[41]

The tests established by the *Blumenthal* case address the relevant issues from two different perspectives.

The Main Purpose Test analyzes the processing operation in question from the perspective of the legislative purpose underlying the Jones Act; in essence, whether the main purpose for transporting the merchandise to a foreign location is to process it, or to avoid (or evade) the requirement to use high-cost United States coastwise-qualified vessels.

The Physical Alteration Test, by contrast, focuses on a single key term in the Act to determine whether the "merchandise" transported from the United States origin to the foreign processing point is the same "merchandise" that is transported from the foreign point to the United States destination.

It appears that the *Blumenthal* court recognized the limitations of the Physical Alteration Test. Although it affirmed the Customs Service's determination that the refining process created products that were physically, chemically and usefully different from crude oil, it declined to establish general principles for determining the point on the spectrum of possible changes of a product at which a new and different product will be created.[42] And, it took pains to discuss the Main Purpose Test, when it could have merely affirmed the Customs Service's decision under the Physical Alteration Test.

C. Post-Blumenthal Decisions, Rulings and Opinions

In the ten years since the *Blumenthal* decision was issued, however, the Customs Service has concentrated exclusively on the Physical Alteration Test, and ignored the Main Purpose Test. In the process, it entered a thicket of technical legal and factual issues and lost sight of the purpose of the Jones Act.

The Customs Service's disparate treatment of the oil and seafood industries — the two industries that have most often sought Jones Act

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[41] Although the "Main Purpose Test" as articulated by the Commissioner of Customs in his initial reply to the Shipbuilders' Council relies upon objective criteria (whether the processing is substantial, changed the merchandise physically, improved its condition or advanced its value), that objective criteria is evidence of a subjective state of mind — the shipper's motivation for transporting the merchandise to the foreign intermediate point. *Infra.* at 607-08; American Maritime Association v. Blumenthal, 590 F.2d 1156, 1160 (D.C. Cir. 1978). The intent of the cargo owner in transporting merchandise to the foreign intermediate point (for legitimate processing or as a ruse to avoid the requirement for using coastwise-qualified vessels) should not be confused with his intent that part of the merchandise be transported to the United States after processing. The former intent is a critical factor in the "Main Purpose Test," while the latter intent is irrelevant under this test. *Infra.* at 609, n. 38; *See also*, C.S.D. 80-46, 14 *Customs Bull.* 801, 803 (1979).

[42] American Maritime Association v. Blumenthal, 590 F.2d 1156, 1163, n. 37 (D.C. Cir. 1978).

rulings on breakages in the continuity of voyages over the past decade — demonstrates the divergence between the purpose of the coastwise trading restrictions and current administrative policy.

The oil industry has been the primary beneficiary of the Customs Service's pattern of relying exclusively on the Physical Alteration Test to determine whether foreign processing will break the continuity of a voyage, while ignoring the Main Purpose Test.

Since 1979, the Customs Service has had the opportunity to consider a number of points on the spectrum of oil processing operations involving processing operations that were less extensive than the refining operations in *Blumenthal.* The Customs Service's case-by-case decision making process has led to its current conclusion that new and different products can be created merely by intermingling different grades of crude oil at a foreign storage facility. Since the blended crude oil will have a different sulfur content, pour point, specific gravity and viscosity than the crude oil transported to the foreign storage point by any particular tanker, the Customs Service has ruled that blending crude oils in a foreign storage tank physically changes the crude to the extent necessary to create a new and different product, thereby breaking the continuity of the voyages in question.[43] In one of its latest rulings on the issue, for example, the Customs Service ruled that the process of blending one tanker load of crude oil with a 1.3% sulfur content and a second tanker load of crude oil with a .7% sulfur content created a new and different product with a sulfur content of 1.0%.[44]

The Customs Service's oil processing rulings have had a significant economic impact on both the oil industry and the United States tanker industry. The oil industry has saved millions of dollars by substituting lower-cost foreign flag tankers for United States coastwise-qualified vessels; while the United States tanker fleet — much of which was built to transport North Slope crude — has encountered severe financial difficulties.[45]

The United States seafood industry has not fared nearly as well when it has sought to use United States non-coastwise-qualified or foreign flag vessels to transport its products to or from foreign processing plants.

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43 Customs Service Ruling No. 105804 (11/16/82); Ruling No. 107071 (10/19/84); Ruling No. 107262 (12/21/84); Ruling No. 107880 (9/6/85); Ruling No. 107912 (9/30/85); Ruling No. 108223 (3/13/86); Ruling No. 108246 (3/19/86).

44 Customs Service Ruling No. 108827 (2/23/87).

45 See Independent U.S. Tanker Owners Committee v. Lewis, 690 F.2d 908 (D.C. Cir. 1982) for a discussion of the shortage of employment opportunities in the coastwise trades for unsubsidized U.S. built tankers.

In 1980, the Customs Service considered the application of the Jones Act to an operation involving the proposed transportation of King Crab from the Bering Sea to Vancouver, B.C., where it was to be processed before being shipped to Seattle. The processing involved cutting crab clusters (*i.e.*, half of a crab with legs and claws attached) into individual legs or claws (with the body trimmed off). The Customs Service ruled that the processing would not create a new and different product, because it consisted "essentially of cutting the crabs into smaller parts and would transform them into products which would have slight physical but no chemical or useful differences from their original form."[46]

Some processed seafood products have passed the Physical Alteration Test. In Customs Service Decision 82-45, the agency advised that the removal of crab meat from its shell and its subsequent sorting, cooking, canning and packing at a Canadian canning plant would create a new and different product. In reaching that conclusion, the Customs Service indicated that the fact that frozen and canned crabmeat are listed under different customs duty classifications, and are subjected to different rates of duty, supports the conclusion that new and different products would be created in that processing operation.[47] In that same ruling, however, the Customs Service ruled that the cleaning, trimming, sorting, segmenting, glazing and packing of frozen crab parts would not create new and different products sufficient to break the continuity of the coastwise voyage.[48]

Subsequent requests for Jones Act rulings from seafood processors introduced a new factual pattern. As in previous rulings, frozen bulk crab was to be cleaned, cut into crab legs and other finished portions, glazed and frozen at foreign processing plants. In these situations, however, the foreign plants were located in Japan and Korea, far removed from normal coastwise routes between Alaska and the continental United States. Again, however, by focusing exclusively on the physical characteristics of the crab before and after processing, the Customs Service concluded that a new and different product had not been created, and that the continuity of the coastwise voyage had not been broken by the foreign processing.[49]

In its most recent ruling on the issue of whether the processing of seafood in a foreign plant would break the continuity of a coastwise voy-

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46 Customs Service Ruling No. 104859 at 2 (9/12/80); Ruling No. 104955 (12/2/80); *accord* Ruling No. 105319(2/5/81).

47 C.S.D. 82-45, 16 *Customs Bull.* 751 (1981).

48 Id.

49 Customs Service Ruling No. 106093 (6/7/83); Customs Service Ruling No. 108294 (4/18/86).

age, the Customs Service subjected a number of processed crab products to the Physical Alteration Test. In this case, frozen ocean run bulk crab were to be transported to a Korean processing plant. Initially the Korean processor would: thaw, or partially thaw, and clean the frozen crab; remove all traces of the seawater glaze; remove any broken pieces of shell, impurities, or foreign matter; trim off any body parts remaining after the initial processing in Alaska; remove blood, internal organs and gills; and grade the crab arms, legs and claws.

Depending on the grade and condition of the crab parts, the Korean processor would then process the crab into: a variety of crab legs and claws (some of which were scored with parallel cuts to enable them to be broken without crab cracking tools); cocktail claws (with most of the shell removed); and extracted crab meat. Those products would then be glazed with fresh water, frozen and packed into packages of convenient size for the restaurant industry.[50]

The Customs Service concluded that the crab legs and claws that were shipped from the processing plant in Korea to restaurants in the United States were not different enough from the bulk crab shipped from Alaska to Korea to constitute a new and different product, sufficient to break the continuity of the coastwise voyage. The cocktail claws and extracted meat products were different enough, however, to warrant a ruling that they were new and different products — in part, because they would be classified under a different tariff classification than bulk crab.[51]

III. Analysis

A. Divergence between Customs Service Rulings and the Legislative Purpose of the Jones Act

In comparing any specific Customs Service ruling issued since the *Blumenthal* case with the precedent established by previous rulings on processing operations in the same industry, no obvious lapses in its logic will be detected. If refining creates products that are physically, chemically and usefully different from crude oil, it does not require a quantum leap of logic to conclude that a mixture of two tanker loads of crude oil creates a blended product that is physically, chemically and perhaps usefully different from either of the initial tanker loads. Applying the oil processing precedent to the seafood industry, it is not illogical to conclude that restaurant or consumer-grade products that are created at processing plants are not chemically different from the seafood shipped

50 Customs Ruling No. 109504 at 2 (8/12/88).
51 Id. at 10.

to the processing plant, and that their physical appearances are somewhat similar. Moreover, once the precedent is established that new and different products are not created in relatively simple seafood processing operations, it is difficult to pinpoint the specific incremental point at which the processing operation will be sufficient to create new and different products.

Ten years after the issuance of the *Blumenthal* decision, however, it is appropriate to shift consideration from specific Customs Service rulings to the broader question of whether the Service is administering the Jones Act in reasonable conformity with the Act's legislative purpose.

In a number of its foreign processing rulings, the Customs Service's employment of the Physical Alteration Test has allowed oil companies to substitute foreign-flag vessels for United States coastwise-qualified vessels that are ready, willing and able to provide the service (albeit at a higher cost). It is now possible for the oil industry to avoid the requirement of using United States coastwise-qualified vessels by expedients as simple as:

— dispatching two tankers with loads of different grades of crude oil from Alaska to an ultimate destination on the United States;
— stopping virtually enroute to offload their cargoes at Caribbean storage tanks;
— waiting until the two grades of crude oil become intermingled in the Caribbean storage tanks;
— reloading the blended crude into the tankers; and
— delivering the blended crude to the intended U.S. Gulf Coast destination.

It is difficult to construct respectable argument that the main purpose for offloading oil in the above-mentioned situation is to process it into a new and different product. It is equally difficult to demonstrate that such processing was substantial, rather than incidental. The cargo owner's motive appears transparent; he seeks to offload the cargoes in the Caribbean for the sole purpose of avoiding the coastwise restrictions of the Jones Act.

Yet, the Customs Service's exclusive reliance on the Physical Alteration Test, and its concomitant rejection of the Main Purpose Test, permits such evasions of the Jones Act, and idles tankers that were built in the United States (without subsidy) to carry that traffic.

In a number of seafood processing rulings, however, the Customs Service has swung the balance sharply away from the interests of cargo owners. The same fascination with the Physical Alteration Test has led it to conclude that the coastwise trade extends to the exportation of prod-

ucts to foreign processing sites (where it is apparent that the cargo owner's main purpose is to process the merchandise and not to evade the Jones Act) because the processing operation would not produce a sufficient chemical or physical change in the merchandise.

In many of those situations, the sharp swing in the balance away from cargo owners does not even produce a compensating benefit to the U.S. merchant marine. Since the coastwise-qualified fleet (particularly liner vessels that operate fixed routes between U.S. ports) provides services in the domestic trades where it is insulated from competition with lower-cost foreign vessels, no coastwise-qualified vessels are available to transport cargoes between U.S. and foreign points located any substantial distance from those domestic routes (such as the Japanese and Korean processing sites considered in Ruling Nos. 106093, 108294 and 109504).

In short, the Customs Service's rulings in the oil and seafood industries are inversely related to the purposes of the Jones Act. When the coastwise tanker fleet stands ready, willing and able to carry crude oil between U.S. points, the Customs Service allows the oil companies to avoid the Jones Act's coastwise restrictions by engaging in inconsequential processing operations virtually enroute between those U.S. points. But, when the coastwise liner fleet has no ability to carry seafood to foreign locations far removed from their domestic routes, the Customs Service rules that substantial processing operations at those foreign sites will not break the continuity of the voyage between the U.S. origin and the ultimate U.S. destinations.

B. Relationship between the Physical Alteration and the Main Purpose Tests

Recognizing the divergence between the Customs Service's administration of the Jones Act and the Act's Congressional purpose is only half the battle. The other half is to bring the Custom Service's administration of the Jones Act into compliance with the purposes of the legislation, while adhering to the *Blumenthal* decision.

The Customs Service lost sight of the purpose of the Jones Act (and a substantial portion of the *Blumenthal* decision) when it relied exclusively on the Physical Alteration Test and ignored the Main Purpose Test. Three other possibilities remain: rely exclusively on the Main Purpose Test and ignore the Physical Alteration Test; conclude that the continuity of a voyage will be broken if either test is met; or consider both tests in conjunction with each other.

Policy considerations might support the substitution of the Main Purpose Test for the Physical Alteration Test as the sole basis for deter-

mining whether foreign processing will break the continuity of a voyage. Certainly, rulings based upon this test would be more compatible with the purposes of the Jones Act than the rulings issued by the Customs Service over the past decade. But, unless Congress legislatively overrules *Blumenthal*, the Physical Alteration Test cannot be eliminated. Thus, neither test can be disregarded completely.

It is not necessary, however, to make an exclusive choice between either of the remaining possibilities (treating the two tests as alternatives or considering them in conjunction with each other). As noted below, either test can be applied with little or no reference to the other in extreme situations. In most situations, however, the two tests should be applied in conjunction with each other.

1. Province of the Physical Alteration Test

At one extreme, cargo owners must be allowed to qualify their foreign processing operations under the Physical Alteration Test for the most technical of reasons. Since non-coastwise-qualified vessels are prohibited from transporting "merchandise" between coastwise points, the continuity of a voyage must be considered to be broken if different merchandise is carried to and from the intermediate foreign processing point. But, the Customs Service should not create any more technical exceptions to the Jones Act than are necessary to fulfill the requirements of the *Blumenthal* precedent. Thus, if the processing in question produces any less physical alteration of the merchandise than was found to exist in the *Blumenthal* case, the Service should conclude that the processing does not break the continuity of the voyage on the basis of the Physical Alteration Test alone.

2. Province of the Main Purpose Test

At the other extreme, the Customs Service should conclude that a new and different product sufficient to break the continuity of the voyage in question is produced whenever the cargo owner conclusively demonstrates that the main purpose for transporting his merchandise to a foreign point is to have it processed, rather than to avoid the coastwise restrictions of the Jones Act.

Although intent is often difficult to prove, in some situations compelling proof will be available. Cargo owners attempt to avoid the coastwise restrictions of the Jones Act for one reason, to substitute lower-cost foreign flag or United States non-coastwise-qualified vessels for United States coastwise-qualified vessels. A cargo owner should be able to make a *prima facia* case for his contention that the main purpose of the expor-

tation is to have the merchandise processed at the foreign point, rather than to avoid the coastwise restrictions of the Jones Act, if he can demonstrate that the proposed non-coastwise-qualified carriers' freight charges (*i.e.*, the cost of transporting the product from the United States origin to the intermediate foreign point, plus the cost of transporting it from that intermediate point to the United States destination) would exceed the prevailing coastwise-qualified carriers' rates for transporting the product directly between the United States origin and destination.

Moreover, the freight charges paid to non-coastwise-qualified vessel operators for transporting cargoes between two United States points via a foreign point normally will exceed the charges paid to coastwise-qualified vessels for transportation directly between those points only if the foreign intermediate point is located relatively far from the direct route between those points (*i.e.*, the greater mileage on the indirect route more than makes up for the higher per mile cost on the shorter direct route). In that situation, not only is the shipper motivated by legitimate processing rather than transportation factors, but coastwise-qualified vessels will not be in a position to carry the traffic even if it were reserved for that segment of the fleet.[52]

3. Combination of Both Tests

The difficult cases, of course, lie between these extremes where neither test can be applied without reference to each other. If the physical alteration of the merchandise is less extensive than in the *Blumenthal* case, and the non-coastwise-qualified carriers' freight charges via the indirect route are less than coastwise-qualified carrier's charges via the direct route, neither test by itself is conclusive.

Ironically, sound criteria for determining whether foreign processing will create a new and different product in light of all relevant circumstances can be found in Jones Act rulings that the Customs Service issued before the *Blumenthal* decision, but overlooked after it focused solely on Physical Alteration Test. Other relevant factors can be derived from its rulings on analogous customs issues.

In a 1964 Treasury Decision, for example, it was proposed that bulk rice would be transported from California to a processing plant in the Virgin Islands where: it would be fumigated, brushed and polished; dust, small particles, broken kernels, lumps, foreign matter and impurities would be removed; and glucose, tale and minerals would be added. After

[52] Even at this extreme, the Main Purpose Test would be subject to the Jones Act requirement that the continuity of a voyage would not be broken by mere transshipment at an intermediate foreign port as in the *250 Kegs of Nails* situation.

the processing, the rice would be shipped to Puerto Rico (a coastwise point for purposes of the Jones Act).[53] The Customs Service concluded that the processing operation created a new and different product, and thereby broke the continuity of the voyage, because:

— the product would be "changed physically;"
— the product would be "improved in condition;"
— the product would be "advanced in value;" and
— the processing would be of a "substantial and not merely incidental nature."[54]

The degree of physical change in this case was not determined by a chemist's test of molecular composition or a physicist's test of specific gravity. Instead, the Customs Service concluded that this product would be physically changed by applying commercial considerations — the physical changes accomplished by cleaning, polishing and fortifying the rice required in order it to sell it in retail markets.

Another ruling that same year illustrates the same point. In this case logs were to be milled into rough cut lumber (generally, the largest rectangular section available from each log) in the United States; the rough cut lumber was to be shipped to a Canadian lumber mill; the rough cut lumber was to be planed, trimmed, graded and packaged in the Canadian lumber mill; and eventually a substantial portion of the finished lumber products was to be shipped back to the United States.[55] The Customs Service ruled that when the rough cut lumber was processed into finished lumber in Canada a new and different product was created.[56]

Again, this processing operation would produce no significant changes in the chemical composition or specific gravity of the product in question. Each piece of finished lumber would have virtually the same chemical composition and specific gravity as the rough cut lumber from which it was cut. But, the physical changes created by turning a piece of rough cut lumber into two-by-fours are necessary to transform semi-processed goods into merchandise suitable for sale to consumers.

The *Blumenthal* Court found that refined products have a different chemical composition and specific gravity than crude oil. However, these are industry-specific factors that provide no useful guidance for processing operations of other industries. An interpretation of greater

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53 Treas. Dec. 56272(2) at 1,2 (7/6/64).

54 Id. These factors were later incorporated into the Main Purpose Test that the Commissioner relied upon in his initial response to the Shipbuilders Council. American Maritime Association v. Blumenthal, 590 F.2d 1156, 1160 (D.C. Cir. 1978).

55 Treas. Dec. 56320(2) (8/6/64); *accord* Customs Service Ruling No. 108520 (8/25/86).

56 Treas. Dec. 56320(2) (8/6/64).

significance is that changes in the product enable the oil companies to transform its raw material into consumer products.

Thus, the crucial factor to be considered in determining whether the processing in question creates a "physical change" is whether the change has a commercial significance. Changes of commercial significance which will tend to demonstrate that the processing has created a new and different product for purposes of the Jones Act ordinarily will include operations that:

— transform unprocessed or semi-processed products that are not saleable in a particular market into products that can be sold in that market;
— enable the owner to sell the product at a different level in the distribution chain; or
— change the product's customs duty classification upon entry into the United States.

Conversely, if the processing operation alters the appearance of the product, changes its specific gravity or alters its chemical composition without affecting its commercial character, the physical change should be irrelevant for purposes of the Jones Act.

The "improvement in condition" criterion also involves commercial considerations. For example, in the Customs Service's rice and lumber rulings, as well as the court's *Blumenthal* decision, the improvements in the condition of the products were substantial because they transformed raw or semi-processed products which would not have been saleable to consumers into consumer products.

The "advancement in value" criterion is particularly relevant to the underlying purpose of the Jones Act. Even if a foreign processing operation does not turn raw or semi-processed goods into consumer merchandise, if that processing adds substantial value to the product, it becomes more likely that the exportation of the product to the foreign processing site was to have it processed rather than to avoid the coastwise restrictions of the Jones Act.

Likewise, determining whether the processing was of a "substantial and not merely an incidental nature" forces the fact-finder to consider the degree of change in the product with reference to the motives of the cargo owner and the purposes of the Jones Act. The more substantial the change in the product, the less likely that the cargo owner has arranged for incidental foreign processing as a means of breaking the continuity of a coastwise voyage rather than to allow him to use lower-cost non-coastwise-qualified vessels.

4. Consistency with Related and Analogous Customs Service Rulings and Decisions

Finally, the determination of whether foreign processing creates a new and different product for purposes of the Jones Act should be consistent with the Customs Service's rulings on related issues; in particular, its rulings on the issue of whether the foreign processing creates a product that must be identified as a product of that foreign country for purposes of the country-of-origin marking requirements of the Tariff Act of 1930.[57] The primary purpose of the country-of-origin marking statute is summarized in *United States v. Friedlander*[58]:

> Congress intended that the ultimate purchaser should be able to know by an inspection of the marking on imported goods the country of which the goods is the product. The evident purpose is to mark the goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods were produced, be able to buy or refuse to buy them, if such marking should influence his will.[59]

When further work or material is added to an article in another country that would effect a "substantial transformation" of the article, the country in which that transformation occurs will be the country-of-origin for purposes of the statute.[60]

A substantial transformation occurs for purposes of the country-of-origin marking statute when the goods shipped to the foreign processing operation "lose their identity as such, and become new articles having . . . a new name, character, and use. . . ."[61] Other tests that have been applied by courts or the Customs Service to determine whether a product has been substantially transformed so as to become a product of the county in which it is processed include the "article of commerce" tests, which focuses on whether a new article of commerce has emerged from the processing operation, and the "value added" test, which provides that substantial transformation occurs if the foreign processing contributes significantly to the value of the final product.[62]

The tests used by the Customs Service in determining whether a product has been substantially transformed for purposes of the country-of-origin marking statute are virtually identical in purpose to the tests

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57 Tariff Act of 1930, §§ 304, 304(a) 19 U.S.C. §§ 1304, 1304(a) (1987).

58 27 CCPA 297 (1940).

59 Id. at 302.

60 Id.

61 Anheuser-Busch Brewing Association v. United States, 207 U.S. 556, 562 (1907); United States v. Gibson-Thomsen Co., 27 CCPA 267, 273 (1940); 19 C.F.R. § 134.35 (1987).

62 Koru North America v. United States, 701 F. Supp. 229, 234 n. 9 (C.I.T. 1988); United States v. Murray, 621 F.2d 1163 (1st Cir. 1980), *cert den'd* 449 U.S. 837 (1980).

that the Service used for considering whether new and different products were created for purposes of the Jones Act before the Customs Service focused exclusively on the Physical Alteration Test. For a country-of-origin determination, the Customs Service compares the merchandise before and after processing to determine whether an article having a new name, character and use is created; whether a different article of commerce is produced; and whether the operation adds substantial value to the product. For a Jones Act determination, the Custom Service should compare the merchandise before and after processing to determine whether the product is changed physically and usefully; whether it is improved in condition; whether it is advanced in value; whether the processing was of a substantial and not merely an incidental nature; and whether the main purpose of the exportation was to have the merchandise processed, rather than to avoid the coastwise restrictions of the Jones Act.

The similarity between these tests is not coincidental. Products originating in the United States must be marked as foreign-origin merchandise if they are substantially transformed at an intermediate foreign processing site enroute from the United States origin to the United States destination. If foreign processing is substantial enough to change an unprocessed or semi-processed United States origin product into a processed foreign product for purposes of the country-of-origin marking statute, it stands to reason for the purposes of the Jones Act that one type of product was shipped to the intermediate foreign point and a new and different product was shipped from that point to the United States.

Although logic indicates that there should be at least a rough parallel between the Jones Act and country-of-origin marking decisions, in fact, many are diametrically opposed.

For example, in *National Juice Products Association v. United States*[63] the Customs Service ruled that foreign origin orange juice concentrate was not substantially transformed in a United States processing operation in which it was blended with water, orange essences, orange oil and fresh juices; packaged in cans or cartons; and frozen or chilled. On review, the Court of International Trade affirmed the Customs Service's ruling.[64]

In *United States v. Murray*,[65] the court of appeals affirmed the conviction of an importer for conspiracy to knowingly and willfully import glue into the United States by means of false statements. His crime was

63 628 F. Supp. 978 (C.I.T. 1986).
64 Id. at 991.
65 621 F.2d 1163 (1st Cir. 1980).

to purchase Chinese glue, blend it with Dutch glue in Rotterdam and import it into the United States marked as a product of the Netherlands.[66]

In both country-of-origin marking cases, the primary reason for rejecting the arguments that the products were substantially transformed in the blending operations in question was that they did not increase the value of the product significantly (an increase of less than 8% in the orange juice case and a negligible increase in the glue case).[67] Yet, in its Jones Act rulings, the Customs Service has ruled that new and different products are created when oil companies blend different grades of crude oil, whether or not the blending process adds any value to the crude oil.

In its Jones Act rulings, the Customs Service ruled that new and different products are created through the blending of different grades of crude oil, because the blended product has a different specific gravity, sulfur content, viscosity and pour point than any of the original grades. Yet, the virtual certainty that orange juice and glue experience a change in specific gravity, pour point and viscosity during blending operations did not convince the Customs Service or courts to find that substantial transformations of those products occurred in the country-of-origin marking cases.

A major discrepancy between Jones Act and country-of-origin marking rulings also exists in the seafood industry. In *Koru North America v. United States*,[68] fish caught in the New Zealand Exclusive Economic Zone were beheaded, de-tailed, eviscerated and frozen in New Zealand; shipped to South Korea; thawed, skinned, boned, trimmed, glazed, refrozen and repackaged in the South Korean processing plant; and exported to the United States.[69] The court found that the products should be marked as products of South Korea because the name was changed (from "headed and gutted Hoki" to "individual quick-frozen fillets"); the fish's character was changed (from whole, albeit headless and tailless, fish to fish fillets packaged for retail sale); the fillets were considered discrete commercial goods, sold in separate areas and markets; and the headed and gutted fish underwent a transformation into a processed retail product in Korea.[70]

Allowing for the physical differences between fish and crabs, virtu-

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66 Id.

67 National Juice Products Association v. United States, 628 F.Supp. 978, 991 (C.I.T. 1986); United States v. Murray, 621 F.2d 1163, 1171 (1st Cir. 1980).

68 701 F.Supp. 229 (C.I.T. 1988).

69 Id. at 230.

70 Id. at 235.

ally identical changes occurred in the *Koru* case and the crab rulings.[71] In the country-of-origin marking case a substantial transformation occurred in the Korean fish processing plant, while in the Jones Act rulings new and different products did not emerge from the Japanese and Korean crab processing plants.

Consistency between the Customs Service's Jones Act and country-of-origin marking rulings should be achieved by utilizing the full panoply of relevant criteria that it presently employs in its country-of-origin marking cases, and recognized in its Jones Act rulings before the Customs Service focused exclusively on the Physical Alteration Test.

IV. CONCLUSION

The Jones Act was enacted to provide a limited degree of protectionism to a specific industry, *i.e.* to reserve domestic maritime trades to United States coastwise-qualified vessels. Properly interpreted and administered, it can promote the objective of assuring the availability of United States built and crewed vessels. Moreover, that protection to the coastwise fleet can be provided without unduly restricting the ability of United States producers to compete in the global market by processing their products wherever the most efficient processing industries happen to be located.

The Customs Service, however, has interpreted the Jones Act in such a way that some industries can substitute lower-cost non-coastwise-qualified vessels for available coastwise-qualified vessels by engaging in incidental processing at intermediate foreign processing points virtually enroute between United States ports of origin and destination. At the same time, other industries are restricted to the use of non-existent coastwise-qualified vessels to transport their products to foreign processing facilities located thousands of miles from the nearest domestic maritime route.

It is within the Customs Service's power to conform its interpretations to the purpose of the Jones Act. Within the parameters of binding court decisions (and the rulings that it issued before it focused exclusively on the Physical Alteration Test), the Customs Service can:

— limit the Physical Alteration Test to situations involving transformations through foreign processing at least as extensive as found in *Blumenthal*;
— apply the Main Purpose Test whenever compelling proof is provided to demonstrate that the cargo owner's motivation for

[71] Customs Service Rulings No. 106093, No. 108294 and No. 109504; *infra.* at 16, 17.

transporting his product to the foreign intermediate point is to have it processed, rather than to avoid the coastwise restrictions of the Jones Act (normally by showing that the non-coastwise-qualified carriers' freight charges via the indirect route are greater than coastwise c arriers' prevailing freight rates via the direct route); and

— in all other situations, determine whether a new and different product has been created with reference to valid commercial factors (*i.e.*, changes in physical composition that enable the product to be sold in different markets, at different levels in the distribution chain or under different customs duty classifications; improvements in the condition of the product; advancements in the value of the product; and other substantial transformations).

If the Customs Service applied these criteria to future ruling requests and penalty proceedings, however, it certainly would have to reverse some of its post-*Blumenthal* rulings.

The rulings holding that oil blending operations virtually enroute between United States ports of origin and destination created new and different products clearly could not be upheld under the Physical Alteration Test (if it were limited to processing at least as extensive as that found in *Blumenthal*), the Main Purpose Test or any combination of relevant commercial factors. Such incidental processing would fall far short of creating new and different products sufficient to break the continuity of coastwise voyages. On the other hand, the Korean and Japanese seafood processing cases clearly would create new and different products under the Main Purpose Test. Since the total freight charges (for transporting bulk seafood from Alaska to South Korean or Japanese processing facilities and processed seafood products from those facilities to United States West Coast ports) via non-coastwise-qualified vessels is substantially greater than the cost of transporting bulk seafood directly from Alaska to United States West Coast ports via coastwise-qualified vessels, it would be clear that the main purpose of the exportation was to have the product processed rather than to avoid the use of higher-cost United States coastwise-qualified vessels.

As advisory opinions, those rulings merely estop the Customs Service from adopting a contrary interpretation of the Jones Act with respect to the person who obtained the ruling, and provide some guidance to other interested parties on the anticipated response that they would obtain if they requested advisory opinions concerning their proposed

transactions.[72]

As a matter of fairness, the Customs Service need only provide adequate notice of its departure from previous rulings. This could be accomplished through inclusion of rulings adopting the suggested criteria in the *Customs Bulletin and Decisions*, or the publication of an appropriate notice of proposed rulemaking in the *Federal Register*.

As a matter of law and policy, the Customs Service should adopt criteria that promote the legislative policy of reserving domestic maritime trades to coastwise-qualified vessels, without requiring producers to use nonexistent coastwise-qualified vessels in foreign maritime trades between the United States and foreign processing facilities, or unduly restricting their opportunity to compete in the global economy by processing their products wherever the most efficient facilities may be located.

72 19 C.F.R. § 177.9 (b) (4) and (c) (1988).