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- ★ Diluting the Defense of Property: Flawed Decision in *Navajo Nation v. Urban Outfitters* Emphasizes Need for New Standard in the Federal Circuit
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Post-*Daubert*: Expert Hot-Tubbing as a Workable Tool for Trial Judges

Samuel S. Kim*

No one will deny that the law should in some way effectively use expert knowledge wherever it will aid in settling disputes. The only question is as to how it can do so best.

—Learned Hand¹

Introduction

In this modern age of science, testimony by expert witnesses plays an undisputedly important role in today's courts, from assisting the court in understanding the underlying scientific subject matter (e.g., in patent law cases) to resolving scientific issues (e.g., psychiatric predictions of defendants' future dangerousness).² Since expert testimony is here to stay,³ one

* J.D. Candidate 2025, Columbia Law School. The author would like to thank Judge Jed S. Rakoff for comments and Professor Rebecca Wexler for suggested readings. This Note is a work of my own and does not represent any of their opinions. All errors are my own.

¹ Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 40, 50 (1901) (considering the history of the expert witnesses and arguing that “the expert is an anomaly . . . that [poses] practical difficulties”). After noticing that “when any conflict between really contradictory propositions [by experts] arises . . . the jury is not a competent tribunal,” Hand advocates for “a board of experts or a single expert, not called by either side, who shall advise the jury of the general propositions applicable to the case which lie within his province.” *Id.* at 55–56.

² See Stephen Breyer, *The Interdependence of Science and Law*, 82 JUDICATURE 24, 25 (1998); see also NATIONAL RESEARCH COUNCIL, REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 9 (3d ed. 2011) (Justice Breyer introduces the manual with the following remark: “[i]n this age of science we must build legal foundations that are sound in science as well as in law. Scientists have offered their help. We in the legal community should accept that offer. We are in the process of doing so. This manual seeks to open legal institutional channels through which science—its learning, tools, and principles—may flow more easily and thereby better inform the law.”).

³ See generally Richard A. Posner, *The Law and Economics of the Economic Expert Witness*, 13 J. ECON. PERSP. 91, 93–97 (1999) (identifying and defending against recurrent criticisms of the use of expert witnesses including excessive partisanship, intelligibility, and cancel-out effect by opposing experts). Despite historical and practical support, some scholars criticize the continued existence of expert testimony. See, e.g., Hand, *supra* note 1, at 40 (“No doubt, there are good historical reasons why [the method of calling before the jury skilled persons

must wonder: how does the court “keep pseudoscience out of the courtroom while letting real science in[?]”⁴ The United States Supreme Court (“Supreme Court”) addressed this very question in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,⁵ recognizing “a gatekeeping role for the judge” under the Federal Rules of Evidence. However, *Daubert* and subsequent decisions⁶ have raised more questions and confusion than they purport to answer, putting “federal judges in an uncomfortable position.”⁷ The discomfort judges face stems from uncertainty, as illustrated by a lack of guidance in applying each of *Daubert*’s illustrative factors. Should judges carry out independent research on underlying science? The Supreme Court anticipated the challenges imposed on trial judges post-*Daubert*; for example, Justice Rehnquist, in his dissent, wrote, “I do not doubt that Rule 702 confides to the judge

as witnesses] has survived, but they by no means justify its continued existence, and it is, as I conceive, in fact an anomaly fertile of much practical inconvenience.”).

⁴ Hon. Jed S. Rakoff, *Science and the Law: Uncomfortable Bedfellows*, 38 SETON HALL L. REV. 1379, 1387 (2008).

⁵ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993) (recognizing that the gatekeeping role is a flexible one and “no matter how flexible, inevitably on occasion will prevent the jury from learning of authentic insights and innovations.”).

⁶ Two other Supreme Court decisions are *General Elec. Co. v. Joiner*, 522 U.S. 136 (1997) and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). In *Joiner*, the court held that “abuse of discretion is the appropriate standard” in reviewing a trial court’s *Daubert* decision. *Joiner*, 522 U.S. at 139 (1997). In *Kumho Tire Co.*, the court held that “*Daubert*’s general holding—setting forth the trial judge’s general ‘gatekeeping’ obligation—applies not only to testimony based on ‘scientific’ knowledge, but also to testimony based on ‘technical’ and ‘other specialized’ knowledge.” *Kumho Tire Co.*, 526 U.S. at 141 (1999). To clarify, Rule 702 from the Federal Rules of Evidence codified the *Daubert* trilogy (*Daubert*, *Joiner*, and *Kumho Tire Co.*) and controls in federal courts.

⁷ *Daubert v. Merrell Dow Pharms., Inc.*, 43 F.3d 1311, 1315 (9th Cir. 1995) (on remand, Judge Kozinski stated that “[f]ederal judges ruling on the admissibility of expert scientific testimony face a far more complex and daunting task in a post-*Daubert* world than before. . . . The first prong of *Daubert* puts federal judges in an uncomfortable position.”). In addition, trial judges may find that some appellate courts have not reviewed their admissibility findings under the proper standard of review, abuse of discretion. See David L. Faigman & Jennifer Mnookin, *The Curious Case of Wendell v. GlaxoSmithKline LLC*, 48 SETON HALL L. REV. 607, 627–29 (2018) (“But under *G.E. v. Joiner*, we believe that the Ninth Circuit itself erred when it asserted that the district court’s exclusion of the plaintiffs’ experts constituted legal error, given both the record and the district court’s analysis of it.”); see also *Wendell v. GlaxoSmithKline LLC*, 858 F.3d 1227, 1240 (9th Cir. 2017) (holding that the district court abused its discretion when it excluded expert testimony). Judge Gould wrote, “The defendants’ expert testimony could have been offered in opposition. Then, the jury, as the trier of fact, would be empowered to decide, based on the law given in proper jury instructions and the facts as determined by the jury.” *Id.* at 1238.

some gatekeeping responsibility in deciding questions of the admissibility of proffered expert testimony. But, I do not think it imposes on them either the obligation or the authority to become amateur scientists in order to perform that role.”⁸

Thirty years after *Daubert*, as Judge Jed S. Rakoff noted, “applying it in practice in an actual legal case is not so easy.”⁹ Federal judges continue to face difficulties performing their gatekeeping role. These difficulties stem from a lack of knowledge of general scientific methods and principles,¹⁰ poor judicial understanding of at least some of the *Daubert* factors,¹¹ and the limited success of scientific evidence reforms—from doctrinal guidelines to court-appointed experts—in aiding judges’ gatekeeping task.¹² Moreover, there is no straightforward institutional remedy to reconcile the tension between upholding traditionally accepted scientific methods and challenging them in light of the advancements in contemporary science.¹³

This Note argues that “hot-tubbing”—the practice of both parties’ expert witnesses testifying concurrently in a courtroom—empowers trial judges by enhancing their comprehension of scientific evidence, thereby improving their engagement with the issues at hand. This Note demonstrates that hot-tubbing is a workable tool to elevate judicial competence. In effect, hot-tubbing informs both trial and appellate judges that science is an evolving discipline, and as such, yesterday’s real science may prove to be pseudoscience; therefore, judicial scrutiny of precedents involving the admissibility of scientific evidence is well-warranted.

⁸ *Daubert*, 509 U.S. at 600–01.

⁹ Rakoff, *supra* note 4, at 1388 (giving an example from his own case *In re Ephedra Prod. Liab. Litig.*, 393 F. Supp. 2d 181 (2005)).

¹⁰ See Sophia I. Gatowski et al., *Asking the Gatekeepers: A National Study of Judges on Judging Expert Evidence in a Post-Daubert World*, 25 LAW & HUM. BEHAV. 433, 442 (2001) (a survey of 251 state court judges revealed that 96% of these judges “had not received instructions about general scientific methods and principles.”).

¹¹ See *id.* at 444–45, 447–48 (only 6% of the judges surveyed demonstrated a true understanding of the scientific meaning of falsifiability, and only 4% for error rate. On the other hand, more than 70% of judges had a clear understanding of the scientific peer review and general acceptance.).

¹² See Edward K. Cheng, *Independent Judicial Research in the Daubert Age*, 56 DUKE L. J. 1263, 1266 (2007) (concluding that both the doctrinal approach in providing judges more guidance and the court appointed technical advisers, in practice, have not been successful).

¹³ See generally PRESIDENT’S COUNCIL OF ADVISORS ON SCI. & TECH., FORENSIC SCIENCE IN CRIMINAL COURTS: ENSURING SCIENTIFIC VALIDITY OF FEATURE-COMPARISON METHODS (2016), https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf [<https://perma.cc/X7HU-BK2Q>].

Part I of this Note overviews past attempts to reform scientific evidence. Part II provides a brief background on hot-tubbing, tracing its roots to the Australian legal system and its subsequent adoption by the American courts. Part II then assesses its appeals and pitfalls, concluding that hot-tubbing fundamentally differs from the past scientific evidence reforms and is well-positioned to become a workable tool for the court. Part III proposes specific instances in which hot-tubbing proves particularly effective, such as in a *Daubert* hearing, *Markman* hearing, or a complex commercial litigation jury trial (e.g., antitrust, patent, or tax). While the specific goals hot-tubbing serves are contextual, this practice promotes public trust and confidence in the federal courts. Part IV concludes with a proposed amendment to the Federal Rules of Evidence to bridge the gap of awareness and motivate judges to consider implementing hot-tubbing in their courtrooms.

I. Overview of Scientific Evidence Reforms

Scientific evidence reforms have emerged to aid federal judges in their gate-keeping role.¹⁴ This Part summarizes past reforms¹⁵ and explains why some have been more successful than others, while also arguing that these reforms share a common flaw in undervaluing the elevation of judicial competence.

A. Doctrinal Guidelines

Doctrinal guidelines seek to modify or clarify the standard governing the admissibility of scientific evidence.¹⁶ *Daubert* itself fits into this category, departing from the earlier standard established in *Frye v. United States*,¹⁷ which focused on general acceptance in the relevant scientific community.¹⁸ In *Daubert*, the Supreme Court addressed “sharp divisions among the courts regarding the proper standard for the admission of expert testimony,” holding that “[g]eneral acceptance” is not a necessary precondition to the admissibility of scientific evidence . . . but Rule 702 [] do[es] assign to the trial judge the task of ensuring that an expert’s testimony both rests on a reliable foundation

¹⁴ While this Note focuses on federal courts, its analysis translates to state courts in jurisdictions that follow *Daubert* or its modified version.

¹⁵ See generally Thomas D. Albright et al., *Science, Evidence, Law, and Justice*, 120 PROC. NAT’L ACAD. SCI. 1, 8–9 (2023), <https://pmc.ncbi.nlm.nih.gov/articles/PMC10576109/pdf/pnas.202312529.pdf> [<https://perma.cc/KR4V-89TL>] (stating various suggestions made to improve the operation of admissibility gates for scientific evidence).

¹⁶ See Cheng, *supra* note 12, at 1268.

¹⁷ 293 F. 1013 (D.C. Cir. 1923).

¹⁸ *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592–94 (1993) (citing *Frye v. United States*, 293 F. 1013, 1014 (D.C. Cir. 1923)).

and is relevant to the task at hand.”¹⁹ The Supreme Court also established a four-factor test to assess the admission of expert testimony: (1) by inquiring into testability; (2) peer review; (3) rate of error; and (4) acceptance in the relevant scientific community.²⁰ After deciding *Daubert*, many scholarly articles emerged to explain and fit the four-factor test into this category of doctrinal guidelines.²¹

Under the current standard, a significant number of judges lack a clear understanding of falsifiability and error rate—two of *Daubert*’s illustrative factors.²² Even supposing doctrinal developments that reflect a judicial understanding of the proper application of the Daubert factors, theoretical comprehension of a doctrine does not necessarily translate to consistent, predictable applications in practice. For instance, in the context of forensic science, Judge Rakoff and Justice Goodwin Liu of the Supreme Court of California have both reported inconsistent gatekeeping roles in both federal and state courts—where courts are “reluctant to exclude even those kinds of forensic science [such as microscopic hair analysis, blood spatter analysis, and bite mark analysis] whose accuracy has been severely questioned over the past few decades.”²³

Acknowledging this dilemma, some judges throw their hands up and concede their inability to make well-informed decisions on questions of admissibility regarding expert testimony.²⁴ They either decide not to perform their gatekeeping roles or apply a liberal approach that relies more on intuition than an analytical framework, attributing the difficulty of operationalizing the doctrine to their lack of a scientific background.²⁵

¹⁹ *Id.* at 585, 597.

²⁰ *Id.* at 593–94.

²¹ See, e.g., G. Michael Fenner, *The Daubert Handbook: The Case, Its Essential Dilemma, and Its Progeny*, 29 CREIGHTON L. REV. 939, 958 (1996) (discussing what federal courts are actually doing post-*Daubert*).

²² See Gatowski et al., *supra* note 10, at 444–48.

²³ Jed S. Rakoff & Goodwin Liu, *Forensic Science: A Judicial Perspective*, 120 PROCS. NAT’L ACAD. SCIS. 1, 3 (2023), <https://pmc.ncbi.nlm.nih.gov/articles/PMC10576125/pdf/pnas.202301838.pdf> [<https://perma.cc/UG3E-SU7D>].

²⁴ See Edward K. Cheng, *The Consensus Rule: A New Approach to Scientific Evidence*, 75 VAND. L. REV. 407, 423 (2022) (citing *McClain v. Metabolife International, Inc.*, 401 F.3d 1233, 1238 n.3 (11th Cir. 2005) (“Trying to cope in this case without a pharmacological, or a medical, or a chemical, or a scientific background, the court cannot fully and fairly appreciate and evaluate the methodology employed by either of these witnesses . . .”)).

²⁵ See *id.*; see also Rakoff & Liu, *supra* note 23, at 3 (listing possible explanations for inconsistency including judges’ prior background as former prosecutors and their intuitions that evidence is probative).

B. Science Court

The Science Court is a proposed institutionalized court where adversarial hearings are open to the public and panels of scientists “resolv[e] technical disputes between biased experts.”²⁶ The panel of scientists—acting as judges—prepares a report on the dispute and delivers judgments on disputed facts after hearing the evidence.²⁷ The concept of the Science Court began with the Presidential Advisory Group on Anticipated Advances in Science and Technology,²⁸ but it has never been implemented.²⁹ The suspected reason for its failure is that once controversial technical issues reach the public policy area, scientific disputes become secondary.³⁰ Another issue facing the Science Court is that it would be extremely resource-intensive, with no realistic path to implementation beyond hypothetical experimentations with the idea.

A variation of the Science Court consists of advisory tribunals, where experts decide what constitutes junk science. For example, Judge Learned Hand suggested the use of an expert panel, which operates as an advisory tribunal, to provide the jury with unbiased general knowledge applicable to a case.³¹ However, similar to the Science Court, advisory tribunals have not been implemented due to practical challenges under the American judicial system.³² Advisory tribunals represent yet another attempt to shift the responsibility and burden from judges to experts.

In some respects, the Science Court and advisory tribunal reforms implicitly recognize the current doctrine’s impracticability and a strong inclination to maintain adversarial systems. It also reveals that courts are generally less willing to adopt radically different approaches that require significant resources and alter the current adversarial system.³³

²⁶ Allan Mazur, *The Science Court: Reminiscence and Retrospective*, 4 RISK 161, 161 (1993).

²⁷ See Arthur Kantrowitz, *The Science Court Experiment*, 17 JURIMETRICS J. 332, 333 (1977).

²⁸ See *id.* at 332.

²⁹ See Mazur, *supra* note 26, at 161 (“In the end, the science court itself became so controversial that it had no chance of success. Like a skyrocket, it got a lot of attention as it ascended but just as quickly fell downward to crash and burn.”).

³⁰ See *id.* at 168–69.

³¹ See Hand, *supra* note 1, at 56.

³² See Albright et al., *supra* note 15, at 7 (“Albright makes the idealist argument that under the intense demands of courtroom litigation, an expert should channel the scientific consensus (‘general acceptance’) of the day, for that is the most rational basis for decision given the exigence and resoluteness of the process. As any legal scholar will tell you, however, that idealism runs up hard against the practicalities of our judicial system, including constitutional protection of due process rights.”).

³³ See, e.g., Jennifer L. Mnookin, *Expert Evidence, Partisanship, and Epistemic Competence*, 73 BROOK. L. REV. 1009, 1033 (2008) (explaining that under our adversarial system, we

C. Court-Appointed Experts

For a given question, there might be, and often are, multiple scientific explanations, which this Note refers to as ‘two schools of thought.’ The two schools of thought—each party presenting an expert testifying in one school of thought supported by a logical explanation—are fairly common and pose a challenge to deciding a *Daubert* motion. Is appointing neutral experts the answer? Pursuant to Rule 706,³⁴ the court may exercise its discretion to appoint experts who assist with decisions about scientific or technical evidence. The Supreme Court in *Daubert* recognized the utility of Rule 706 in the context of Rule 702,³⁵ and Justice Breyer, concurring in *Joiner*, noted an increased use of court-appointed experts.³⁶

Judges and scholars have praised the role of court-appointed experts in diminishing adversarial bias, arguably resolving the issue of the “hired gun”—an expert witness willing to testify to any opinion that advances the needs of the party who hired him.³⁷ However, even neutral experts have other types of biases stemming from their desire to maintain professional reputations and ideologies (e.g., once an academic becomes a professional expert, he may be less willing to publish counter-ideological results).³⁸ This is especially problematic because juries disproportionately rely on the testimony of neutral experts.³⁹

Judge Richard A. Posner further notes that when there is no professional consensus, using court-appointed experts is less meaningful simply because there are no available neutrals.⁴⁰ In practice, court-appointed experts are rarely

are stuck at the “imperfect, conceptually unsatisfying, and awkward” approaches to expert evidence).

³⁴ FED. R. EVID. 706.

³⁵ See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993) (“Throughout, a judge assessing a proffer of expert scientific testimony under Rule 702 should also be mindful of other applicable rules. . . . Rule 706 allows the court at its discretion to procure the assistance of an expert of its own choosing.”).

³⁶ See *General Electric Co. v. Joiner*, 522 U.S. 136, 149 (1997) (Breyer, J., concurring) (“Among these techniques [to overcome difficulties of scientific evidence] are an increased use of Rule 16’s pretrial conference authority to narrow the scientific issues in dispute, pretrial hearings where potential experts are subject to examination by the court, and the appointment of special masters and specially trained law clerks.”).

³⁷ See, e.g., Hon. Bradford H. Charles, *Rule 706: An Underutilized Tool to Be Used When Partisan Experts Become “Hired Guns”*, 60 VILL. L. REV. 941, 953–54 (2016).

³⁸ See Posner, *supra* note 3, at 97.

³⁹ See *id.* at 96.

⁴⁰ See *id.* at 96–97.

employed; while Rule 706 is not reserved for extraordinary circumstances, judges and parties generally view neutral experts as a last resort.⁴¹

II. Hot-Tubbing (Concurrent Evidence)

Hot-tubbing is a method employed by the court to hold a joint testimony session in the courtroom, where two or more experts, under oath, present their testimonies concurrently⁴²—this is why hot-tubbing is also referred to as concurrent evidence. This Section explores the origin of hot-tubbing, its adoption in American courts from the United States Tax Court to United States district courts, and provides insights into its appeal and pitfalls.

A. Origin: Hot-Tubbing in Australia

Hot-tubbing originated in Australian competition law tribunals in the early 1990s and has since been widely adopted in Australian courts and agencies.⁴³ As Gary Edmond—a scholar on expert evidence in Australia—explains hot-tubbing as “a civil procedure employed when parties have secured the service of experts and those experts disagree about one or more issues pertinent to the resolution of a dispute. Concurrent evidence enables experts from similar or closely related fields to testify together during a joint session.”⁴⁴ Hot-tubbing is codified in the Australian Civil Procedure Act⁴⁵ or its equivalents, which

⁴¹ See JOE S. CECIL & THOMAS E. WILLGING, FED. JUD. CTR., COURT-APPOINTED EXPERTS: DEFINING THE ROLE OF EXPERTS APPOINTED UNDER FEDERAL RULE OF EVIDENCE 706, at 20, 22, 67 (1993), <https://www.ojp.gov/pdffiles1/Digitization/145624NCJRS.pdf> [<https://perma.cc/9G9X-UR9M>].

⁴² Hot-tubbing usually involves two experts, one retained by plaintiff and another by defendant. In principle, hot-tubbing may involve more than two experts. See Emily Sawicki, *AI Terms, “Coffee Badging” Among Top New Words in Law*, LAW360 (Dec. 12, 2024, 4:29 PM), <https://www.law360.com/articles/2272992/>.

⁴³ See Dan Papszun, *Courtroom ‘Hot Tub’ Puts Google Trial Experts to Stress Test*, BLOOMBERG LAW (Oct. 6, 2023), https://www.bloomberglaw.com/bloomberglawnews/antitrust/X2L1DR7O000000?bna_news_filter=antitrust#jcite [<https://perma.cc/F4MF-32EY>]; Steven Rares, *How Concurrent Expert Evidence Aids Understanding Issues*, Federal Court of Australia (2013), ¶ 1 (Justice Rares of the Federal Court of Australia noting the usage of hot-tubbing in both Australian courts and agencies).

⁴⁴ See Gary Edmond, *Merton and the Hot Tub: Scientific Conventions and Expert Evidence in Australian Civil Procedure*, 72 LAW & CONTEMP. PROBS. 159, 162 (2009). Many readers would agree that disagreement between experts extremely frequently happens in today’s courts. The main feature of hot-tubbing is “a joint session,” where experts testify together. *Id.*

⁴⁵ See, e.g., Civil Procedure Act 2010 (Victoria), Sect 65K (“the court may direct any expert witness—give evidence concurrently with one or more expert witnesses; be permitted to ask questions of any other expert witness who is concurrently giving evidence.”).

provide discretion to a judge in directing hot-tubbing and asking questions to any hot-tubbed experts.⁴⁶

In Australian courts, judges have employed hot-tubbing not only in civil proceedings but also in criminal bench trials.⁴⁷ While there are variations in implementing hot-tubbing depending on individual judges and tribunals, judges typically first issue a pre-trial order requesting experts to confer without their lawyers and then prepare a joint report on their agreement and disagreement.⁴⁸ Next, in the courtroom, the experts, under oath, sit together and engage in a judge-moderated dialogue.⁴⁹ Finally, counsel is given the opportunity to cross and re-examine.⁵⁰

With nearly thirty years of use in Australian courts, has hot-tubbing proven effective to courts, judges, experts, counsels, and jurors? An oft-cited survey conducted by the Administrative Appeals Tribunal in Australia reports unanimous satisfaction among 26 judges who presided over trials involving hot-tubbing.⁵¹ This same survey reported that an overwhelming majority of judges found that hot-tubbing enhanced the decision-making process and improved the quality and objectivity of the experts' evidence.⁵² Experts and counsels also responded favorably to the use of hot-tubbing.⁵³ However, while

⁴⁶ *See id.*

⁴⁷ *See Rares, supra* note 43, ¶ 25.

⁴⁸ *See Rares, supra* note 43, ¶ 31 ("The judge explains to the experts the procedure that will be followed and that the nature of the process is different to their traditional perception or experience of giving expert evidence. First, each expert will be asked to identify and explain the principal issues, as they see them, in their own words. After that, each can comment on the other's exposition. Each may then, or afterward, ask questions of the other about what has been said or left unsaid. Next, counsel is invited to identify the topics upon which they will cross-examine. Each of the topics is then addressed in turn.").

⁴⁹ *See id.*

⁵⁰ *See id.*

⁵¹ *See* HON. GARRY DOWNES, CONCURRENT EXPERT EVIDENCE IN THE ADMINISTRATIVE APPEALS TRIBUNAL: THE NEW SOUTH WALES EXPERIENCE 14–15 (2004) <https://www.aat.gov.au/AAT/media/AAT/Files/Speeches%20and%20Papers/concurrent.pdf> [<https://perma.cc/8CZL-KPXL>] ("The majority of Members (18 out of 26) stated that they were very satisfied with CE [(concurrent evidence)] in the specific matter. The remaining 8 Members stated that they were satisfied.").

⁵² *See id.* at 15–16 (reporting the survey result that "nearly all Members found that CE made it easier for them to compare the evidence of each expert and that it enhanced the decision-making process (24 out of 26 in both cases). . . . Members who found that CE enhanced the decision-making process stated that it identified areas of contention, made the technical issues easier to understand, and distilled the issues more quickly.").

⁵³ *See id.* at 16 (stating that a number of counsels have requested hot-tubbing to be used in their hearings, and expert witnesses appreciated the opportunity to expand on their opinions and answer fully).

hot-tubbing has widespread use in Australia,⁵⁴ some criticize that its effectiveness in enhancing jurors' understanding is theoretical at best.⁵⁵ With respect to judicial economy, whether hot-tubbing saves hearing time is also debatable. But under some circumstances involving a large number of experts, it can significantly save time, for instance, by shortening a trial from six months to five weeks.⁵⁶

The question is whether the perceived benefits observed in the Australian courts would translate to the American courts despite differences in institutional design.

B. Uncommon Adoption by the American Courts

In the United States, the use of hot-tubbing remains uncommon among judges, with a suspected count of fewer than two dozen instances wherein this practice has been employed in federal courtrooms.⁵⁷ Notably, Judge David Laro, a federal judge at the U.S. Tax Court from 1992 to 2018, is believed to be the first federal judge to use hot-tubbing.⁵⁸ In his 2011 decision, Judge Laro described how he implemented hot-tubbing:

With the agreement of the parties, *we directed the experts to testify concurrently*. To implement the concurrent testimony, the Court sat at a large table in the middle of the courtroom with all three experts, each of whom was under oath. The parties' counsel sat a few feet away. *The Court then engaged the experts in a three-way conversation about ultimate issues of fact*. Counsel could, but did not, object to any of the experts' testimony. *When necessary, the Court directed the discussion and focused on matters that the Court considered important to resolve*. By engaging in this conversational testimony, the experts were able and allowed to speak to each other, to ask questions,

⁵⁴ See RACHEL PEPPER, 'HOT TUBBING': THE USE OF CONCURRENT EXPERT EVIDENCE IN THE LAND AND ENVIRONMENT COURT OF NEW SOUTH WALES AND BEYOND, 14 (2015) [https://lec.nsw.gov.au/documents/speeches-and-papers/PepperJ%20Alaska%20Bar%20Convention%20-%20Hot-tubbing%20or%20Concurrent%20Evidence%20paper\(Final\)%20140515.pdf](https://lec.nsw.gov.au/documents/speeches-and-papers/PepperJ%20Alaska%20Bar%20Convention%20-%20Hot-tubbing%20or%20Concurrent%20Evidence%20paper(Final)%20140515.pdf) [<https://perma.cc/KT5A-USNE>] ("Concurrent expert evidence is now used in both judge-alone trials and jury trials, in both criminal and civil proceedings").

⁵⁵ See Edie Greene & Natalie Gordon, *Can the 'Hot Tub' Enhance Jurors' Understanding and Use of Expert Testimony?*, 16 WYO. L. REV. 359 (2016) (arguing that hot-tubbing could eventually play an important role in jury trials involving complex issues).

⁵⁶ See Downes, *supra* note 51, at 5, 15.

⁵⁷ See Dan Papszun, *Courtroom 'Hot Tub' Puts Google Trial Experts to Stress Test*, BLOOMBERG LAW (Oct. 6, 2023), <https://news.bloomberglaw.com/antitrust/courtroom-hot-tub-puts-google-trial-experts-to-stress-test> [<https://perma.cc/F4MF-32EY>].

⁵⁸ See Christina Weed, *Interview with Tax Court Judge David Laro*, CONTRA COSTA CNTY. BAR ASS'N (Sept. 2017) <https://www.cccba.org/article/interview-with-tax-court-judge-david-laro/> [<https://perma.cc/SS72-G9NH>] (Judge Laro states that "I have employed hot tubbing in approximately eight or nine cases – and I believe I may have been the first federal judge in the United States to use it").

and to probe weaknesses in any other expert's testimony. *The discussion that followed was highly focused, highly structured, and directed by the Court.*⁵⁹

Judge Laro offered further guidance on his use of hot-tubbing in a 2016 decision, stating that "concurrent witness testimony may be especially helpful in cases such as these, involving technical issues related to a relatively new industry."⁶⁰ This observation aligns with the current trend, as contemporary courts have increasingly utilized hot-tubbing for technically complex cases involving damages experts.⁶¹

Judges have employed hot-tubbing outside of tax disputes: Judge Douglas P. Woodlock in the District of Massachusetts used hot-tubbing in various non-jury cases, including those pertaining to patents, business, and voting rights, after learning about hot-tubbing from former Australian Federal Court Justice Peter Heerey.⁶² For example, Judge Woodlock, along with Judges Bruce Selya and Michael A. Ponsor as a three-judge panel, hot-tubbed two political scientists to assess the relevance and validity of their use of analytical tools and interpretations of the results concerning *Gingles* factors used to determine the existence of vote dilution.⁶³ The dialogue among two experts and the judges is insightful to see how hot-tubbing is operationalized in practice:

Judge Selya: [after noting that both experts are "well qualified"] The three of us have read your reports [and have heard your testimony here today]. [. . .] So we're attempting to use that degree of knowledge and expertise in our own quest for the appropriate solution to this case. And we'd just like your help in that endeavor.

Dr. Engstrom (the plaintiffs' expert): I think the critical weakness in Dr. Stanley's analysis is [. . .]

⁵⁹ *Rovakat, LLC v. Comm'r, T.C.* Memo. 2011-225, 2011 WL 4374589, at *12 (emphasis added).

⁶⁰ *Green Gas Del. Statutory Tr. v. Comm'r of Internal Revenue*, 147 T.C. 1, 36 (2016) (citing three prior cases where Judge Laro used hot-tubbing).

⁶¹ See, e.g., *In re Google Play Store Antitrust Litig.*, No. 20-CV-05761-JD, 2022 WL 17252587, *3 (N.D. Cal. 2022) ("To aid the *Daubert* and class certification analysis, the Court held a concurrent expert proceeding, known informally as an 'expert hot tub.' The hot tub featured Dr. Singer and Google's expert, Dr. Michelle M. Burtis, in a debate about the economic factors germane to the question of certification.").

⁶² See Lisa C. Wood, *Experts in the Tub*, 21 ANTITRUST ABA 95, 97 (2007).

⁶³ See *id.* at 98 (citing *Black Pol. Task Force v. Galvin*, 300 F. Supp. 2d 291, 303 (D. Mass. 2004) (finding both experts knowledgeable and both used acceptable analytical tools)). This case arose from African American and Hispanic voters' complaint alleging that the Massachusetts 2001 Redistricting Act led to vote dilution. *Black Pol. Task Force*, 300 F. Supp. 2d at 296. To address this question of vote dilution, the court applied the *Gingles* three-step framework. See *id.* at 299–310 (the three preconditions set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986), are numerosity, political cohesiveness, and bloc voting).

Judge Selya: Professor, consider that question as having been posed by the Court. And let's hear your response to it.

Dr. Stanley (the defendants' expert): Yes. [Dr. Stanley explained the analysis he conducted].

Judge Woodlock: Can I interject, which is to say you can't do much with the data that we have?

Dr. Stanley: By not doing much, Your Honor, it depends in terms of— certainly, the question asked determines whether or not this goes far in providing the answer. [Dr. Stanley continued to explain his analysis.].⁶⁴

Closing hot-tubbing, Judge Selya commented that hot-tubbing uninterrupted by counsels helped illuminate the matters the panel must decide.⁶⁵

More recently, a series of antitrust trials in the Northern District of California showcased the application of hot-tubbing. Both *In re Capacitors Antitrust Litigation*⁶⁶ and *In re Google Play Store Antitrust Litigation*⁶⁷ were presided over by Judge James Donato.⁶⁸ In *In re Capacitors Antitrust Litigation*, Judge Donato resolved *Daubert* by using hot-tubbing with three economists, one testifying for the plaintiffs and two for the defendants.⁶⁹ There, defendants filed a *Daubert* motion to exclude the opinions of plaintiffs' economist expert, arguing that her econometric model is unreliable and invalid, and proposed hot-tubbing, to which plaintiffs did not object.⁷⁰ Prior to the hot-tubbing session, the court instructed three experts to prepare a joint statement of the top five areas of disagreement without involvement of the counsels.⁷¹ Then, the court held a two-hour hot-tubbing session, following a structure similar to the excerpted dialogue above.⁷² Judge Donato found hot-tubbing

⁶⁴ Wood, *supra* note 62, at 99–100 (citing Transcript of Day 3 of Trial, Black Pol. Task Force v. Galvin, 300 F. Supp. 2d 291 (2003) (No. 02-11190)).

⁶⁵ *See id.* at 100 (“Dr. Stanley, Dr. Engstrom, this has been a rather innovative procedure. I’m tempted to say unprecedented. But speaking for all three of us, *we have found it very helpful*. Sometimes when we are able to get the experts untethered from the constrictions of the lawyers and their questions and their pet theories of the case, it helps to illuminate for us the matters we have to decide.”) (emphasis modified).

⁶⁶ No. 14-3264, 2021 WL 5407452 (N.D. Cal. Nov. 18, 2021).

⁶⁷ No. 20-CV-05761-JD, 2022 WL 17252587 (N.D. Cal. Nov. 28, 2022).

⁶⁸ *See In re Google Play Store Antitrust Litig.*, No. 20-CV-05761-JD, 2022 WL 17252587 (N.D. Cal. Nov. 28, 2022); *see also In re Capacitors Antitrust Litig.*, No. 14-3264, 2021 WL 5407452 (N.D. Cal. Nov. 18, 2021).

⁶⁹ *See In re Capacitors Antitrust Litig.*, 2021 WL 5407452, at *1, *4.

⁷⁰ *See id.* at *1.

⁷¹ *See id.* (noting that “hot tubs are most useful when the opposing experts work and communicate directly with each other, free of attorney filtering.”).

⁷² *See id.* at *2.

“immensely helpful in understanding each expert’s point of view and theory of the case, far more so than the often-stultifying Q&A routine of traditional *Daubert* hearings.”⁷³ Finding hot-tubbing appealing, Judge Donato used it in this case, and then again in *In re Google Play Store Antitrust Litigation*.⁷⁴

In *In re Google Play Store Antitrust Litigation*, consumer plaintiffs alleged that defendant Google illegally monopolized the Android app distribution market.⁷⁵ Plaintiffs moved for class certification under Rule 23 of the Federal Rules of Civil Procedure (prerequisites for class certification), and Google made a *Daubert* motion to exclude plaintiffs’ economic expert.⁷⁶ In the court’s order, Judge Donato heavily relied on the hot-tubbing transcript to determine both issues.⁷⁷ Regarding the *Daubert* motion, the court referenced the admission made by Google’s expert that the two-sided market model used by the plaintiffs’ expert was not junk science and concluded that Google’s critiques, focusing on the novelty of methodology, were not persuasive as far as Rule 702 was concerned.⁷⁸ As to the class certification, the Court granted in main part, finding that Google’s objections were not supported by the record, namely the expert report and hot-tubbing testimony.⁷⁹

Despite some uncommon adoptions of hot-tubbing by American courts, the vast majority of judges either lack awareness of this practice or have not yet used it.⁸⁰ It is very possible that unfamiliarity is the primary reason behind its rarity.

C. The Appeal and Pitfalls of Hot-Tubbing

Hot-tubbing presents an attractive remedy in the aftermath of *Daubert*, where judges, lacking expertise themselves, are entrusted with a gatekeeping responsibility. The immediate appeal of hot-tubbing lies in its capacity for issue refinement and the enhanced comprehension of scientific or technical matters. More importantly, its ultimate appeal rests in the prospect of elevating judicial competence with minimal procedural changes, all the while preserving the adversarial nature of judicial proceedings.

⁷³ *Id.*

⁷⁴ See generally *In re Google Play Store Antitrust Litig.*, No. 20-CV-05761-JD, 2022 WL 17252587 (N.D. Cal. Nov. 28, 2022); *In re Capacitors Antitrust Litig.*, 2021 WL 5407452.

⁷⁵ See *In re Google Play Store Antitrust Litig.*, 2022 WL 17252587, at *1.

⁷⁶ See *id.* at *1.

⁷⁷ See *id.* at *3, *5–7.

⁷⁸ See *id.* at *6–7.

⁷⁹ See *id.* at *11–12.

⁸⁰ See Papszun, *supra* note 57.

1. Hot-Tubbing Enables Issue Refinement

As illustrated by the aforementioned cases,⁸¹ hot-tubbing facilitates the precise refinement of issues by narrowing down and focusing on areas of disagreement. This efficiency is achieved as experts in the hot tub reveal the key issues and identify the aspects left unanswered by their reports. On top of that, because experts from both sides opine on the same issue concurrently, the court can focus on one specific issue at a time.

What kinds of cases benefit from the issue refinement? This Note argues for cases with experts holding polarizing opinions (e.g., due to a lack of consensus in the relevant scientific field). Take, for example, *In re Ephedra Product Liability Litigation*,⁸² presided over by Judge Rakoff.⁸³ In this consolidated tort case, Judge Rakoff commented that there was no definitive epidemiological study showing the causation between ephedra (a plant substance) and strokes or heart attacks.⁸⁴ As a result, experts formed a wide variety of opinions, with plaintiffs' experts testifying causality based on inferences and defendants' experts testifying that there is no valid scientific evidence on causality. In instances like these, hot-tubbing would have played a crucial role in accentuating differences among the experts, promoting a more nuanced understanding of the key issues, and helping them find common ground through an informal conversation.

Indeed, one lesson from the Science Court concept was that an exchange of statements among experts often reveals less factual disagreement than expected.⁸⁵ This same lesson is translatable to hot-tubbing.

2. Hot-Tubbing Yields Improved Comprehension of Evidence

Hot-tubbing is believed to improve judicial comprehension of expert evidence related to scientific or technical matters.⁸⁶ During the hot-tubbing session, experts address identical issues and thus can promptly elucidate any potential misunderstandings that judges, or opposing experts, may have in

⁸¹ See *supra* Section II.B.

⁸² 393 F. Supp. 2d 181 (S.D.N.Y. 2005).

⁸³ See *id.* at 182.

⁸⁴ See Rakoff, *supra* note 4, at 1388–91 (stating the challenges of deciding Rule 702 issues after a two-week evidentiary hearing).

⁸⁵ See Mazur, *supra* note 26, at 167.

⁸⁶ See John Emmerig & Michael Legg, *Room in American Courts for an Australian Hot Tub?*, JONES DAY: INSIGHTS (Apr. 26, 2013), <https://www.jonesday.com/en/insights/2013/04/room-in-american-courts-for-an-australian-hot-tub> [<https://perma.cc/85UE-AZEP>] (“Apart from promoting impartial expert testimony, many Australian supporters of hot-tubbing believe that it improves the judge’s, experts’ and legal practitioners’ understanding of the evidence.”).

real-time.⁸⁷ The immediate juxtaposition of experts, without a prolonged delay between their testimonies and uninterrupted by attorneys, enhances the precision and clarity of technical communications by the experts.⁸⁸ For example, if experts do not quite understand the questions posed by attorneys, and attorneys, in turn, misunderstand the testimony provided by the experts, it leaves the fact finder in a state of confusion. That is the problem hot-tubbing purports to fix.

In addition, the increased comfort levels of experts contribute to improved comprehension of evidence.⁸⁹ When immersed in a hot-tub, experts often feel less constrained because they “feel that there is less risk that their evidence will be distorted by the skill of the advocate.”⁹⁰ The hot-tubbing environment resembles a professional conference, as noted by Judge Donato.⁹¹ This familiarity aligns with experts’ preferences, ultimately leading them to favor the hot-tubbing approach over the traditional method.⁹²

3. Hot-Tubbing Requires Minimal Procedural Changes

Hot-tubbing involves few procedural changes. The court does not need the parties’ permission to utilize hot-tubbing. While Judge Laro and Judge Donato held hot-tubbing sessions with the agreement of the parties,⁹³ Rule 611 from the Federal Rules of Evidence provides trial courts “control over the mode and order of examining witnesses and presenting evidence so as to . . . make those procedures effective for determining the truth . . . [and to] avoid wasting time. . . .”⁹⁴ That is, so long as a trial court preserves the

⁸⁷ This is, in part, achieved from a collegial environment hot-tubbing fosters. *See, e.g.,* Weed, *supra* note 58 (Judge Laro stated that “You likely will talk to your adversary, the other expert, in a professional and collegial manner. That is the essence of hot tubbing.”).

⁸⁸ *See* Megan A. Yarnall, *Dueling Scientific Experts: Is Australia’s Hot Tub Method a Viable Solution for the American Judiciary?*, 88 OR. L. REV. 311, 334 (2009) (noting the disconnect between the language of science and the language of law as a source of misunderstanding the nuances of questions).

⁸⁹ *See id.* at 328, 337 (citing various studies showing that experts feel more comfortable expressing their opinions during the hot-tubbing session than the traditional method of examination and cross-examination).

⁹⁰ *Id.* at 328 (quoting ADMIN. APPEALS TRIBUNAL (Austl.), AN EVALUATION OF THE USE OF CONCURRENT EVIDENCE IN THE ADMINISTRATIVE APPEALS TRIBUNAL 8–9 (2005)).

⁹¹ *See* Exhibit 1, *In re Capacitors Antitrust Litig.*, No. 14-3264, 2021 WL 5407452 (N.D. Cal. Nov. 18, 2021).

⁹² *See* Yarnall, *supra* note 88, at 328.

⁹³ *See supra* Section II.B.

⁹⁴ FED. R. EVID. 611.

cross-examination rights of the parties, the use of hot-tubbing by trial courts is reviewable under the abuse of discretion standard.⁹⁵

If a party requests hot-tubbing, as in *In re Capacitors Antitrust Litigation* in the United States District Court for the Northern District of California, the court simply turns to Rule 611. Again, the court is not obligated to seek objections from the other party who did not request hot-tubbing, although the court generally does ask.⁹⁶

In the course of a hot-tubbing session, the court generally explains the concept of hot-tubbing to the testifying experts, counsels, and parties.⁹⁷ Following this, the court provides instructions on how the court would like to proceed—including the duration of the hot-tubbing session, the specific topics to be addressed, and the sequence in which the experts will speak on each topic.⁹⁸ Lastly, the court may clarify whether counsels are permitted to interject during the hot-tubbing session or only afterward.⁹⁹ The prevailing trend favors the latter approach, as courts have found it to foster a more conducive learning environment.¹⁰⁰

4. Hot-Tubbing Maintains Adversarial Nature

As past scientific evidence reforms illustrate, maintaining an adversarial nature is critical for a reform to become a workable tool for the court.¹⁰¹ Despite subtle variations in form, hot-tubbing always allows cross-examination and re-examination by counsel.¹⁰² If the court follows the procedure set by Judge Laro, counsels could object in the middle of the hot-tubbing

⁹⁵ See Emmerig & Legg, *supra* note 86 (“As long as cross-examination rights are preserved, the use of the concurrent expert testimony technique appears to be a matter of a trial court’s discretion reviewed only for abuse of discretion under the circumstances of a particular case.”).

⁹⁶ See, e.g., *In re Capacitors Antitrust Litig.*, No. 14-3264, 2021 WL 5407452 (N.D. Cal. Nov. 18, 2021) (the court asking party objections and upon hearing no objections, proceeding hot-tubbing).

⁹⁷ See *supra* Section II. B; see also *Rovakat, LLC v. Comm’r*, T.C.Memo. 2011-225, 2011 WL 4374589, at *12 (Judge Laro’s explanation of hot-tubbing).

⁹⁸ See *Rovakat, LLC*, 2011 WL 4374589, at *12.

⁹⁹ See *id.*

¹⁰⁰ See *supra* Section II.B. In deciding *Black Pol. Task Force v. Galvin*, Judge Selya stated, “Sometimes when we are able to get *the experts untethered from the constrictions of the lawyers and their questions and their pet theories of the case*, it helps to illuminate for us the matters we have to decide.” Transcript of Day 3 of Trial, *Black Pol. Task Force v. Galvin*, 300 F. Supp. 2d 291 (2003) (No. 02-11190) (emphasis added).

¹⁰¹ See *supra* Section II.B–C.

¹⁰² Hot-tubbing does not preclude cross-examination and re-examination. See FED. R. EVID. 611. See, e.g., *Rovakat, LLC*, 2011 WL 4374589, at *12 (Judge Laro’s implementation of hot-tubbing); *In re Google Play Store Antitrust Litig.*, No. 20-CV-05761-JD, 2022 WL 17252587 (N.D. Cal. Nov. 28, 2022) (Judge Donato’s implementation of hot-tubbing).

session.¹⁰³ Even then, counsels rarely interrupted the conversation among hot-tubbed experts and the judge.¹⁰⁴ While counsels do not have full control over the questions raised during the hot-tubbing session,¹⁰⁵ the adversarial system is fully maintained.

5. Pitfalls: When Hot-Tubbing is Ill-Equipped

Hot-tubbing is not for every case: in Australian courts, common reasons for not using hot-tubbing include (1) when experts have differing levels of expertise (the most common reason); (2) when experts specialize in different fields; (3) when experts do not comment on the same issue; (4) cost and time considerations; and (5) objections by the parties or experts.¹⁰⁶ The same issues, with the exception of objections by the parties or experts, apply to American courts.¹⁰⁷

As a preliminary consideration, hot-tubbing is not well-positioned for cases where expert witnesses are not central to the outcome of a trial. When expert evidence plays a crucial role, courts must then inquire whether both experts specialize in the same field and possess similar levels of expertise, akin to the approach taken by Judge Selya.¹⁰⁸ If the answer is ‘no’ to either question, hot-tubbing is not appropriate.

Is the variation in the personalities of experts a deterring factor against the use of hot-tubbing? For example, one expert may be more confident and assertive than another. Justice Steven Rares of the Federal Court of Australia responds that this criticism has not been validated in practice.¹⁰⁹ Even if it has some basis, experts highly value their professional reputations and are unlikely to blur the merits of the arguments through overly assertive behaviors. Besides, courts often have no idea about the experts’ personalities before their testimony. Furthermore, the judge’s moderation over the hot-tubbing session serves as an additional safeguard.

¹⁰³ See *Rovakat, LLC*, 2011 WL 4374589, at *12.

¹⁰⁴ See *id.*

¹⁰⁵ Counsels have some control over the questions, as they are likely to prepare the expert prior to the hot-tubbing.

¹⁰⁶ See Downes, *supra* note 51, at 14.

¹⁰⁷ See FED. R. EVID. 611 (within the trial court’s discretion over the mode and order of examining).

¹⁰⁸ See Transcript of Day 3 of Trial, *Black Pol. Task Force v. Galvin*, 300 F. Supp. 2d 291 (2003) (No. 02-11190).

¹⁰⁹ See Hon. Justice Steven Rares, *Using the ‘Hot Tub’: How Concurrent Expert Evidence Aids Understanding Issues*, BAR NEWS 70 (2010), <http://classic.austlii.edu.au/au/journals/NSWBarAssocNews/2010/67.pdf> [<https://perma.cc/D2CV-WJFE>].

III. Recommendation for Hot-Tubbing in Action

A. Promising Candidate to Reform Scientific Evidence

Hot-tubbing is a distinct approach that differs from past scientific evidence reforms.¹¹⁰ All of the past reforms take a normative view that judges are not, and should not, become amateur scientists. Hot-tubbing challenges this line of passive acceptance and adopts the view that judges are well-positioned to be amateur scientists, at least from the perspective of learning the science underlying various scientific evidence.

The following proposed use cases illustrate how hot-tubbing may increase a judge's engagement and improve his comfort level¹¹¹ dealing with scientific and technical evidence. Over time, judicial competence will rise, overcoming the status quo without needing an advisory tribunal. The achieved judicial competence will, in turn, promote public trust and confidence in the federal courts and satisfy the public's perception that courts can deal with increasingly complex science.

B. Proposed Uses

1. *Daubert* Hearing

Forensic science evidence, however much of a misnomer it may be,¹¹² is a prime example of courts' inconsistent applications of *Daubert*. The National Academy of Science ("NAS") conducted a comprehensive review of forensic science and concluded that many variations of forensic science, such as bite mark analysis and hair comparisons, are not sound science and have exceedingly high error rates.¹¹³ Despite this finding by the NAS emphasizing high error rates of forensic science evidence, criminal defendants have rarely been successful in their *Daubert* challenges.¹¹⁴ This is because courts continue

¹¹⁰ See *supra* Section II.

¹¹¹ See Papszun, *supra* note 57 (Judge Donato, during the interview, said, "[Hot-tubbing the economists] gives me a higher sense of confidence in the decision I make about whether that person should be allowed to testify at trial, or should be excluded.").

¹¹² See Jed S. Rakoff, *Is 'Forensic Science' a Misnomer?*, 106 JUDICATURE 80, 80 (2023) ("With the exception of DNA analysis, a great deal of so-called 'forensic science'—that is, the analysis of tool marks, bite marks, hair comparisons, fingerprints, blood spatters, arson patterns, and crime scene investigation in general— is not science at all.").

¹¹³ See Rakoff & Liu, *supra* note 23, at 2–3 (citing the studies led by the National Academy of Science in 2009 and 2016).

¹¹⁴ See Michael D. Cicchini, *The Daubert Double Standard*, 2021 MICH. ST. L. REV. 705, 707, 743 (2021) (reporting that the defense has never won a single *Daubert* decision at any level of the court system in Wisconsin since 2011).

to rely on pre-*Daubert* precedent,¹¹⁵ reflecting a hesitance to deprive the prosecution of evidence, especially in high-visibility cases.¹¹⁶ In other words, much of the forensic science is assumed to be valid and will continue to creep into courtrooms because courts have admitted such evidence in the past.

When criminal defendants can afford their own experts,¹¹⁷ hot-tubbing has the potential to reconcile the tension between pre-*Daubert* precedents and the finding by the NAS. The hot-tubbing session could serve as a tutorial about forensic science, providing a contrasting, up-to-date opinion to the views adopted in the precedents. Perhaps judges would feel more comfortable assessing the reliability of scientific evidence after hearing experts' concurrent testimony.¹¹⁸ Better yet, hot-tubbing will likely prompt courts to make decisions based on an analytical framework rather than a simplified hard-look test relying on intuitions, thereby improving the quality and objectivity of forensic science evidence.

On a related note, similar criticisms of forensic science at a trial apply to the use of junk science at sentencing. For example, courts increasingly use predictive risk assessment tools at sentencing, despite the fact that the developers who designed them warned against using these tools at sentencing.¹¹⁹ Because the training data used in developing these tools may not align with individual data, researchers have questioned the predictive power of the tools.¹²⁰ In addition to these black box algorithmic tools, prosecutors may present evidence of uncharged crimes, relying on forensic science (e.g., fingerprint matching and ballistic analysis).¹²¹ Since admissibility rules do not apply at sentencing, a creative solution is needed—perhaps by leveraging lessons learned from the hot-tubbing on forensic evidence.

¹¹⁵ See *id.* at 741 (“Most baffling of all, courts have even relied upon pre-*Daubert* cases, applying the old relevancy standard, to justify allowing the state’s expert to testify under *Daubert*’s new, much more demanding reliability standard.”).

¹¹⁶ See Rakoff, *supra* note 112, at 82.

¹¹⁷ Many criminal defendants cannot afford to pay experts, let alone for DNA testing in connection with their cases. See Brandon L. Garrett, *The Costs and Benefits of Forensics*, 57 Hous. L. Rev. 593, 600 (2020). For eligible defendants, the Criminal Justice Act provides defense counsels to obtain reimbursement for hiring experts. See *Criminal Justice Act (CJA) Guidelines*, U.S. Cts., <https://www.uscourts.gov/rules-policies/judiciary-policies/criminal-justice-act-cja-guidelines> [<https://perma.cc/4KZL-BQPR>].

¹¹⁸ At the very least, judges would recognize that forensic science is an evolving field, prompting them to carefully examine the reliability of such evidence.

¹¹⁹ See Maneka Sinha, *Junk Science at Sentencing*, 89 GEO. WASH. L. REV. 52, 69, 71 (2021) (discussing use of predictive tools at sentencing).

¹²⁰ See *id.* at 72. For example, the predictive power diminishes for Americans if the training data is based on Canadian populations. See *id.*

¹²¹ See *id.* at 79.

How about civil cases? Hot-tubbing is well-equipped for complex *Daubert* motions.¹²² Judge Kathleen O'Malley in the United States District Court for the Northern District of Ohio used hot-tubbing in a product liability case: in *In re Welding Fume*,¹²³ the court had to decide a *Daubert* motion by the defendants regarding the general causation between manganese exposure and Parkinson's disease.¹²⁴ The court initially held a *Daubert* hearing using a traditional format; experts offered very different opinions on general causation.¹²⁵ Then, the court decided to hold a hot-tubbing session, where the experts simultaneously answered questions from the court and responded to each other's opinions.¹²⁶ Both Judge O'Malley and the parties found the hot-tubbing "extremely valuable and enlightening."¹²⁷ If courts believe holding an additional hearing could enhance their decisions, they may hold an additional hearing using a hot-tubbing format. Of course, judges familiar with hot-tubbing may opt to conduct a *Daubert* hearing using hot-tubbing from the outset, considering both time and cost.

2. Markman Hearing

A *Markman* hearing,¹²⁸ also known as a claim construction hearing, imposes on trial judges the responsibility of construing patent claims—defining the metes and bounds of the invention.¹²⁹ Claim construction decisions have a persistently high reversal rate, reaching as high as 44%.¹³⁰

¹²² See *In re Ephedra Prod. Liab. Litig.*, 393 F. Supp. 2d 181 (S.D.N.Y. 2005).

¹²³ No. 1:03-CV-17000, 2005 U.S. Dist. LEXIS 46164 (N.D. Ohio Aug. 8, 2005).

¹²⁴ See *id.* at 95; see also Adam E. Butt, *Concurrent Expert Evidence in U.S. Toxic Harms Cases and Civil Cases More Generally: Is There A Proper Role for "Hot Tubbing"?*, 40 Hous. J. INT'L L. 1, 64 (2017) (describing *In re Welding Fume*).

¹²⁵ See Butt, *supra* note 124, at 64.

¹²⁶ See *id.*

¹²⁷ *Id.*

¹²⁸ See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996).

¹²⁹ See *id.* at 372. In a *Markman* hearing, defendants argue for a construction to pave their non-infringement theory, and plaintiffs argue for a construction that balances both of their infringement and validity arguments. To be clear, patent examiners and administrative patent judges construe patent claims as well. However, hot-tubbing is not well-fitted for those instances, given the limited opportunity for oral arguments involving experts.

¹³⁰ Amy Semet, *Specialized Trial Courts in Patent Litigation: A Review of the Patent Pilot Program's Impact on Appellate Reversal Rates at the Five-Year Mark*, 60 B.C. L. REV. 519, 528 (2019). Reversal rates depend on the years of studies, but this rate is based on the robust studies of 2001. See Christian A. Chu, *Empirical Analysis of the Federal Circuit's Claim Construction Trends*, 16 BERKELEY TECH. L.J. 1075, 1104 (2001). Scholars suspect that the high reversal rates for claim construction will remain constant. See Rainey C. Booth Jr., *The Only Certainty is Uncertainty: Patent Claim Construction in the United States Court of Appeals for the Federal Circuit*, 21 J. TECH. L. & POL'Y 243, 254 (2017).

In patent litigations, claim construction is one of the most pivotal pre-trial hearings; indeed, one of the best times to settle is after a claim-construction order.¹³¹ While a hearing is not necessary, courts have found it helpful to have oral arguments, especially when experts have sharply diverged opinions (e.g., how persons of ordinary skill in the art would have understood the claim terms).¹³² Besides claim construction, courts use the *Markman* hearing as an opportunity to learn about the technology at issue.¹³³ For example, as Judge Beth Freeman of the United States District Court for the Northern District of California stated, “[a]t the claim construction hearing, it’s really as much about construing claims as continuing to teach me about how the technology works.”¹³⁴

District judges, who assume the role of generalists, generally lack scientific backgrounds.¹³⁵ How do judges grapple with unfamiliar technology that is an integrated part of the claim construction hearing? The prevailing approach is to hire law clerks with technical backgrounds to compensate for their lack of expertise.¹³⁶ Another approach is a technical advisor, analogous to a specialized law clerk, who is not subject to Rule 706.¹³⁷ The United States Court of Appeals for the Federal Circuit (“Federal Circuit”) permitted the practice of using a technical advisor, reasoning that a claim construction is “far beyond the boundaries of the normal questions of fact and law with which judges routinely grapple.”¹³⁸ For example, Judge Rodney Gilstrap in the United States

¹³¹ See Peter S. Menell et al., *PATENT CASE MANAGEMENT JUDICIAL GUIDE* (3d ed. 2016), at 1-16, 2-13, <http://dx.doi.org/10.2139/ssrn.2637605>.

¹³² See *id.* at 2-18, 2-19.

¹³³ See J. Michael Jakes, *Using an Expert at a Markman Hearing: Practical and Tactical Considerations*, FINNEGAN (Aug. 2002), <https://www.finnegan.com/en/insights/articles/using-an-expert-at-a-markman-hearing-practical-and-tactical.html> [<https://perma.cc/2DFV-EFDY>].

¹³⁴ Scott Graham, *Silicon Valley Judge Freeman Developing Brand Name for IP Trials*, Law.com (Mar. 13, 2017), <https://www.law.com/therecorder/almID/1202781087877/> [<https://perma.cc/M4UN-2YMQ>].

¹³⁵ See Sapna Kumar, *Judging Patents*, 62 WM. & MARY L. REV. 871, 874 (2021) (explaining why trial judges are ill-equipped to understand the technical issues arising in patent litigation cases).

¹³⁶ See *id.* at 875–76; see also Timothy T. Hsieh, *Making the Mark(man): a Suggested Methodology for Enhanced Patent Claim Construction*, 93 MISS. LAW J. 249, 269, 279 (2023) (reporting lessons learned from serving as a judicial law clerk to Judge Roy Payne, the federal judge who construed the most patent claim terms: 8,601 terms as of April 26, 2023).

¹³⁷ See Hsieh, *supra* note 136, at 258.

¹³⁸ *Id.* at 258 (citing *TechSearch L.L.C. v. Intel Corp.*, 286 F.3d 1360, 1369 (Fed. Cir. 2002)).

District Court for the Eastern District of Texas, who presided over 12% of the nation's patent cases,¹³⁹ has several trusted technical advisors.¹⁴⁰

However, these two approaches are prone to the same criticisms as court-appointed experts and the Science Court.¹⁴¹ The most noteworthy objection is that, given that there is often little consensus in the scientific community on the meaning of disputed claim terms, law clerks or technical advisors are often not neutral.¹⁴² Coupled with the fact that judicial opinions lack information about the extent to which assistance comes from the clerk or technical advisor,¹⁴³ there are concerns about transparency and qualification.

Hot-tubbing is well-positioned to disrupt this status quo. All the benefits of hot-tubbing—issue refinement, comprehension of evidence, minimal procedural changes—apply to *Markman* hearings.¹⁴⁴ This is because experts discuss the same issue surrounding disputed terms, by the definition of a claim construction hearing, and also because they likely have similar levels of expertise. The hot-tubbing session will reveal areas of agreement and disagreement between the experts, providing a bipartisan tutorial about the technology underlying the patent. Furthermore, hot-tubbing can enhance the transparency of judicial decision-making and potentially contribute to the diversity of law clerks for trial judges with heavy patent dockets. Indeed, the use of hot-tubbing is not unprecedented in the context of a *Markman* hearing: Judge Woodlock has employed hot-tubbing in a patent infringement case in the United States District Court for the District of Massachusetts.¹⁴⁵

To the extent that experts' conflicting testimony cancels each other out, courts may be inclined to turn to a neutral advisor; judges have expressed that

¹³⁹ Over a 21-week period beginning July 25, 2021. Michael Shapiro, *West Texas Still Tops Patent Venues, Even After Cases Randomized*, BLOOMBERG LAW (Dec. 27, 2022), <https://news.bloomberglaw.com/ip-law/west-texas-still-tops-patent-venues-even-after-cases-randomized> [<https://perma.cc/RR35-5WJL>].

¹⁴⁰ See Kumar, *supra* note 135, at 898.

¹⁴¹ See *supra* Section I.B–C. Additionally, the practice of predominantly hiring law clerks with technical backgrounds may demotivate other graduates from entering the field of patent litigation.

¹⁴² See Posner, *supra* note 3, at 96–97.

¹⁴³ See Kumar, *supra* note 135, at 893 (“Furthermore, there is no indication in a judicial opinion regarding which information is coming from the clerk. Judicial abdication is already a general concern with regard to judges’ use of clerks, and the risk is far greater when relying on them for knowledge that the judge does not possess.”). Parties could object to the qualification of a clerk or a technical advisor; however, the lack of transparency prevents effective objections.

¹⁴⁴ See *supra* Section II.C.

¹⁴⁵ See *Genzyme Corp. v. Seikagaku Corp.*, No. 11-10636 at 42–43 (D. Mass. Nov. 30, 2011) (order dismissing case with prejudice).

they find the explanations of the party-offered experts easier to understand than those of court-appointed experts.¹⁴⁶ Again, the question of whether the court-appointed expert is truly neutral and facilitates a transparent judicial decision is yet another criticism.¹⁴⁷

Lastly, courts can easily deploy hot-tubbing remotely post-COVID-19. Increasingly, courts are holding remote *Markman* hearings that are accessible to the public.¹⁴⁸ There is less concern over finding dates when both experts can be available for a remote hearing, and the same procedure of hot-tubbing would apply regardless of whether a hearing is in-person or remote.

3. *Jury Trial in Complex Commercial Litigation*

While hot-tubbing has largely been limited to bench trials so far, some judges have used¹⁴⁹ or are open to trying hot-tubbing in front of the jury, especially for cases in which jurors “have to make difficult decisions based on complex expert testimony.”¹⁵⁰ Admittedly, the jury complicates the use of hot-tubbing, depending on the type of cases and judicial training, as the judge likely needs to exercise a more active yet unbiased role.¹⁵¹ Some may criticize that hot-tubbing interrupts the traditional order of the trial, where the plaintiff’s case-in-chief is followed by the defendant’s case-in-chief.¹⁵² Therefore, hot-tubbing in the context of a civil jury trial should be narrowly tailored to especially complex cases, where the need to present both experts from the plaintiff and the defendant is particularly strong.

¹⁴⁶ See Jakes, *supra* note 133 (reporting an opinion by a panel of district court judges from the May 2001 Federal Circuit Bench and Bar Conference).

¹⁴⁷ See Posner, *supra* note 3, at 96.

¹⁴⁸ See Hsieh, *supra* note 136, at 268; see also Judge Albright Opens Virtual Courtroom Doors to Public — Shares Thoughts on *Markman*, 101, *His Procedures*, WINSTON & STRAWN LLP BLOG (May 26, 2020), <https://www.winston.com/en/blogs-and-podcasts/wacowatch/judge-albright-opens-virtual-courtroom-doors-to-public-shares-thoughts-on-markman-101-his-procedures> [<https://perma.cc/QUN6-K4CC>] (reporting that Judge Alan Albright in the Western District of Texas opened the virtual doors to his courtroom).

¹⁴⁹ See Butt, *supra* note 124, at 45 (noting that Judge Jack Weinstein in the Eastern District of New York has used hot-tubbing in a jury trial for a medical malpractice case, where experts concurrently testified about a method of birthing).

¹⁵⁰ Hon. Jack Zouhary, *Splash! Hot Tubbing in a Federal Courtroom*, 29 OHIO LAW. 10, 11 (2015).

¹⁵¹ See Nancy Gertner & Joseph Sanders, *Alternatives to Traditional Adversary Methods of Presenting Scientific Expertise in the Legal System*, 147 DAEDALUS 135, 140–41 (2018). Note that Nancy Gertner is a former Senior United States District Judge in the District of Massachusetts.

¹⁵² See Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 714-715 (1983).

What are such cases? One example may be the question of damages, a topic jurors often struggle to understand.¹⁵³ Jurors often choose one dollar figure over another proposed by either a plaintiff or a defendant instead of engaging with the experts' statistical analysis and arriving at a more nuanced truth—often a figure between the two.¹⁵⁴ While finding an absolute truth in the context of damages seems unattainable, hot-tubbing may improve the jurors' engagement and bring them one step closer to finding the truth.

Procedurally, pursuant to Rule 16 of the Federal Rules of Civil Procedure, courts can simplify issues through pretrial conferences to facilitate hot-tubbing in trials.¹⁵⁵ Thus, jurors can focus on more narrow issues during trial. In summary, hot-tubbing may aid jurors in understanding technically complex damage questions and arriving at a just outcome.

C. Reluctance in Criminal Jury Trial

Today's criminal proceedings often involve expert testimony, and the subject matter of the testimony is becoming increasingly diverse and complicated.¹⁵⁶ Given the potentially impactful, yet limited, role of hot-tubbing in civil jury trials, one might question its applicability within the context of criminal jury trials. At the outset, there are far fewer studies, both theoretical and empirical, on the issue of whether hot-tubbing has a place in criminal jury trials. First, this Section presents arguments for and against the use of hot-tubbing in a criminal jury trial and ultimately expresses reluctance about its use in this context. Then, this Section addresses why the objections do not necessarily apply to civil jury trials. Lastly, this Section argues that in practice, hot-tubbing could be a much more valuable tool for criminal cases if the court employs it prior to the trial, for instance, in a *Daubert* hearing.

Proponents of extending hot-tubbing to criminal jury trials argue that it can help counteract the widespread rejections of the criminal defendant's expert¹⁵⁷ (when compared to the prosecution's) and potentially enhance jury

¹⁵³ See Greene & Gordon, *supra* note 55, at 377 (summarizing studies of mock jurors confronted with damage awards). For example, an ideal case would have been *VLSI Tech. LLC v. Intel Corp.*, No. 6:21-CV-057-ADA, 2022 WL 1477725 (W.D. Tex. May 10, 2022). The Federal Circuit recently vacated the award of damages for the '373 patent. See *VLSI Tech. LLC v. Intel Corp.*, No. 2022-1906, 2023 WL 8360083 (Fed. Cir. Dec. 4, 2023).

¹⁵⁴ See *id.* (citing Allan Raitz et al., *Determining Damages: The Influence of Expert Testimony on Jurors' Decision Making*, 14 L. & HUM. BEHAV. 385, 394 (1990)).

¹⁵⁵ See FED. R. CIV. P. 16 ("Pretrial Conferences; Scheduling; Management").

¹⁵⁶ See Greene & Gordon, *supra* note 55, at 362.

¹⁵⁷ See Wes R. Porter, *Repeating, Yet Evading Review: Admitting Reliable Expert Testimony in Criminal Cases Still Depends Upon Who Is Asking*, 36 RUTGERS L. RECORD 48, 49 (2009).

competence.¹⁵⁸ They suggest that testimonies presented in a dialog format among experts could lead to better juror understanding of both the issue at hand and the testimonies themselves.¹⁵⁹ Additionally, even if hot-tubbing's effectiveness in criminal jury trials has yet to be established, case studies could still offer valuable insights for empirical research. However, advocates likely recognize that hot-tubbing may be inadequate when experts have differing levels of expertise, specialize in different fields, or address different issues.¹⁶⁰ These fundamental requirements could present significant obstacles for criminal defendants.¹⁶¹

On the other hand, critics question whether hot-tubbing truly aids jurors' understanding.¹⁶² However, these arguments fail because numerous studies indicate that jurors tend to accept expert testimony uncritically when presented by only one side; however, when experts from opposing sides are introduced, jurors become more alert to potential adversarial bias and may become skeptical of all testimonies.¹⁶³ This skepticism could compromise the accuracy of the jury's fact-finding responsibilities. A more pressing issue is that, although proponents make theoretical arguments based on a few assumptions, the prerequisites for effective hot-tubbing—namely, experts having equal levels of expertise—are rarely met in criminal jury trials.¹⁶⁴

On the other hand, these objections do not apply to civil jury trials, due to procedural differences between civil and criminal cases. For example, the Federal Rules of Criminal Procedure¹⁶⁵ are insufficient to address the resource deficiencies often faced by criminal defendants, which generally results in an unequal standing between defendants' experts and prosecution experts.¹⁶⁶ In contrast, civil cases allow far more robust fact discovery beyond just the basis

¹⁵⁸ Greene & Gordon, *supra* note 55, at 384 ("If these and other necessary modifications can be made, then experts' explanations of complex principles in a discussion-like forum could aid jurors in resolving the parties' disagreements").

¹⁵⁹ *See id.* at 381, 385.

¹⁶⁰ *See supra* Section II.C.5.

¹⁶¹ *See* Garrett, *supra* note 117, at 600.

¹⁶² *See generally* Greene & Gordon, *supra* note 55.

¹⁶³ *See* Gertner & Sanders, *supra* note 151, at 138 (citing *O'Conner v. Commonwealth Edison Co.*, 807 F. Supp. 1376 (C.D. Ill. 1992)); *see also id.* at 138 n.29 (numerous studies suggest jurors' perceptions of adversarial bias).

¹⁶⁴ *See id.* at 140 ("Expert testimony has different resonance in criminal than in civil cases. It is rare that criminal cases become battles between equally competent prosecution and defense experts. Too often the adversaries are not of equal stature and lack equal resources").

¹⁶⁵ *See, e.g.*, FED. R. CRIM. P. 16(1)(G).

¹⁶⁶ *See* Gertner & Sanders, *supra* note 151, at 140 ("Appointed counsel have a difficult time getting the state to pay for their experts at a level that would attract the best in their profession; the government has no such problem.").

for an expert's testimony.¹⁶⁷ Moreover, the order of presentation in civil trials is more flexible and can be adjusted at the court's discretion.¹⁶⁸ Furthermore, pre-trial conferences permitted by Rule 16 of the Federal Rules of Civil Procedure help facilitate hot-tubbing in civil jury trials.¹⁶⁹

Therefore, in criminal cases, hot-tubbing finds greater utility prior to trial, such as in a *Daubert* hearing. Criminal defendants often attempt to exclude the prosecution experts, while their efforts have been largely unsuccessful.¹⁷⁰ It is less burdensome to engage an expert for an evidentiary challenge than for a full trial, and hot-tubbing could enable defense counsel to challenge the imbalance¹⁷¹ caused by favoring the admission of prosecution experts.¹⁷² The use of hot-tubbing in this context will involve minimal procedural obstacles and practical concerns while leveraging benefits.¹⁷³

D. Addressing Objections to Hot-Tubbing

Hot-tubbing invites numerous common objections, ranging from the sufficiency of the traditional order of presentation and procedural mechanisms to the lack of studies supporting the effectiveness of hot-tubbing in reducing

¹⁶⁷ See *id.* at 140 (citing FED. R. CRIM. P. 16(1)(G)).

¹⁶⁸ See *id.* at 141 ("the order of presentation—at least in civil cases—is within the court's discretion"). Gertner & Sanders also explain that "rearranging the order of expert testimony by agreement is also less likely in criminal cases." *Id.* This statement is especially true for a criminal trial in state court.

¹⁶⁹ See *supra* Section III.B.3. The pretrial conference can ensure that both experts have some common grounds and address the same issue during the trial.

¹⁷⁰ See Gertner & Sanders, *supra* note 151, at 140 ("As a result, rather than coequal dueling experts, the more typical pattern is that the government offers expert witnesses and the defendant seeks to exclude or challenge them on *Daubert* grounds, but does not offer its own expert.").

¹⁷¹ At least in some courts. See *id.* at 140 ("In some criminal trials, the judicial role is simultaneously passive and active. It is passive with regard to the admission of government experts, and active in the exclusion of defense experts.").

¹⁷² See Cicchini, *supra* note 114, at 743.

¹⁷³ See *supra* Section II.C.

adversarial allegiance¹⁷⁴ and improving jurors' understanding.¹⁷⁵ In the context of expert testimony, the first objection concerns outright rejections of the challenges judges face in performing their gatekeeping roles. Given the limited success of past reforms, it is indeed timely to consider hot-tubbing as a promising approach to assist trial judges. As for the second objection regarding the lack of studies, it is worth acknowledging that there are very few applicable studies,¹⁷⁶ presumptively due to the lesser recognition of hot-tubbing in the United States. Nevertheless, among fewer than two dozen instances¹⁷⁷ of hot-tubbing in the United States, the overwhelming number of judges report positive attitudes.¹⁷⁸ Therefore, these objections should not dissuade the broader adoption of hot-tubbing as a practice.

In addition to the above-mentioned common objections, the two strongest objections to hot-tubbing are that it promotes dilettantism—judges becoming amateur scientists—and disturbs power dynamics between judges and attorneys. Regarding dilettantism, critics are concerned about “a dangerous psychological trap” where a judge “knows too much to defer to others, yet knows too little to make sound decisions.”¹⁷⁹ As such, critics view judges' efforts to attend scientific seminars and read educational materials negatively rather than as a means of enhancing judicial comfort and confidence.¹⁸⁰ Those opposed to judicial dilettante decision-making suggest abandoning

¹⁷⁴ See Thomas D. Albright, *A Scientist's Take on Scientific Evidence in the Courtroom*, 120 PROCS. NAT'L ACAD. SCIS. 1, 9 (2023) (quoting Yarnall, *supra* note 88, at 311) (“there is little evidence that [hot-tubbing] works to reduce adversarial allegiance, possibly because there is no oversight and moderation by an independent body of scientists”); see also Jennifer T. Perillo et al., *Testing the Waters: An Investigation of the Impact of Hot Tubbing on Experts From Referral Through Testimony*, 45 L. HUM. BEHAV. 229, 229 (2021) (reporting that, based on simulated criminal responsibility evaluations, that “[e]xperts who initially favored the prosecution or defense showed adversarial allegiance regardless of expert testimony method [including hot-tubbing], and we observed no attenuation of this bias over the course of their case involvement.”).

¹⁷⁵ See Gertner & Sanders, *supra* note 151, at 138 n.29 (numerous studies suggesting jurors' perceptions of adversarial bias).

¹⁷⁶ It is also unclear whether findings from simulated studies translate to real-world practice.

¹⁷⁷ See Papsuncun, *supra* note 57.

¹⁷⁸ See, e.g., *In re Capacitors Antitrust Litig.*, No. 14-3264, 2021 WL 5407452, at *59 (N.D. Cal. Nov. 18, 2021) (finding hot-tubbing “immensely helpful in understanding each expert's point of view and theory of the case”).

¹⁷⁹ Cheng, *supra* note 24, at 420.

¹⁸⁰ See *id.*

judicial gatekeeping altogether and shifting the responsibility to the expert community.¹⁸¹

However, under the current regime, where judges must perform their gatekeeping roles, dilettante decision-making poses less harm than the status quo. Through hot-tubbing, judges are engaged, focused, and learning. Further, their decisions synthesize the records before the court, rather than an unskillful attempt to understand the evidence. The same critics further assume that judicial competence remains unchanged, regardless of how much effort judges put into learning about evolving science and scientific principles. Besides, delegating the responsibility to the expert community poses the same challenge when there is no consensus.¹⁸²

Regarding adversarialism, critics view peer scrutiny as not being as rigorous as cross-examination, and cross-examination after the hot-tubbing session as being incomplete.¹⁸³ As the critics recognize, hot-tubbing does not preclude cross and re-examination.¹⁸⁴ Admittedly, hot-tubbing diminishes some powers traditionally held by attorneys, as they typically have full control over questions. Moreover, given hot-tubbing's emphasis on free-flowing conversations among experts and the judge, attorneys may feel uncomfortable intervening in the middle of the session.¹⁸⁵ However, the disruption of power dynamics is one of the aims hot-tubbing seeks to achieve by empowering trial judges and aiding in their pursuit of truth. In this journey, hot-tubbing retains adversarial elements, though not necessarily in a traditional sense. Ultimately, this disruption in power dynamics is one of the costs of hot-tubbing, and this Note argues that this cost is well-justified for proposed use cases that require elevated judicial engagement and comprehension.

¹⁸¹ See *id.* at 472 (“The answer to the expert evidence problem is to abandon the gatekeeping approach of Daubert and to adopt the inference rule approach of the Consensus Rule. If the relevant expert community believes a specialized fact, then the factfinder should proceed accordingly.”).

¹⁸² See *id.* at 437 (Cheng argues that “if the expert community is divided, the legal system cannot do much better than a coin flip anyway.”). This argument oversimplifies the issue and assumes static nature of judicial competence.

¹⁸³ See Emmerig & Legg, *supra* note 86 (examining the benefits and drawbacks of hot-tubbing from both the lawyer's and client's perspectives).

¹⁸⁴ See FED. R. EVID. 611. See *Rovakat, LLC v. Comm'r*, T.C.Memo. 2011-225, 2011 WL 4374589, at *12 (noting that counsel retained the opportunity to object and cross-examine during the hot-tubbing session but chose not to do so); see also *In re Google Play Store Antitrust Litig.*, No. 20-CV-05761-JD, 2022 WL 17252587, at *5 (N.D. Cal. Nov. 28, 2022) (describing Judge Donato's use of hot-tubbing to structure expert debate, followed by argument from counsel).

¹⁸⁵ See *supra* Section II.C.4.

IV. Proposed Amendment to the Federal Rules of Evidence

An amendment to the Federal Rules of Evidence is not mandatory for a court to embrace hot-tubbing. However, considering the current lack of judicial awareness and unfamiliarity with this method, this Note proposes the following amendment to Rule 611, a logical place because Rule 611 already discusses the mode and order of examining witnesses:

[Proposed] Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

- (1) make those procedures effective for determining the truth;
- (2) avoid wasting time; and
- (3) protect witnesses from harassment or undue embarrassment.

[. . .]

(d) Hot-tubbing (concurrent evidence). This Rule's section (a) authorizes the court to hold a hot-tubbing session, where two or more witnesses testify concurrently. During the hot-tubbing session, the court may ask questions to witnesses and may direct witnesses to ask questions to one another. Prior to the hot-tubbing session, the court may ask that a joint report be prepared by the witnesses themselves.

The purpose of this proposed amendment is to educate the judiciary, following the approach taken in Australia¹⁸⁶ and Canada.¹⁸⁷ Therefore, if the Advisory Committee on Evidence Rules hesitates to codify hot-tubbing, alternatives such as a judicial training program can help bridge the gap in awareness and motivate judges to try hot-tubbing in their courtrooms.

Conclusion

Science and law are inseparable. As scientific expert evidence becomes even more ubiquitous in courtrooms, judges find that a lack of scientific

¹⁸⁶ See Civil Procedure Act 2010 (Victoria), *supra* note 45 (“the court may direct any expert witness—give evidence concurrently with one or more expert witnesses; be permitted to ask questions of any other expert witness who is concurrently giving evidence.”).

¹⁸⁷ For example, Canada codified hot-tubbing in its Federal Courts Rules. See Federal Courts Rules, (SOR/98-106) (Can.), 282.1 Expert witness panel (“The Court may require that some or all of the expert witnesses testify as a panel after the completion of the testimony of the non-expert witnesses of each party or at any other time that the Court may determine.”); 282.2(1) Testimony of panel members (“Expert witnesses shall give their views and may be directed to comment on the views of other panel members and to make concluding statements. With leave of the Court, they may pose questions to other panel members.”); 282.2(2) Examination of panel members (“On completion of the testimony of the panel, the panel members may be cross-examined and re-examined in the sequence directed by Court.”).

background or technical training is not a golden ticket to evade their gate-keeping responsibilities. Both litigants and scientific communities have noted the urgent necessity for judges to competently distinguish good science from junk science. This Note has argued that judges are not so different from scientific researchers. As they strive to attain a higher level of expertise and comfort in deciding complex scientific issues, the practice of hot-tubbing is poised to become their invaluable ally. Encouragingly, the Federal Rules of Evidence already permit hot-tubbing, leaving only judicial curiosity to spur its implementation.

In a broader context, this Note hopes to spark discussions on practical considerations of judicial duties imposed by Rule 702. Should we plainly accept Justice Rehnquist's view that judges do not possess a degree of scientific principles,¹⁸⁸ or should we challenge this judicial norm through elevated judicial understanding of scientific principles? This Note adopts the latter yet rejects ongoing reform for independent judicial research.¹⁸⁹ Judges do not need to go to the library to look up unfamiliar terms or perform Google searches to learn about disputed scientific methodologies. Hot-tubbing opens a judicial library for them, allowing them to hear from partisan expert witnesses who share their wealth of knowledge relevant to deciding issues before the court.

Now is the time to waterproof the courtroom.

¹⁸⁸ See *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 600–01 (1993) (expressing skepticism about judges' ability to understand scientific concepts and rejecting the expectation that they act as amateur scientists).

¹⁸⁹ See generally Cheng, *supra* note 12 (arguing that judges should engage in independent library search to better educate themselves about the underlying science and reporting polarized responses among judges).

Diluting the Defense of Property: Flawed Decision in *Navajo Nation v. Urban Outfitters* Emphasizes Need for New Standard in the Federal Circuit

Caroline DiCostanzo*

“We believe in protecting our Nation, our artisans, designs, prayers and way of life . . . We expect that any company considering the use of the Navajo name, or our designs or motifs, will ask us for our permission.”

—Navajo Nation President Russell Begaye¹

Introduction

For centuries, Native American imagery has been glorified. From sports mascots to fashion trends,² their cultural influence can be found in various facets of modern society. Some may categorize these acts as ostensibly innocent, but others view this usage as intentional, indecent, and disparaging.³ For instance, in 2004, the American hip-hop duo OutKast performed their song “Hey Ya!” at the Grammy Awards, sparking an outcry among Native

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¹ David Schwartz, *Navajo Nation Settles Trademark Suit Against Urban Outfitters*, REUTERS (Nov. 18, 2016, 6:26 PM), <https://www.reuters.com/article/navajo-urbanoutfitters/navajo-nation-settles-trademark-suit-against-urban-outfitters-idUSL1N1DJ25O> [<https://perma.cc/R4M5-RG2P>].

² Angela R. Riley & Kristen A. Carpenter, *Owning Red: A Theory of Indian (Cultural) Appropriation*, 94 TEX. L. REV. 859, 862–63 (2016). See also *Imagining the Indian: The Fight Against Native American Mascoting*, CIESLA FOUND., <https://imaginingtheindianfilm.org> [<https://perma.cc/7BNK-SF6Q>] (last visited Mar. 31, 2024) (The documentary *Imagining the Indian* was released in March 2023, addressing the stereotypes and marginalization of Native American culture, particularly in sports mascots. Despite growing recognition of the exploitation of Native American imagery, tribes and artists continue to be inadequately compensated for their cultural and intellectual property).

³ See Trevor G. Reed, *Fair Use as Cultural Appropriation*, 109 CAL. L. REV. 1373, 1376 (2021).

communities over the stereotypical portrayal of tomahawk-and-tipi culture, using ceremonial items like feathers and war paint.⁴ Specifically, the Navajo Nation criticized the song, stating that the melody introducing “Hey Ya!” originated from its sacred song “Beauty Way.”⁵ Further, in 2019, fashion retailer MadHappy released a sweatshirt line that the Navajo Nation condemned as an appropriation of its official seal.⁶ These instances underscore a larger ongoing pattern of Native American culture being appropriated and tribes being inadequately compensated for their cultural and intellectual property.⁷

In recent decades, Congress has granted unique intellectual property rights and passed statutes for over 100 organizations—including the U.S. Olympic Committee (“USOC”), Boy Scouts of America, and Girl Scouts of the United States of America.⁸ Congress has also enacted protections for Native American cultural and intellectual property through laws like the Native American Graves Protection and Repatriation Act (“NAGPRA”) and the Indian Arts and Crafts Act (“IACA”).⁹ Nonetheless, these statutes differ from other organizations and groups’ unique and exclusive property rights.¹⁰

The decision of *Navajo Nation v. Urban Outfitters*¹¹ illustrates the lack of protection afforded to Native American tribes under the strict federal trademark dilution standard.¹² In May 2016, a federal district court rejected the Navajo Nation’s trademark dilution claim against Urban Outfitters, ruling that the “NAVAJO” mark did not meet the “famous” requirement under the Lanham Act.¹³ The district court based its decision in *Navajo Nation* on the United States Court of Appeals for the Federal Circuit’s (“Federal Circuit”)

⁴ Angela R. Riley, *Straight Stealing: Towards an Indigenous System of Cultural Property Protection*, 80 WASH. L. REV. 69, 70–71 (2005).

⁵ See *id.* at 71.

⁶ See Reed, *supra* note 3, at 1375 (the sweatshirt line, released in 2019, contained a design with two cornstalks, vividly colored in psychedelic patterns, shaped like a crest with four mountains naming Aspen, Colorado ski resorts).

⁷ See Trey V. Perez, *Native American Intellectual Property Protection: Altering Federal IP Law and the Indian Arts and Crafts Act to Aid Tribal Economic Development*, 11 AM. INDIAN L. J. 1, 11 (2023).

⁸ See *Little League Baseball, Inc. v. Kaplan*, No. 08-60554-CIV, 2009 WL 10668763, at *8 (S.D. Fla. Mar. 3, 2009).

⁹ See Nicole Martin, *Indigenous Rights: An Analysis of Intellectual Property Protections*, 13 A.M. U. INTELL. PROP. BRIEF 33, 44 (2021).

¹⁰ See *id.* (explaining that the Indian Arts and Crafts Act is limited in its exclusive intellectual property rights).

¹¹ No. 12-195 BB/LAM, 2016 WL 3475342 (D.N.M. May 13, 2016).

¹² See *id.* at *4.

¹³ *Id.*

decision in *Coach Services, Inc. v. Triumph Learning LLC*,¹⁴ determining that the mark was not widely recognized as a household name.¹⁵

This Note argues that the flawed decision in *Navajo Nation*, which relies on precedent from *Coach Services*, undermines protections for Native American intellectual property and cultural expression.¹⁶ It further contends that the Federal Circuit should adopt a more comprehensive standard for determining the famous requirement of trademark dilution claims, particularly as it pertains to Native American tribes.¹⁷ This would provide a clear precedent for district courts across the country, ensuring greater recognition and protections for Native American tribes while preserving the cultural integrity of Indigenous work in the United States.¹⁸ Part I of this Note outlines current trademark and federal Indian laws, including trademark dilution and the *Navajo Nation* decision. Part II examines Congress' authority to create unique property rights for Native American intellectual property and critiques the limitations of current federal statutes.¹⁹ Part III proposes a new standard the Federal Circuit should adopt for trademark dilution claims and corresponding legislation by Congress.²⁰

I. Background

The Lanham Act sets forth the requisite elements to ensure trademark protection and gives individuals with registered marks the exclusive right to use their marks in commerce.²¹ Trademark dilution by tarnishment and dilution by blurring offer the owner of a mark an additional cause of action to assert their exclusive rights.²² Outside of the Lanham Act, Congress has expanded the scope of trademark protection to particular organizations through criminal and civil statutes.²³ Aside from the protections afforded to owners of a mark, Congress has enacted several statutes affording Native American tribes

¹⁴ 668 F.3d 1356 (Fed. Cir. 2012).

¹⁵ *Navajo Nation*, No. 12-195 BB/LAM at *4.

¹⁶ See *infra* Parts II–III.

¹⁷ See *infra* Part III.

¹⁸ See *id.*

¹⁹ See Angela R. Riley, *Recovering Collectivity: Group Rights to Intellectual Property in Indigenous Communities*, 18 CARDOZO ARTS & ENT. L.J. 175, 215 (2000).

²⁰ See *infra* Part III.

²¹ See Lanham Act, 15 U.S.C. § 1127.

²² See Kathryn Moynihan, *How Navajo Nation v. Urban Outfitters Illustrates the Failure of Intellectual Property Law to Protect Native American Cultural Property*, 19 RUTGERS RACE & L. REV. 51, 53–54 (2018).

²³ See *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 537 (1987); 36 U.S.C. § 80305; 36 U.S.C. § 30905; 18 U.S.C. § 713.

certain rights, attempting to combat the problem of cultural appropriation.²⁴ However, these protections are ineffective, as illustrated by the decision of the United States District Court for the District of New Mexico to deny the Navajo Nation's trademark dilution claim against Urban Outfitters because NAVAJO does not meet the famous requirement.²⁵

A. Trademark Law

The federal and state governments in the United States have provided trademark legislation to define registration requirements, types of marks, and statutory benefits for trademark owners.²⁶ The Trademark Act of 1905, grounded in the Commerce Clause, granted Congress the authority to regulate trademarks.²⁷ Congress passed the Trademark Act of 1946 (the "Lanham Act") to expand the scope and protection of trademark rights.²⁸ The Lanham Act provides various causes of action, including trademark dilution, which the Navajo Nation sought to establish.²⁹

1. Establishing Trademark Rights

To garner trademark protection, the mark must meet three basic requirements: (1) distinctiveness; (2) non-functionality; and (3) use in commerce.³⁰ A mark can be inherently distinctive if its innate nature readily identifies a particular source³¹ or has acquired distinctiveness through advertising or usage in the marketplace.³² The Lanham Act defines a trademark as any "word, name, symbol, or device, or any combination thereof" used or intended for use in commerce "to identify and distinguish his or her [own] goods."³³ Its overt purpose is to regulate commerce and prevent unfair competition, fraud, and

²⁴ Jack F. Trope & Walter R. Echo-Hawk, *The Native American Graves Protection and Repatriation Act: Background and Legislative History*, 24 ARIZ. ST. L.J. 35, 36 (1992).

²⁵ Navajo Nation v. Urb. Outfitters, Inc., No. 12-195 BB/LAM, 2016 WL 3475342, at *4 (D.N.M. May 13, 2016).

²⁶ BARTON BEEBE, TRADEMARK LAW: AN OPEN-ACCESS CASEBOOK 9 (10th ed. 2023).

²⁷ See *id.*

²⁸ See *id.*

²⁹ See *infra* Section I.D.

³⁰ See Beebe, *supra* note 26, at 32; I.P. Lund Trading ApS v. Kohler Co., 163 F.3d 27, 36 (1st Cir. 1998).

³¹ See Wal-Mart Stores, Inc. v. Samara Bros., 529 U.S. 205, 211 (2000).

³² See *id.* at 210–11.

³³ Lanham Act, 15 U.S.C. § 1127. See also Christian Faith Fellowship Church v. adidas AG, 841 F.3d 986, 989 (Fed. Cir. 2016) (discussing use in commerce requirement, stating the goods represented by the mark must be sold or transported per Congress' authority to regulate under the Commerce Clause).

deception by prohibiting misrepresentation that could distort trade.³⁴ The economic justification for trademark protection includes reducing consumer search costs and incentivizing producers to maintain uniform product quality standards.³⁵

Once an owner establishes trademark rights, they can exclude others from using their registered mark.³⁶ For a trademark holder to bring an infringement claim, the plaintiff must demonstrate that (1) the plaintiff retains the exclusive right to use the mark and (2) the defendant infringed upon those rights.³⁷

2. *Trademark Dilution*

The concept of trademark dilution was first presented as the public's "gradual whittling away or dispersion of the identity" of a mark through its use on non-competing goods.³⁸ In 1995, Congress passed the Federal Trademark Dilution Act ("FTDA"),³⁹ creating a distinct cause of action, which was amended in 2006 as the Trademark Dilution Revision Act ("TDRA").⁴⁰ To recover under a trademark dilution claim, a plaintiff must establish the following: (1) the mark itself is famous; (2) the defendant's commercial use is likely to dilute the mark's value in commerce; (3) the defendant's mark presents a similarity to the famous mark to result in association between the two; and (4) there is a likelihood that association either diminishes the distinctiveness of the famous mark or causes harm to the reputation of the famous mark.⁴¹ The Supreme Court of the United States ("Supreme Court") defines a famous mark as "'widely recognized' by the public as 'designati[ing the] source' of the mark owner's goods."⁴² When determining whether a mark

³⁴ See Lanham Act, 15 U.S.C. § 1127; see also S. REP. NO. 79-1222, at 5–6 (1946).

³⁵ See Beebe, *supra* note 26, at 25.

³⁶ See *Qualitex Co. v. Jacobson Prod. Co.*, 514 U.S. 159, 162 (1995); see also 15 U.S.C. § 1115.

³⁷ See Beebe, *supra* note 26, at 351.

³⁸ Frank I. Schechter, *The Rational Basis of Trademark Protection*, 40 HARV. L. REV. 813, 825 (1927) (referencing German trademark law to argue the United States needs a similar law protecting trademark owners from unauthorized uses on non-competing goods that do not amount to consumer confusion—now referred to as the concept of "trademark dilution").

³⁹ *Avery Dennison Corp. v. Sumpton*, 189 F.3d 868, 873 (9th Cir. 1999).

⁴⁰ See Lanham Act, 15 U.S.C. § 1125 (revising the 1996 version of the FTDA by clarifying dilution protection and providing more practical enforcement for trademark owners, which had eight relevant factors in determining whether a mark is famous); Moynihan, *supra* note 22, at 54; H.R. REP. NO. 109–23, at 5 (2005).

⁴¹ See *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252, 264–65 (4th Cir. 2007).

⁴² *Jack Daniel's Props., Inc. v. VIP Prod. LLC*, 599 U.S. 140, 147 (2023) (citing 15 U.S.C. § 1125(c)(1)) (Jack Daniel's brought a counterclaim of trademark dilution by tarnishment against VIP Products for the sale of the "Bad Spaniels" dog toy).

meets the statutory definition of constituting famous, the TDRA outlines four non-exclusive factors that a court may consider:

(1) the duration, extent, and geographic reach of advertising and publicity of the mark, whether advertised or publicized by the owner or third parties; (2) The amount, volume, and geographic extent of sales of goods or services offered under the mark; (3) The extent of actual recognition of the mark; (4) Whether the mark was registered under the Act of March 3, 1881, or the Act of February 20, 1905, or on the principal register.⁴³

In addition to the abovementioned factors, courts have implemented the rule that the mark must be distinctive and famous.⁴⁴ Further, courts have found that the fame of a mark is constricted to those widely identifiable by the “general consuming public,” not only to niche markets.⁴⁵

The Federal Circuit has emphasized the heightened requirements for a dilution claim when determining whether the mark was famous.⁴⁶ In *Coach Services*, the Federal Circuit affirmed the Trademark Trial and Appeal Board’s (“TTAB”) dismissal of Coach Services, Inc. (“CSI”) trademark dilution claim, finding the “COACH” mark did not meet the famous requirement under the TDRA.⁴⁷ To establish fame under the TDRA, the Federal Circuit highlighted the “general consuming public” threshold, essentially removing the possibility of “niche fame.”⁴⁸ Acknowledging that fame for dilution purposes is notoriously hard to substantiate, the Federal Circuit has stated that a “mark’s owner must demonstrate that the common or proper noun uses of the term and third-party uses of the mark are now eclipsed by the owner’s use of the mark.”⁴⁹ In essence, the general population must associate the mark as a “household name.”⁵⁰ Regarding CSI, the Federal Circuit stated that the annual reports of

⁴³ *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1372 (Fed. Cir. 2012) (citing Lanham Act, 15 U.S.C. § 1125(c)).

⁴⁴ *See Bentley v. NBC Universal, LLC*, No. CV1603693TJHKSX, 2016 WL 10570587, at *3 (C.D. Cal. Sept. 28, 2016) (citing *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 634 (9th Cir. 2007)).

⁴⁵ *Id.* at *3–4 (finding that plaintiffs’ mark extends to a “limited segment of individuals,” despite demonstrating significant recognition by “people interested in football, sports performance, and fitness training”); *see also Dan-Foam A/S v. Brand Named Beds, LLC*, 500 F. Supp. 2d 296, 307 n. 90 (S.D.N.Y. 2007).

⁴⁶ *See Coach Servs., Inc.*, 668 F.3d at 1373.

⁴⁷ *See id.* at 1376.

⁴⁸ *Id.* at 1374. *See also* Heidi L. Belongia, *Why Is Fame Still Confusing? Misuse of the “Niche Market Theory” Under the Federal Trademark Dilution Act*, 51 DEPAUL L. REV. 1159, 1176 (2002) (“A niche may be limited to a specific consumer group, geographic area, product feature, or price-quality level”).

⁴⁹ *Coach Servs., Inc.*, 668 F.3d at 1373 (citations omitted).

⁵⁰ *Id.* (citations omitted).

its sales and advertisements were unauthenticated and inadmissible.⁵¹ However, the court noted that even if the reports were admissible, limited sales and advertisements are insufficient to demonstrate fame.⁵² Further, the TTAB noted that registration ownership does not provide conclusive evidence of fame for trademark dilution.⁵³ When analyzing the hundreds of articles CSI offered to show media attention and results from brand awareness studies, the Federal Circuit affirmed the TTAB's conclusion that the evidence did not show widespread recognition.⁵⁴ Given that CSI failed to provide enough evidence to demonstrate the fame of the COACH mark, the Federal Circuit affirmed the TTAB's finding dismissing CSI's dilution claim.⁵⁵

B. Expanding Scope of Trademark Protection

Congress recognizes the need for enhanced trademark protections in specific cases and has, at times, created new statutes and standards to expand the scope of trademark protections.⁵⁶ The following laws allude to Congress' ability and authority to strengthen the safeguards of Native Americans' intellectual property rights.

1. *The Olympic and Amateur Sports Act*

When considering the scope of trademark protections, Congress afforded exclusive rights to the USOC by passing the Ted Stevens Olympic and Amateur Sports Act ("OASA").⁵⁷ The OASA established exclusive rights and controls over words, symbols, and emblems associated with the Olympic, Paralympic, and Pan-American Games.⁵⁸ The OASA expands the scope of trademark protection to the USOC by not requiring evidence of consumer confusion of the contested use and disallowing normal statutory defenses for

⁵¹ See *id.* at 1374 (noting that most reports for sales and advertisements demonstrate evidence after the defendant filed its use-based application, which fails to meet the requirement that the plaintiff needed to demonstrate fame *before* the defendant's use).

⁵² See *id.* at 1372.

⁵³ See *id.*

⁵⁴ See *id.* at 1374–75.

⁵⁵ See *id.* at 1376.

⁵⁶ See *Little League Baseball, Inc. v. Kaplan*, No. 08-60554-CIV, 2009 WL 10668763, at *8 (S.D. Fla. Mar. 3, 2009).

⁵⁷ 36 U.S.C. § 220501 (West); 36 U.S.C. § 220506 (West).

⁵⁸ 36 U.S.C. § 220506 (West); see also § 19:73. There are also statutory restrictions on the use of institutional names or logos. See *generally* Olympics, 4 Entertainment Law 3d: Legal Concepts and Business Practices § 19:73 (statutory protection extends to other words, including Citius Altius Fortius, Paralympic, American Espirito Sport Fraternite, and Olympiad).

unauthorized users of the words.⁵⁹ Congress enacted the OASA to encourage the USOC to continue producing quality goods and services that are advantageous to the public.⁶⁰

Relying on congressional purpose as a tool of statutory interpretation, the Supreme Court affirmed the constitutionality of the OASA in *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Committee*.⁶¹ The USOC filed a lawsuit against San Francisco Arts & Athletics, Inc. (“SFAA”), asserting the exclusive right to the use of the word “Olympic.”⁶² In its decision, the Supreme Court discussed Congress’ determination to provide a limited property right for the word “Olympic,”⁶³ given its use in commerce by the USOC to sell goods since 1896.⁶⁴ Moreover, the Supreme Court’s ruling to uphold Congress’ decision to grant the USOC the exclusive right was to guarantee equitable compensation, incentivizing the USOC to market a “quality product” that benefits the public.⁶⁵ To provide further reasoning, the Supreme Court stated that it was reasonable to find the word “Olympic” to have acquired significant commercial and promotional value through the USOC’s “talents and energy, the end result of much time, effort, and expense.”⁶⁶ The Supreme Court acknowledged the USOC’s use of the word “Olympic,” as well as its historical origin and national interest.⁶⁷ As a result, it dismissed the argument made by SFAA, alleging that Congress took a generic word out of the English language and gave the USOC the exclusive right to use it.⁶⁸

⁵⁹ See *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 531 (1987) (holding defendant’s commercial use of “Olympic” in the title “Gay Olympic Games” violates the restricted use outlined in the OASA).

⁶⁰ See *id.* at 537.

⁶¹ See *id.* at 522.

⁶² See *id.*

⁶³ See *id.* at 534.

⁶⁴ See *id.* at 533.

⁶⁵ *Id.* at 537 (citing 1 J. McCarthy, *Trademarks and Unfair Competition* § 2:1, pp. 44–47 (1984)).

⁶⁶ *Id.* at 533 (citing *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575 (1977)); see also *Kelly Browne, A Sad Time for the Gay Olympics: San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 107 S. Ct. 2971 (1987), 56 U. CIN. L. REV. 1487, 1508 (1988).

⁶⁷ See *San Francisco Arts & Athletics, Inc.*, 483 U.S. at 533–44.

⁶⁸ See *id.*

2. Title 18 and Title 36 of the United States Code

Title 18 and 36 of the U.S.C. provide further examples of Congress' attempt to provide trademark protection beyond the Lanham Act.⁶⁹ Title 18 references certain instances where using the badge, medal, or emblem of veterans' organizations⁷⁰—or the Great Seal of the United States—amounts to a federal crime.⁷¹ Chapter 33 of Title 18 provides examples of emblems, insignia, and names that are exclusively protected. For example, 18 U.S.C. § 706 refers to the sign and insignia color of the Red Cross.⁷² The American National Red Cross and its employees, agents, as well as hospital authorities of the U.S. armed forces retain the exclusive right to use the Red Cross emblem.⁷³ Congress established a federal crime for the unauthorized or fraudulent wearing, displaying, or imitating of the Red Cross sign.⁷⁴ In *Johnson & Johnson v. American National Red Cross*,⁷⁵ the court noted that the American Red Cross has used the Red Cross symbol and its name for over 100 years.⁷⁶ The court also notes that the emblem has been used for various purposes, including shelters, first aid supplies for victims of disasters, and blood drives.⁷⁷ Thereby, the court upheld Congress' intent to protect the use of the Red Cross symbol.⁷⁸ Another instance where Congress expanded the scope of trademark protection was through 18 U.S.C. § 705, which made it a federal offense to sell or produce goods associated with any badge or emblem of any veterans' organization.⁷⁹ In *United States v. Dettra Flag Company, Inc.*,⁸⁰ the court affirmed the constitutionality of 18 U.S.C. § 705,⁸¹ noting the policy and purpose behind the enactment was an attempt to protect the veterans' interest in self-identification.⁸²

⁶⁹ See *Little League Baseball, Inc. v. Kaplan*, No. 08-60554-CIV, 2009 WL 10668763, at *8 (S.D. Fla. Mar. 3, 2009).

⁷⁰ See 18 U.S.C. § 705.

⁷¹ See 18 U.S.C. § 713.

⁷² 18 U.S.C. § 706.

⁷³ See *id.*

⁷⁴ § 19:75. There are statutory restrictions on use of institutional names or logos. See generally *Red Cross*, 4 Entertainment Law 3d: Legal Concepts and Business Practices § 19:75.

⁷⁵ 552 F. Supp. 2d 434 (S.D.N.Y. 2008).

⁷⁶ *Id.* at 448.

⁷⁷ See *id.*

⁷⁸ See *id.*

⁷⁹ See 18 U.S.C. § 705.

⁸⁰ See 86 F. Supp. 84 (E.D. Pa. 1949).

⁸¹ See *id.* at 85.

⁸² See *id.* at 86.

Further, Title 36—The Patriotic and National Observances, Ceremonies, and Organizations—states the Boy Scouts of America⁸³ and the Girl Scouts of the United States of America⁸⁴ have the “exclusive right to use all emblems and badges, descriptive or designated marks, and works or phrases” adopted by each of their respective corporations.⁸⁵ In *Wrenn v. Boy Scouts of America*,⁸⁶ the court noted the mark’s prevalence in the marketplace and the control of the Boy Scouts of America over its mark.⁸⁷ Specifically, the court found that the mark’s “extensive advertising, length of exclusive use, public recognition and uniqueness” is undisputed.⁸⁸ While discussing Congress’ ability to grant the Boy Scouts of America protections exceeding traditional trademark law, the court referenced Congress’ original intent in granting the limited property right by recognizing the fame, popularity, and prestige of the Boy Scouts of America in 1916.⁸⁹

C. Native American Cultural Property and Appropriation

Many historians and legal scholars have dedicated their research to demonstrating how intellectual property and cultural appropriation appear distinctly interrelated in the American legal system.⁹⁰ Cultural appropriation broadly refers to adopting existing cultural meanings, practices, or property from one source community and altering its meaning or form.⁹¹ The concept of cultural appropriation within intellectual property alludes to the mechanisms through which dominant groups acquire and frequently profit from subordinate groups’ artistic, musical, and intellectual contributions.⁹² From the Native American point of view, Canadian writer Lenore Keeshig-Tobias defined cultural appropriation as the taking of intellectual property, cultural expressions, artifacts, history, and approaches to knowledge from another’s culture.⁹³ Native American cultural property refers to “all material and

⁸³ See 36 U.S.C. § 30905.

⁸⁴ See 36 U.S.C. § 80305.

⁸⁵ *Id.*; see also 36 U.S.C. § 30905.

⁸⁶ No. C 03-04057 JSW, 2008 WL 4792683 (N.D. Cal. Oct. 28, 2008).

⁸⁷ See *id.* at *5.

⁸⁸ *Id.* (citing *Accuride Int., Inc. v. Accuride Corp.*, 871 F.2d 1531, 1536 (9th Cir. 1989)).

⁸⁹ See *id.* (citing H.R. Rep. No. 130 (1916)).

⁹⁰ See Sari Sharoni, *The Mark of a Culture: The Efficacy and Propriety of Using Trademark Law to Deter Cultural Appropriation*, 26 FED. CIR. B.J. 407, 416 (2017).

⁹¹ See Sally Engle Merry, *New Direction: Law, Culture, and Cultural Appropriation*, 10 YALE J.L. & HUMAN. 575, 585 (1998).

⁹² See *id.* at 585–86.

⁹³ See Olga Bryana Gonzalez, *Cultural Appropriation: The Native American Artist Struggle for Intellectual Property Protection in Canada, Mexico, and the United States*, 42

intangible knowledge considered significant to protect spiritual, social and artistic interests of a community.”⁹⁴

In response to the growing problem of unauthorized acquisitions of Native American religious and cultural property by institutions like museums and federal agencies, Congress attempted to provide legal safeguards against the disparate treatment of Native American tangible property.⁹⁵ On November 23, 1990, Congress passed NAGPRA,⁹⁶ which was enacted to afford Native Americans ownership and control of cultural objects—including Native American human remains and sacred objects—discovered on Federal or tribal land.⁹⁷ NAGPRA was the first law Congress enacted that allowed communal ownership.⁹⁸ Communal ownership—formally known as cultural patrimony—refers to objects and art owned by a culturally-affiliated tribe, rather than any individual member of a tribe.⁹⁹ Before NAGPRA, courts held that Native American tribes had no property interest in their communally owned objects despite their cultural significance.¹⁰⁰ However, NAGPRA created a cause of action for cultural patrimony, recognizing that such property may be intertwined with Native American tribal identity, existence, and well-being.¹⁰¹

In 1935, Congress enacted the IACA.¹⁰² In 1985, the U.S. Department of Commerce conducted a study that found the Indian arts and crafts industry

T. JEFFERSON L. REV. 1, 21 (2019) (citing Phillip Marchand, *Dancing to the Pork Barrel Polka*, TORONTO STAR, B6 (Aug. 5, 1992)).

⁹⁴ Jill Koren Kelley, *Owning the Sun: Can Native Culture Be Protected Through Current Intellectual Property Law*, 7 J. HIGH TECH. L. 180, 183–84 (2007).

⁹⁵ Trope & Echo-Hawk, *supra* note 24; *Interior Department Announces Final Rule for Implementation of the Native American Graves Protection and Repatriation Act*, U.S. DEPT. OF INTERIOR (Dec. 6, 2023), <https://www.doi.gov/pressreleases/interior-department-announces-final-rule-implementation-native-american-graves> [<https://perma.cc/YX5E-JGHT>].

⁹⁶ See Native American Graves Protection and Repatriation Act, 25 U.S.C. §§ 3001–3013.

⁹⁷ See *id.* at § 3002(a).

⁹⁸ See David B. Jordan, *Square Pegs and Round Holes: Why Native American Economic and Cultural Policies and United States Intellectual Property Law Don't Fit*, 24 AM. INDIAN L. REV. 93, 103 (2000).

⁹⁹ Sarah Harding, *Justifying Repatriation of Native American Cultural Property*, 72 IND. L. J. 723, 723–24 (1997) (citing 25 U.S.C. § 3001(3)(D)).

¹⁰⁰ *Onondaga Nation v. Thacher*, 29 Misc. 428, 434, 61 N.Y.S. 1027, 1032 (Sup. Ct. 1899), *aff'd*, 53 A.D. 561, 65 N.Y.S. 1014 (App. Div. 1900), *aff'd*, 169 N.Y. 584, 62 N.E. 1098 (1901) (holding the Onondaga Nation does not retain a property interest over their wampum belts because there is no individual owner).

¹⁰¹ See Harding, *supra* note 99, at 735, 750.

¹⁰² See 25 U.S.C. § 305.

reached \$800,000,000.00 in annual gross sales.¹⁰³ Recognizing the growth of Native American arts and crafts within the United States, Congress amended the IACA in 1990 to combat misrepresentation of Indian arts and crafts in the U.S. market by awarding injunctions and damages for misuse.¹⁰⁴ The IACA also established the Indian Arts and Crafts Board to promote the economic welfare of Native American tribes and individuals.¹⁰⁵ It grants the Indian Arts and Crafts Board the authority to create and register “trademarks of genuineness and quality for Indian products and the products of an individual Indian”¹⁰⁶ Congress intended that the provision regarding trademarks would provide an instrument of enforcement allowing the board to create, register, and pursue or defend trademarks of “genuineness and quality for Indian products.”¹⁰⁷

D. Navajo Nation v. Urban Outfitters

In 1868, through a treaty with the United States, the Navajo Nation was formally recognized as an independent, sovereign nation.¹⁰⁸ Since then, the Navajo Nation has grown into the largest Native American tribe out of the 574 federally-recognized tribes in the United States.¹⁰⁹ Its population has reached nearly 400,000 citizens, and the Navajo Nation reservation exceeds 17 million acres across Arizona, New Mexico, and Utah.¹¹⁰ The Navajo Nation has used NAVAJO as a trademark to sell goods and services for the past 150 years, spending more than \$3.8 million annually to market its products.¹¹¹ These products include “clothing, accessories, blankets, jewelry, foods, tools, decorations, crafts, gaming establishments, tourism, educational institutions, retail services, fairs and events, and a news publication.”¹¹² Since 1943, the Navajo Nation has taken steps to register the NAVAJO trademark with the

¹⁰³ Jon K. Parsley, *Regulation of Counterfeit Indian Arts and Crafts: An Analysis of the Indian Arts and Crafts Act of 1990*, 18 AM. INDIAN L. REV. 487, 489 (1993) (citing H.R. REP. NO. 400(I), pt. 1, at 5 (1990)).

¹⁰⁴ See 25 U.S.C. § 305e(b).

¹⁰⁵ See 25 U.S.C. § 305a.

¹⁰⁶ *Id.*

¹⁰⁷ Parsley, *supra* note 103; 25 U.S.C. § 305a.

¹⁰⁸ See *Arizona v. Navajo Nation*, 599 U.S. 555, 558 (2023).

¹⁰⁹ See Simon Romero, *Navajo Nation Becomes Largest Tribe in U.S. After Pandemic Enrollment Surge*, N.Y. TIMES (May 21, 2021), <https://navajoprofile.wind.enavajo.org> [<https://perma.cc/UD7K-A7QV>].

¹¹⁰ See *id.*

¹¹¹ See *Navajo Nation v. Urb. Outfitters, Inc.*, No. 12-195 BB/LAM, 2016 WL 3475342, at *2 (D.N.M. May 13, 2016).

¹¹² Amended Complaint for Injunctive Relief and Damages, *Navajo Nation v. Urb. Outfitters, Inc.*, No. 1:12-cv-00195-LH-WDS (D.N.M. May 21, 2012).

United States Patent and Trademark Office (“USPTO”).¹¹³ In fact, the Navajo Nation currently has eighty-six registered trademarks using the word NAVAJO with the USPTO, resulting in over half a billion dollars in sales under the mark.¹¹⁴ Accordingly, the NAVAJO mark symbolizes the Navajo Nation as a sovereign entity within the United States.¹¹⁵

Urban Outfitters, Inc. is an internationally recognized retail company with over 200 stores worldwide.¹¹⁶ Beginning in March 2009, Urban Outfitters marketed and sold various product lines—clothing, handbags, accessories, jewelry, and flasks—using the NAVAJO and NAVAHO trademarks:¹¹⁷

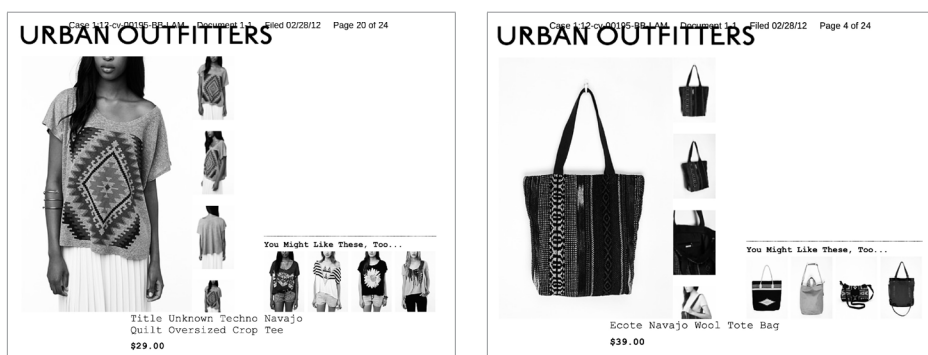


Figure I. “Title Unknown Techno Navajo Quilt Oversized Crop Tee” and “Ecote Navajo Wool Tote Bag.”¹¹⁸

Moreover, Urban Outfitters and its subsidiaries’ goods incorporated the NAVAJO mark and tribal patterns, mimicking and resembling the Navajo Nation’s geometric prints and designs.¹¹⁹ These goods include Navajo Nation Crew Pullovers, Navajo Feather Earrings, Navajo Hipster Panties, and Ecote Navajo Wool Tote Bags:¹²⁰

¹¹³ See *id.*

¹¹⁴ See *id.*; Navajo Nation v. Urb. Outfitters, Inc., 918 F. Supp. 2d 1245, 1249 (D.N.M. 2013).

¹¹⁵ See Amended Complaint for Injunctive Relief and Damages, *supra* note 112.

¹¹⁶ See *Navajo Nation*, 918 F. Supp. 2d at 1249.

¹¹⁷ Moynihan, *supra* note 22, at 64.

¹¹⁸ Complaint Exhibit A, at 4, 20, Navajo Nation v. Urban Outfitters, Inc., No. 1:12-cv-00195 (D.N.M. Feb. 28, 2012).

¹¹⁹ See Amended Complaint for Injunctive Relief and Damages, *supra* note 112, at 3 (defendant Urban Outfitters, Inc. owns various subsidiary brands, including Anthropologie, Free People, Terrain, and BHLDN).

¹²⁰ See *id.* at 6–7. Ecote is a brand and collection created by Urban Outfitters, which incorporates bohemian and classic hippie vibes. See *Ecote*, LYST, <https://www.lyst.com/designer/ecote/> [https://perma.cc/SG2M-NXXP] (last visited Mar. 18, 2025).

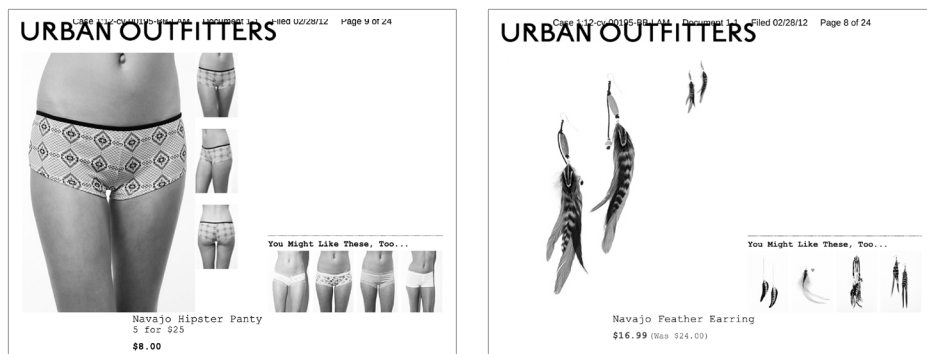


Figure II. “Navajo Hipster Panty” and “Navajo Feather Earring.”¹²¹

Furthermore, Urban Outfitters and its subsidiaries utilized the NAVAJO mark within its internal search engine to make it easier for consumers to access these goods and promote them on its internet platform.¹²² In 2011, Urban Outfitters retracted the product line following a cease-and-desist letter from the Navajo Nation’s Department of Justice.¹²³

On February 28, 2012,¹²⁴ the Navajo Nation brought a six-count lawsuit against Urban Outfitters claiming “trademark infringement, trademark dilution, unfair competition, false advertising, commercial practices laws violations, and violation of the Indian Arts and Crafts Act.”¹²⁵ On May 21, 2012, the Navajo Nation filed an Amended Complaint for Injunctive Relief and Damages.¹²⁶ In Count Two of the complaint, the Navajo Nation argued that Urban Outfitters’ use of the NAVAJO and NAVAHO marks to market and sell its product line constituted willful trademark dilution by blurring and dilution by tarnishment—directly violating § 1125(c) of the Lanham Act.¹²⁷ In response to the trademark dilution claim, Urban Outfitters alleged

¹²¹ Complaint Exhibit A, at 8–9, Navajo Nation v. Urban Outfitters, Inc., No. 1:12-cv-00195 (D.N.M. Feb. 28, 2012).

¹²² See Amended Complaint for Injunctive Relief and Damages, *supra* note 112, at 6. Urban Outfitters also operates a significant online presence through websites such as www.urbanoutfitters.com, www.freepeople.com, and www.anthropologie.com. See *id.* at 3.

¹²³ Moynihan, *supra* note 22, at 64–65.

¹²⁴ Navajo Nation v. Urb. Outfitters, Inc., 918 F. Supp. 2d 1245, 1251 (D.N.M. 2013).

¹²⁵ *Id.* at 1249–50.

¹²⁶ See Amended Complaint for Injunctive Relief and Damages, *supra* note 112, at 1.

¹²⁷ *Navajo Nation*, 918 F. Supp. 2d at 1250; see also 15 U.S.C. § 1125. The TDRA defines trademark dilution by blurring as an “association arising from the similarity between a mark or trade name and a famous mark that impairs the distinctiveness of the famous mark,” while dilution by tarnishment refers to an “association arising from the similarity between a mark or trade name and a famous mark that harms the reputation of the famous mark”. 15 U.S.C. § 1125(c)(2)(B)–(C). The TDRA outlines relevant factors a court considers when assessing a dilution by blurring claim, including the degree of similarity between the marks,

the mark did not meet the heightened standard required for famous marks, given the lack of evidentiary proof.¹²⁸

Despite the NAVAJO mark's significant impact on the U.S. market, the United States District Court for the District of New Mexico ruled that it was neither nationally recognized nor a "household name."¹²⁹ The district court found that the Navajo Nation mark did not meet the requisite elements required under the TDRA for trademark dilution by blurring or dilution by tarnishment.¹³⁰ Citing *Coach Services*, the court noted the heightened standard for establishing a mark as famous requires "widespread recognition by the general public," essentially designating it as a "household name."¹³¹ The court's opinion quoted the Federal Circuit's decision in *Coach Services*, establishing that a mark must be recognized by a broader market, rather than appealing to a niche one.¹³² Here, despite the Navajo Nation providing evidence of widespread distribution and advertisements for its goods, the lack of surveys or additional concrete evidence was taken to demonstrate that NAVAJO had not become a household name.¹³³ The district court also provided an alternative explanation for the insufficient evidence of trademark dilution.¹³⁴ It specified that even if the NAVAJO mark was widely recognized, the Navajo Nation failed to substantiate that it was perceived by "more than a niche of

the degree of inherent or acquired distinctiveness of the known mark, whether the owner of the famous mark excludes the use of its mark, how recognizable the famous mark is, the attempted association with the famous mark, and whether there is an actual association between the two marks. 15 U.S.C. § 1125(c)(2)(B).

¹²⁸ See Reply in Support of Defendants' Motion to Dismiss the Amended Complaint, *Navajo Nation v. Urb. Outfitters, Inc.*, No. CIV 2012-00195 LH-WDS (D.N.M. Aug. 7, 2012).

¹²⁹ *Navajo Nation v. Urb. Outfitters, Inc.*, No. 12-195 BB/LAM, 2016 WL 3475342, at *4 (D.N.M. May 13, 2016).

¹³⁰ See *id.* at *5.

¹³¹ *Id.* at *3 (citing *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1373 (Fed. Cir. 2012)).

¹³² *Id.* at *4–5 (citing *Coach Servs., Inc. v. Triumph Learning LLC*, 668 F.3d 1356, 1372 (Fed. Cir. 2012)).

¹³³ See *id.* at *4 (The court noted that "conclusory allegations of nationwide recognition without surveys or other supporting evidence are insufficient to show that a mark is a household name." While this may have been a situation where Navajo Nation's counsel and experts failed to provide sufficient evidence through surveys, the court made clear there were more substantial reasons for denying the trademark claim. The court noted that despite the Navajo Nation's annual spending \$3.8 million for marketing and their numerous trademarks, being widely recognized is not enough under the TDRA—the marks must be recognized as famous and distinctive by the general consuming public.).

¹³⁴ See *id.* at *5.

the broader public.”¹³⁵ Given the high standard of proof required and lack of requisite evidence, the district court held that the Navajo Nation could not recover for its trademark dilution claim.¹³⁶

II. Analysis

The *Navajo Nation* decision highlights the inadequacy of U.S. trademark law in protecting the rights of Native American tribes.¹³⁷ The heightened standard for fame in trademark dilution claims applied in this case, rooted in the Federal Circuit’s precedent in *Coach Services*, underscores the need for the Federal Circuit to adopt a more comprehensive standard for determining the fame requirement, particularly as it pertains to Native American intellectual property and cultural expressions. Further, statutes like the OASA and U.S.C. Titles 18 and 36 illustrate Congress’ ability to regulate and expand the scope of trademark law.¹³⁸ However, despite Congress’ attempt to preserve Native American tangible property through laws such as NAGPRA and the IACA, federal Indian law remains limited.¹³⁹ Thus, as the stated legislation exemplifies, Congress has both the authority and the responsibility to expand the scope of federal trademark and federal Indian law to better protect Native American intellectual and cultural heritage.¹⁴⁰

A. Federal Trademark Law

Congress has demonstrated its authority and capability to grant intellectual property protections outside the scope of traditional federal laws.¹⁴¹ The exclusive rights established in the OASA and Title 18 and Title 36 of the U.S.C. demonstrate Congress’ ability to expand trademark protection in certain instances and for specific groups or associations.¹⁴² Various courts and pieces of legislative history and materials illustrate the congressional purpose and intent for these exclusive rights.¹⁴³ This same approach should apply to creating a limited or exclusive property right for Native American tribes.

¹³⁵ *Id.* at *4.

¹³⁶ *See id.* at *5.

¹³⁷ *See Sharoni, supra* note 90, at 416–20.

¹³⁸ *See San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 537 (1987); 36 U.S.C. § 80305; 36 U.S.C. § 30905; *see* 18 U.S.C. § 713.

¹³⁹ *See Martin, supra* note 9, at 44.

¹⁴⁰ *See supra* Sections I.B–C.

¹⁴¹ *See Little League Baseball, Inc. v. Kaplan*, No. 08-60554-CIV, 2009 WL 10668763, at *8 (S.D. Fla. Mar. 3, 2009).

¹⁴² *See supra* Section I.B.

¹⁴³ *See supra* Section I.B.

1. *The Olympic and Amateur Sports Act*

The same reasoning for expanding trademark rights in *San Francisco Arts & Athletics* by the Supreme Court should apply to Native American cultural expressions and intellectual property. Analogous to how the United States recognized the word “Olympic” in commerce in 1896,¹⁴⁴ it also officially deemed the Navajo Nation as “Navajo” in 1849.¹⁴⁵ In addition, Congress acknowledged the time, effort, and expense the USOC has spent to bolster the commercial and promotional value of the products associated with the word “Olympic.”¹⁴⁶ Similarly, since 1943, the Navajo Nation has used its name and a registered trademark, NAVAJO, in conjunction with the marketing and selling of goods, such as clothing and accessories.¹⁴⁷ Aside from spending over \$3.8 million a year on marketing, the Navajo Nation provided evidence that¹⁴⁸ it accrued over \$500 million in selling its goods.¹⁴⁹ The Navajo Nation’s substantial presence in the U.S. marketplace is comparable to the USOC’s use of the word “Olympic.”

Moreover, the Supreme Court in *San Francisco Arts & Athletics* stated that the USOC performed activities representing national interests and objectives.¹⁵⁰ Given the national relevance of the word “Olympic,” the Supreme Court noted that Congress wanted to “ensure that the USOC receives the benefit of its own efforts so that the USOC will have an incentive to continue to produce a ‘quality product,’ that, in turn, benefits the public.”¹⁵¹ Native American tribes have little control or power to limit or prevent the use of their names in association with others’ products, which is a contributing factor to the economic hardships that Native Americans face.¹⁵² While Native American intellectual property rights are governed under traditional federal trademark laws, tribes often fail to receive adequate economic benefits from the sale of

¹⁴⁴ See *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 533 (1987).

¹⁴⁵ See Amended Complaint for Injunctive Relief and Damages, *supra* note 112, at 2.

¹⁴⁶ See *San Francisco Arts & Athletics, Inc.*, 483 U.S. at 533 (citing *Zacchini v. Scripps-Howard Broad. Co.*, 433 U.S. 562, 575 (1977)).

¹⁴⁷ See Amended Complaint for Injunctive Relief and Damages, *supra* note 112, at 2.

¹⁴⁸ See *id.* at 4–5.

¹⁴⁹ See *Navajo Nation v. Urb. Outfitters, Inc.*, 835 F. Supp. 2d 1147, 1166 (D.N.M. 2013).

¹⁵⁰ *San Francisco Arts & Athletics, Inc.*, 483 U.S. at 544.

¹⁵¹ *Id.* at 537 (citing 1 J. McCarthy, *Trademarks and Unfair Competition* § 2:1, pp. 44–47 (1984)).

¹⁵² See Trey V. Perez, *Native American Intellectual Property Protection: Altering Federal IP Law and the Indian Arts and Crafts Act to Aid Tribal Economic Development*, 11 AM. INDIAN L. J. 1, 4 (2023).

their products.¹⁵³ Specifically, Native American tribes suffer economic loss due to the unauthorized reproductions of their traditional property and designs, given that many tribes and individual Native artists do not have the monetary resources to initiate a trademark infringement action.¹⁵⁴ Congress originally enacted the OASA to ensure that the USOC receives adequate benefits for producing goods concerning the word “Olympic,” because it serves a national purpose.¹⁵⁵ The demonstrated economic disadvantages that Native American tribes suffer from the lack of protection for their cultural and intellectual property could be combated by the enactment of a similar limited property right afforded to the USOC.¹⁵⁶

2. Title 18 and Title 36 of the United States Code

The purpose of enacting Title 18 and Title 36 of the U.S.C. can be applied to creating an exclusive property right for Native American tribes.¹⁵⁷ In *Johnson & Johnson*, the court recognized the particular act of Congress to create an exclusive right to the Red Cross emblem.¹⁵⁸ As the court noted, the Red Cross symbol has been used for over 100 years by the American National Red Cross and its employees, agents, hospital authorities, and the armed forces.¹⁵⁹ The Red Cross emblem is readily recognizable, given its association with various groups and areas, such as shelters, first aid supplies for victims of disasters, and blood drives.¹⁶⁰ In contrast, the *Navajo Nation* court held that the word “Navajo” did not meet the famous threshold required for a trademark dilution claim.¹⁶¹ While 18 U.S.C. § 706 establishes a federal crime for the unauthorized use of the Red Cross symbol because it is well known, the word “Navajo” should hold the same value and recognition.¹⁶²

Title 36 of the U.S.C. affords exclusive rights to use the emblem, symbols, or words associated with the Boy Scouts of America and the Girl Scouts of the

¹⁵³ See *id.* (citing U.S. GOV'T ACCOUNTABILITY OFF., GAO-11-432, INDIAN ARTS AND CRAFTS: SIZE OF MARKET AND EXTENT OF MISREPRESENTATION ARE UNKNOWN 9 (2011)).

¹⁵⁴ See *id.* at 11.

¹⁵⁵ *San Francisco Arts & Athletics, Inc.*, 483 U.S. at 537 (citing 1 J. McCarthy, Trademarks and Unfair Competition § 2:1, pp. 44–47 (1984)).

¹⁵⁶ See *e.g.*, *Little League Baseball, Inc. v. Kaplan*, No. 08-60554-CIV, 2009 WL 10668763, at *8 (S.D. Fla. Mar. 3, 2009).

¹⁵⁷ See *id.*

¹⁵⁸ See *Johnson & Johnson v. Am. Nat. Red Cross*, 552 F. Supp. 2d 434, 448 (S.D.N.Y. 2008).

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*

¹⁶¹ *Navajo Nation v. Urb. Outfitters, Inc.*, No. 12-195 BB/LAM, 2016 WL 3475342, at *4 (D.N.M. May 13, 2016).

¹⁶² 18 U.S.C. § 706.

United States of America.¹⁶³ In *Wrenn*, the court reaffirmed Congress' original intent in the limited property right that the Boy Scouts of America possess, given its fame, popularity, and prestige.¹⁶⁴ The court provided evidence of the symbol's advertising, length of use, public recognition, and uniqueness.¹⁶⁵ The Navajo Nation presented the same evidence in *Navajo Nation*—illustrating that for the past 150 years, the Navajo Nation has spent over \$3.8 million extensively marketed and advertised its products.¹⁶⁶ Yet, the *Navajo Nation* court did not find the word “Navajo” to be a nationally recognized household name.¹⁶⁷ Native American tribes are identified by the U.S. legal system as sovereign nations, thus possessing a significant status in the United States.¹⁶⁸ As a sovereign nation, Native American tribes can enter into treaties, trade agreements, and military alliances.¹⁶⁹ While the inherent powers granted to Native American tribes have their limits, the Indian nations have the power to assert their rights as a sovereign nation.¹⁷⁰ This demonstrates the need for Congress to find that the Navajo Nation, as well as other Native American tribes, possess enough recognition in the United States to grant unique statutory protections.¹⁷¹

B. Federal Indian Law: The Native American Graves Protection and Repatriation Act and the Indian Arts and Crafts Act

With the enactment of NAGPRA and the IACA, Congress attempted to preserve and safeguard cultural property and artifacts. However, Native American tribes continue to suffer economic harm from the commercial use of their works and property because they are not fairly compensated.¹⁷² In 2021, the U.S. Census Bureau analyzed and collected data on poverty levels by racial and ethnic groups and found that 21.4% of American Indians and

¹⁶³ See 36 U.S.C. § 30905; 36 U.S.C. § 80305.

¹⁶⁴ *Wrenn v. Boy Scouts of Am.*, No. C 03-04057 JSW, 2008 WL 4792683, at *5 (N.D. Cal. Oct. 28, 2008) (citing H.R. Rep. No. 130 (1916)).

¹⁶⁵ See *id.* (citing *Accuride Int., Inc. v. Accuride Corp.*, 871 F.2d 1531, 1535 (9th Cir. 1989)).

¹⁶⁶ See *Navajo Nation*, 2016 WL 3475342, at *2.

¹⁶⁷ See *id.* at *4.

¹⁶⁸ See Nancy Kremers, *Speaking with a Forked Tongue in the Global Debate on Traditional Knowledge and Genetic Resources: Is U.S. Intellectual Property Law and Policy Really Aimed at Meaningful Protection for Native American Cultures?*, 15 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 70 (2004).

¹⁶⁹ Kirke Kickingburd et al., *Indian Sovereignty*, in NATIVE AMERICAN SOVEREIGNTY 1, 6 (John R. Wunder ed., 1999).

¹⁷⁰ See *id.* at 17.

¹⁷¹ See *id.*

¹⁷² Sharoni, *supra* note 90, at 413.

Alaskan Natives fell below the poverty line.¹⁷³ When discussing the misrepresentation and market presence of Native American arts and crafts, the U.S. Government Accountability Office noted that the “sale of goods falsely represented as authentic Indian-produced arts and crafts has been a persistent and potentially growing problem in the United States.”¹⁷⁴ Thus, intellectual property and cultural appropriation appear distinctly interrelated in the American legal system.

Congress passed NAGPRA in 1990 to afford Native American tribes protection for human remains and cultural objects.¹⁷⁵ While NAGPRA was one of the first pieces of legislation that granted Native American cultural property protection, its application has its limits.¹⁷⁶ NAGPRA does not apply to Native American intangible property—such as songs, ceremonies, and dances,¹⁷⁷ which are an integral part of Native American culture.¹⁷⁸ Instead, NAGPRA focuses on physical property by developing a concrete category of indigenous objects subject to protection: “human remains, associated and unassociated funerary objects, sacred objects, and ‘objects of cultural patrimony,’” if sufficiently central to a tribe’s culture.¹⁷⁹ While this alludes to cultural property, NAGPRA is narrowly tailored to apply only to objects with demonstrated intellectual significance.¹⁸⁰ Thus, for cultural property to be protected, it must be tethered to physical property, like an artifact.¹⁸¹ Another limitation of NAGPRA is that it only applies to federal agencies and museums possessing protected cultural property.¹⁸² However, private entities and institutions, such as “art auction houses, dealers and private collectors,” are not held accountable through the Act.¹⁸³

The IACA is another federal Indian law enacted that lacks actual protections and contains significant limitations to affording Native American tribes adequate protection.¹⁸⁴ The IACA provides protection for Native American artists’ work and cultural symbols that are marketed and sold as “authentic

¹⁷³ Perez, *supra* note 152, at 2.

¹⁷⁴ *Id.* at 4 & n.21; U.S. GOV’T ACCOUNTABILITY OFF., GAO-11-432, INDIAN ARTS AND CRAFTS: SIZE OF MARKET AND EXTENT OF MISREPRESENTATION ARE UNKNOWN 1 (2011).

¹⁷⁵ See Kelley, *supra* note 66, at 193.

¹⁷⁶ See *id.* at 194–95.

¹⁷⁷ See Cortelyou C. Kenney, *Reframing Indigenous Cultural Artifacts Disputes: An Intellectual Property-Based Approach*, 28 CARDOZO ARTS & ENT. L.J. 501, 533 (2011).

¹⁷⁸ See Perez, *supra* note 152, at 12.

¹⁷⁹ Kenney, *supra* note 177, at 533 (citing 25 U.S.C. §§ 3001–3013).

¹⁸⁰ See *id.*

¹⁸¹ See *id.* at 550.

¹⁸² 25 U.S.C. § 3001.

¹⁸³ Kelley, *supra* note 66, at 194–95, 194 n.106.

¹⁸⁴ See Martin, *supra* note 9, at 44.

Indian products.”¹⁸⁵ The IACA’s narrow definition of “authentic Indian products” provides a robust federally protected work category.¹⁸⁶ Federal law associates “Indian” with tribal enrollment; however, despite an individual having a complete Indigenous ancestry, they will not be considered Indian for legal purposes unless they are registered with a federally recognized tribe.¹⁸⁷ Rather than protecting craft practices or aesthetic styles, the IACA focuses on the authenticity and genuineness of an Indian product, thus limiting the scope of protection.¹⁸⁸ Additionally, rather than being afforded immediate protection for their products, the IACA requires Native American artists to take affirmative steps to suggest the product is Indian-produced and advertised.¹⁸⁹ Because individual artists may not have the resources or understanding to take these affirmative steps, many of their claims will be left unaccounted for.¹⁹⁰

Furthermore, the IACA established the Indian Arts and Crafts Board to “promote the economic welfare of the Indian tribes and individuals through the development of Indian arts and crafts and the expansion of the market for the products of Indian art and craftsmanship.”¹⁹¹ Congress created a trademark program through the IACA, allowing the Board to establish marks that fell within the scope of the IACA.¹⁹² While this seemed like a promising avenue of protection for Native American artists and artisans, it has not been implemented.¹⁹³ Because the Lanham Act requires that an owner of a mark use, or intends to use, the mark in commerce, the result of the IACA trademark program fails to meet the statutory requirements of trademark law.¹⁹⁴

III. Recommendations

A. The Federal Circuit’s New Standard for Trademark Dilution

The Federal Circuit’s decision in *Coach Services* highlights the strict interpretation of the famous requirement for a trademark dilution claim.¹⁹⁵ The TDRA states, “[i]n determining whether a mark possesses the requisite degree

¹⁸⁵ *Id.*

¹⁸⁶ William J. Hapiuk, Jr., *Of Kitsch and Kachinas: A Critical Analysis of the Indian Arts and Crafts Act of 1990*, 53 STAN. L. REV. 1009, 1012 (2001).

¹⁸⁷ *See id.*

¹⁸⁸ *See id.* at 1031.

¹⁸⁹ Martin, *supra* note 9, at 44.

¹⁹⁰ *See id.*

¹⁹¹ 25 U.S.C. § 305a.

¹⁹² *See* Moynihan, *supra* note 22, at 70.

¹⁹³ *See id.* at 71.

¹⁹⁴ *See id.*

¹⁹⁵ *See* Coach Servs., Inc. v. Triumph Learning LLC, 668 F.3d 1356, 1360 (Fed. Cir. 2012).

of recognition, the court may consider all relevant factors.”¹⁹⁶ These factors include the mark’s advertisement and publicity, the extent of the sales of goods or services using the mark, the extent of “actual recognition” of the mark, and the date the mark was registered.¹⁹⁷ Congress explicitly indicated that these four factors are not exclusive, allowing courts to analyze other evidence, such as the distinctiveness of a mark and its reach.¹⁹⁸ This includes whether the mark is recognized by the general consuming public of the United States as a “household name” or is limited to a niche market.¹⁹⁹ Despite congressional intent and the statute’s language, courts continue to apply a narrow interpretation by denying trademark dilution claims when the mark is not a household name, notwithstanding significant evidence under the other TDRA factors.²⁰⁰ For instance, the district court in *Navajo Nation* dismissed the Navajo Nation’s federal trademark dilution claim given the lack of concrete evidence that NAVAJO was a household name, in spite of widespread distribution and advertisements for its goods as well as the duration of the mark’s use.²⁰¹

Just as the Supreme Court recognized the historical origin and national significance of the OLYMPIC mark when upholding its protection, the Federal Circuit should adopt a more holistic approach in evaluating trademark dilution. Rather than placing disproportionate weight on whether the mark is a household name, the Federal Circuit should weigh the factors and evidence presented equally. Moreover, integrating additional factors—specifically, the association between the mark and its holder, the original intent behind its conception, cultural significance and community recognition, and the historical legacy of the mark—merits careful consideration. By considering the correlation between the mark and its owner, the Federal Circuit can acquire a more nuanced understanding of the cultural or community ties associated with the mark. For instance, if the mark provides affiliation to the identity of a particular demographic group, especially those with unique cultural, spiritual, or historical significance, it will reveal how the mark functions not only as a commercial identifier but also as a symbol of group identity and heritage.²⁰²

¹⁹⁶ 15 U.S.C. § 1125(c).

¹⁹⁷ *Id.*

¹⁹⁸ See *Bentley v. NBC Universal, LLC*, No. CV1603693TJHKSX, 2016 WL 10570587, at *3 (C.D. Cal. Sept. 28, 2016); see also *Navajo Nation v. Urb. Outfitters, Inc.*, No. 12-195 BB/LAM, 2016 WL 3475342, at *3 (D.N.M. May 13, 2016).

¹⁹⁹ See *Bentley*, 2016 WL 10570587, at *3–4; see also *Navajo Nation*, 2016 WL 3475342, at *4.

²⁰⁰ See generally *Navajo Nation*, 2016 WL 3475342, at *4.

²⁰¹ See *id.*

²⁰² See Chi-Ru Jou, *The Perils of a Mental Association Standard of Liability: The Case Against the Subliminal Confusion Cause of Action*, 11 VA. J.L. & TECH. 2, 30 (2006).

Another factor is whether the mark qualifies as a geographical indication (“GI”). The USPTO defines GIs as “indications that identify a good as originating in the territory of a country, or from a region or locality within that territory.”²⁰³ These indications denote qualities or reputations associated with their geographic origin.²⁰⁴ For example, the Federal Circuit could consider the geographical impact of the Navajo Nation. As a sovereign entity spanning a vast geographical area, the Navajo Nation has gained widespread recognition through collective centuries of movies, TV shows, and novels.²⁰⁵ By acknowledging the geographic influence of Native American tribes, the Federal Circuit could incorporate this factor into its analysis of whether the mark meets the fame requirement.

In addition, examining the original purpose behind a mark’s creation would shed light on its historical context and relevance.²⁰⁶ Many marks, particularly those tied to Native American intellectual and cultural property, were designed to preserve cultural traditions, embody collective memory, and express shared identity.²⁰⁷ These marks act as carriers of history and heritage, emphasizing that trademarks can hold profound cultural and historical value beyond their commercial purpose.

Finally, and perhaps most crucially, recognizing the historical legacy of the mark would allow the Federal Circuit to appreciate the mark’s role as a living symbol of historical and cultural significance. Many marks, including those mentioned in *Navajo Nation*, are deeply rooted in a group’s traditions, struggles, and resilience over time.²⁰⁸ These longstanding symbols can hold immense importance for a community’s sense of identity and continuity.²⁰⁹

By shifting focus from the narrow “household name” standard to a comprehensive evaluation of all relevant factors—both under the TDRA and additional ones mentioned above—the Federal Circuit can create a more equitable standard for determining fame.²¹⁰ Native American tribes, as well

²⁰³ *Geographical Indications*, USPTO, <https://www.uspto.gov/ip-policy/trademark-policy/geographical-indications> [<https://perma.cc/5Y9K-8EXQ>] (last visited Feb. 21, 2025).

²⁰⁴ *See id.*

²⁰⁵ *See* Lewis Randolph, *The New Navajo Cinema: Cinema and Nation in the Indigenous Southwest*, *THE VELVET LIGHT TRAP* 66, 50 (2010).

²⁰⁶ *See generally* Elizabeth L. Rosenblatt, *Rethinking the Parameters of Trademark Use in Entertainment*, 61 *FLA. L. REV.* 1011, 1057 (2009).

²⁰⁷ *See generally* Reed, *supra* note 3, at 1387 (discussing how Native American intellectual property fosters culturally distinct Native American communities by cultivating individuality and distinctive qualities).

²⁰⁸ *See id.* at 1387–89.

²⁰⁹ *See id.* at 1387.

²¹⁰ *See generally* *Navajo Nation v. Urb. Outfitters, Inc.*, No. 12-195 BB/LAM, 2016 WL 3475342, at *4 (D.N.M. May 13, 2016); 15 U.S.C. § 1125(c).

as other minority communities, often lack the resources to market and promote their marks to the same extent as other entities, making it particularly challenging for their marks to meet the current stringent requirements.²¹¹ Thus, if the Federal Circuit adopts a more inclusive approach, there would be greater safeguards for Native American intellectual property and cultural expressions, ensuring these communities receive the protection they deserve under trademark dilution law.

B. Exclusive Intellectual Property Rights for Native Americans

Congress has attempted to provide adequate protections for Native American tribes through NAGPRA and IACA; however, the execution of these Acts has fallen short.²¹² It is within Congress' authority to expand the scope of federal trademark and federal Indian law.²¹³ Therefore, Congress should create the same limited property rights for Native American tribes as it has for other organizations to combat the misrepresentation and lack of compensation for their goods and services. Congress has expanded the scope of trademark protection through OASA and Title 18 and Title 36 of the U.S.C.²¹⁴

The OASA affords the USOC an exclusive right over words, symbols, and emblems associated with Olympic, Paralympic, and Pan-American Games.²¹⁵ In addition, unlike traditional federal trademark laws, the OASA allows the USOC to contest the use of its property by not requiring evidence of consumer confusion and disallowing normal statutory defenses.²¹⁶ Further, 18 U.S.C. § 706, 36 U.S.C. § 30905, and 36 U.S.C. § 80305 create a federal criminal cause of action for the unauthorized use of the Red Cross, Boy Scouts of America, and the Girl Scouts of the United States of America symbols.²¹⁷ By creating an exclusive right to use words, symbols, and other marks associated with particular Native American tribes, Congress would expand the federal trademark protection of Native American intellectual and cultural property.²¹⁸ This would also allow more Native American tribes to assert the unauthorized use of their property as a federal crime while limiting the need

²¹¹ See Perez, *supra* note 152, at 4; U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 176, at 9; Moynihan, *supra* note 22, at 72–73.

²¹² See discussion *supra* Section II.B.

²¹³ See discussion *supra* Sections I.B–C.

²¹⁴ See *supra* Section I.B.

²¹⁵ See *id.*

²¹⁶ See *San Francisco Arts & Athletics, Inc. v. U.S. Olympic Comm.*, 483 U.S. 522, 531 (1987).

²¹⁷ See *supra* Section I.B.

²¹⁸ See *id.*

for evidence of consumer confusion and the normal statutory defenses offered to unauthorized users.²¹⁹

Conclusion

Navajo Nation not only underscores the restricted protections regarding intellectual property and cultural expressions but also highlights the need for change in this country.²²⁰ This Note pieces together the impact of appropriation, lack of recognition, and compensation afforded to Native American tribes to argue that the Federal Circuit should establish a new standard for assessing trademark dilution. Further, Congress should create an exclusive property right over Native American intangible and cultural expressions, as it has demonstrated the authority to do so in the past.²²¹ Instead of merely focusing on whether the mark is a household name, the Federal Circuit should apply a holistic view of the factors stated in the TDRA while also analyzing the association between the mark and its holder and the original intent behind its creation.²²²

Moreover, Congress must protect the intellectual property of Native American tribes in the same capacity as it does for other organizations, including the USOC, the American National Red Cross, the Boy Scouts of America, and the Girl Scouts of the United States of America.²²³ These statutes demonstrate Congress' ability to recognize exclusive rights and extend tailored legal protections to specific groups. While Congress passed NAGPRA and IACA to protect Native American tribes, the extent of the protections is insufficient.²²⁴ Implementing the recommendations set forth above will afford greater protections to Native American tribes and artists to combat the glorification and appropriation of Native American imagery that has been prevalent in our country for centuries.²²⁵

²¹⁹ See *San Francisco Arts & Athletics*, 483 U.S. at 531.

²²⁰ See discussion *supra* Section II.A.

²²¹ See discussion *supra* Section III.B.

²²² See discussion *supra* Part III.

²²³ See discussion *supra* Section I.B.

²²⁴ See discussion *supra* Section II.B.

²²⁵ Riley & Carpenter, *supra* note 2, at 863.

An Origin-Based Analysis of the Uyghur Forced Labor Prevention Act

Kelly Zhang*

Introduction

By 2021, the plight of the Uyghurs, an ethnic and religious minority that populate the Xinjiang Uyghur Autonomous Region (“XUAR”) of the People’s Republic of China, captured international attention for the Chinese government’s enactment of forced labor practices and other human rights abuses.¹ The Chinese government allegedly “detained and ‘reeducated’ more than 1 million Uyghurs and other Muslim and ethnic minorities” in the XUAR, directing them to perform factory work and forcibly transferring them to work all over the country.² Various governments, including the United States, responded to this revelation with legislation targeting forced labor and focusing on products from the XUAR.³ The United States has declared ending forced labor as a “moral, economic, and national security imperative.”⁴

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¹ See Press Release, Off. of the High Comm’r, China: UN experts deeply concerned by alleged detention, forced labour of Uyghurs (Mar. 29, 2021) (on file with author).

² See Amy Lehr, *Addressing Forced Labor in the Xinjiang Uyghur Autonomous Region*, CTR. FOR STRATEGIC & INT’L STUD. 1–2 (Jul. 30, 2020, 2:54 PM), https://csis-website-prod.s3.amazonaws.com/s3fs-public/publication/200730_Lehr_XinjiangUyghurForcedLabor_brief_FINAL_v2.pdf [https://perma.cc/QR7H-38SP]. Modern slavery includes forced labor, which is defined by the International Labor Organization (“ILO”) as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself or herself voluntarily.” ILO Convention (No. 29) Concerning Forced or Compulsory Labour art. 2(1), June 28, 1930, 39 U.N.T.S. 55. Forced labor may be imposed by state authorities as a means of racial, religious, or other discrimination. See ILO Convention (No. 105) Concerning the Abolition of Forced Labour art. 1(e), June 25, 1957, 320 U.N.T.S. 291.

³ See Lehr, *supra* note 2, at 3 (discussing the Trade Facilitation and Enforcement Act of 2015 and related U.S. Customs and Border Protection orders relating to factories in the XUAR in light of forced labor allegations).

⁴ U.S. DEP’T OF HOMELAND SEC., 2023 UPDATES TO THE STRATEGY TO PREVENT THE IMPORTATION OF GOODS MINED, PRODUCED, OR MANUFACTURED WITH FORCED LABOR IN THE PEOPLE’S REPUBLIC OF CHINA: REPORT TO CONGRESS (July 26, 2023), <https://www.dhs.gov>.

Traditionally, the United States has enacted its prohibition on forced labor through Section 307 of the Tariff Act of 1930 (“Section 307”), which adopts the International Labor Organization’s (“ILO”) definition of “forced labor” for the purpose of protecting domestic producers from competing with products made with forced labor.⁵ While the central legislative purpose of Section 307 was more about economic protection than humanitarian concerns, the moral and ethical dimension of forced labor has received more legislative attention over the past century, culminating in the implementation of the Uyghur Forced Labor Prevention Act (Public Law No. 117-78) (the “UFLPA” or the “Act”) in 2021.⁶ The UFLPA seeks “to strengthen the prohibition against the importation of goods made with forced labor” and address human trafficking, which it recognizes as a form of modern slavery linked to government-sponsored forced labor schemes.⁷ The UFLPA goes further than any other forced labor prohibition in United States law, by creating a rebuttable presumption that all goods manufactured wholly or in part in the XUAR were made with forced labor and, therefore, prohibited from entering the country.⁸

The essence of the UFLPA is the origin-based rule that any goods produced in the XUAR are barred from entry into the United States.⁹ However, the Act’s enforcement has been fraught with inconsistencies and ineffectiveness.¹⁰ Congress empowered U.S. Customs and Border Protection (“CBP”), operating under the U.S. Department of Homeland Security, to detain and investigate imports that are suspected to contain goods manufactured with forced labor anywhere in its supply chain.¹¹ Most shipments detained by CBP’s enforcement of the UFLPA do not come from China, and nearly as many shipments are denied as are released.¹² CBP enforcement statistics reveal

gov/sites/default/files/2023-08/23_0728_plcy_uflpa-strategy-2023-update-508.pdf [https://perma.cc/LPL8-RC6B] [hereinafter 2023 UPDATES TO THE STRATEGY TO PREVENT THE IMPORTATION OF GOODS].

⁵ See CHRISTOPHER A. CASEY ET AL., CONG. RSCH. SERV., IF11360, SECTION 307 AND IMPORTS PRODUCED BY FORCED LABOR (updated 2024).

⁶ See *id.*; Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, 135 Stat. 1525 (2021).

⁷ Uyghur Forced Labor Prevention Act § 1(1), (4).

⁸ See *id.* § 3.

⁹ See discussion *infra* Section II.A.

¹⁰ See discussion *infra* Section I.B.

¹¹ See *Uyghur Forced Labor Prevention Act*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/trade/forced-labor/UFLPA> [https://perma.cc/955T-VTNB] (Feb. 4, 2025).

¹² See *Uyghur Forced Labor Prevention Act Statistics*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/newsroom/stats/trade/uyghur-forced-labor-prevention-act-statistics> [https://perma.cc/5CQX-32NA] (Mar. 12, 2025) (shipment metrics across fiscal years 2022 through 2024 show 4,718 denied shipments compared to 5,351 released).

an easily foreseeable problem: the nature of global supply chains produces no airtight method to accurately identify which shipments may be prohibited by the UFLPA.¹³ Due to the impossibility of suspecting “correct” shipments, and considering that each product might have touched every corner of the world while passing through its global supply chain before reaching U.S. borders, CBP must rely on trial-and-error, which not only obfuscates its enforcement standards, but also leaves importers little remedy.¹⁴

This enforcement problem finds its roots in a legal issue that stems from the Act’s text—despite the origin-based nature of the rule, the statute provides little guidance on how to determine the origin of the goods it prohibits.¹⁵ The Act states simply that it prohibits “any goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region of the People’s Republic of China or produced by an entity on a list required by clause (i), (ii), (iv) or (v) of section 2(d)(2)(B) (the ‘UFLPA Entity List’).”¹⁶ The UFLPA Entity List, which the Forced Labor Enforcement Task Force (the “FLETF”) maintains and updates every year, names companies associated with forced labor practices and the products mined, produced, or manufactured wholly or in part in the XUAR by each entity.¹⁷ Beyond the names on the entity list and research on risk assessment factors, CBP and importers receive little guidance on determining whether any part of a good is associated with forced labor.¹⁸ Congress, in implementing the UFLPA, has provided enforcement *clarifications*, but no enforcement rules.¹⁹

This Note seeks to address the fragmentary implementation of the UFLPA by examining the problem through the lens of origin determination, including how rules of origin are traditionally applied in international trade law, whether CBP applies traditional legal practices of origin determination in its enforcement of the UFLPA, and how the lack of a *de minimis* exception in the UFLPA exacerbates the enforcement problem. This Note proposes a solution to the ambiguity in origin determination by conceptualizing enforcement

¹³ See discussion *infra* Section I.C.

¹⁴ See discussion *infra* Sections I.B–C.

¹⁵ See discussion *infra* Section II.A.

¹⁶ Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, § 3(a), 135 Stat. 1525, 1529 (2021).

¹⁷ See U.S. DEP’T OF HOMELAND SEC., STRATEGY TO PREVENT THE IMPORTATION OF GOODS MINED, PRODUCED, OR MANUFACTURED WITH FORCED LABOR IN THE PEOPLE’S REPUBLIC OF CHINA: REPORT TO CONGRESS, at v (June 17, 2022), https://www.dhs.gov/sites/default/files/2022-06/22_0617_fletf_uflpa-strategy.pdf [<https://perma.cc/4ARY-N4GW>] [hereinafter STRATEGY TO PREVENT THE IMPORTATION OF GOODS].

¹⁸ See discussion *infra* Sections I.B–C.

¹⁹ See discussion *infra* Section I.B.

under the UFLPA as an origin-based analysis, similar to that traditionally used in administering trade benefits under preferential rules of origin. Just as importers might document and provide the evidence necessary to prove that they qualify for preferential rules of origin schemes that mitigate or remove customs duties, this solution recontextualizes importers' ability to rebut the presumption under the UFLPA as a trade benefit which may be acquired through a preferential rule of origin analysis.

Part I of this Note presents the historical context of forced labor prevention laws in international and domestic law, the development of U.S. legislation aimed to combat the forced labor practices and human rights abuses in the XUAR, an assessment of CBP's enforcement mechanisms and progress, and current litigation regarding CBP enforcement mechanisms. Part II examines the origin determination scheme under the UFLPA and discusses traditional rules of origin schemes under both U.S. law and World Trade Organization ("WTO") law. Part II also contrasts the lack of *de minimis* exception with other trade laws and analyzes how that distinction changes the implementation of the UFLPA compared to other trade laws. Finally, Part III outlines the proposed solution, which recontextualizes the UFLPA's rebuttable presumption in light of trade benefits under the preferential rules of origin scheme, in order to clarify origin determination under the UFLPA.

I. Background

With the dawn of the twentieth century came the recognition of human rights as a necessary component of the international law regime, leading to the establishment of the ILO and the promulgation of many conventions promoting workers' rights and prohibiting forced or compulsory labor.²⁰ U.S. labor rights law developed in tandem, building on nineteenth-century laws with Section 307.²¹ Since then, labor rights and trade policy have become inextricably intertwined, so much so that most U.S. trade policies are formulated with labor rights provisions in mind.²² The UFLPA is another step forward in the ongoing effort to prevent forced labor through trade policy. Within its policy statement, the UFLPA sets out the main two elements of its

²⁰ See, e.g., ILO Convention (No. 29) Concerning Forced or Compulsory Labour, June 28, 1930, 39 U.N.T.S. 55; ILO Convention (No. 105) Concerning the Abolition of Forced Labour, June 25, 1957, 320 U.N.T.S. 291.

²¹ See generally Casey, *supra* note 5.

²² See, e.g., Agreement on the Establishment of a Free Trade Area, Jordan-U.S., art. 6, Oct. 24, 2000, Hein's No. KAV 5970; U.S.-Mex.-Can. Agreement Implementation Act, Pub. L. No. 116-113, § 741, 134 Stat. 11, 88 (2020).

approach: (1) to end forced labor practices internationally and (2) by focusing on one specific region: the XUAR.²³

The latter element gives rise to the host of enforcement problems the UFLPA has faced since its enactment in 2022.²⁴ Thousands of shipments have been detained, but CBP has released as many shipments under suspicion as it denies.²⁵ Success in enforcing the UFLPA has come down to the flip of a coin.²⁶ Determining where a good was mined, produced, or manufactured has become endlessly complicated in an era of global supply chains, where a shipment from anywhere in the world has a high likelihood of passing through the XUAR at some point in its production process.²⁷ As discussed below, the evolution in U.S. trade legislation prohibiting products made with forced labor was a gradual process that historically focused on setting objectives and intentions—the UFLPA, however, raised the bar by creating a bright-line rule.

A. Forced Labor Prevention in International and U.S. Law

Enacted in 1930, the ILO's Convention No. 29, was the first major step in prohibiting forced or compulsory labor in international law.²⁸ That same year, the United States enacted Section 307, which added to previous laws prohibiting imports of goods manufactured by prison labor.²⁹ Section 307 expanded the prohibition to any products of forced labor, not just those

²³ See Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, § 1(2), 135 Stat. 1525, 1525 (2021) (“to lead the international community in ending forced labor practices wherever such practices occur through all means available to the United States Government, including by stopping the importation of any goods made with forced labor, including those goods mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region”).

²⁴ See discussion *infra* Section I.C.

²⁵ See *id.*

²⁶ See *id.*

²⁷ See *id.*; ALAN CRAWFORD & LAURA T. MURPHY, *Over-Exposed: Uyghur Region Exposure Assessment for Solar Industry Sourcing*, SHEFFIELD HALLAM UNIV., Aug. 2023, at 1–3 (surveying study results indicating that the XUAR is involved in “the production of materials essential to the manufacture of more than 95% of solar modules.”).

²⁸ See CATHLEEN D. CIMINO-ISAACS ET AL., CONG. RSCH. SERV., R46631, SECTION 307 AND U.S. IMPORTS OF PRODUCTS OF FORCED LABOR: OVERVIEW AND ISSUES FOR CONGRESS 22 (2021). The United States has not ratified ILO Convention No. 29 due to conflicts in U.S. law and practice related to the use of prison labor. See *id.* Curiously, it has ratified Convention No. 105, concerning forced labor enacted by state authorities. See *id.*; ILO Convention (No. 105) Concerning the Abolition of Forced Labour, art. 1(e), June 25, 1957, 320 U.N.T.S. 291.

²⁹ See CIMINO-ISAACS ET AL., *supra* note 28, at 3.

manufactured.³⁰ Since 1930, Congress has amended Section 307 twice and broadened its scope both times, reflecting increased efforts to combat forced labor practices in recent decades.³¹ Section 307's first amendment added child labor to its definition of forced or indentured labor.³² The most recent amendment struck out the "consumptive demand" clause,³³ which allowed products of forced labor, if no comparable product was made in the United States or the level of domestic production did not meet the United States' "consumptive demand."³⁴ Use of Section 307 has also increased as ongoing interest in workers' rights continues to steer U.S. trade policy.³⁵

Recent U.S. trade policy reflects this interest in combatting forced labor.³⁶ Following the completion of the Marrakesh Agreement establishing the WTO in 1994, the United States has expanded its efforts toward open trade and began negotiating free trade agreements ("FTAs") with a growing pool of trade partners.³⁷ In 2000, the U.S.-Jordan FTA became the first U.S. FTA to address the relationship between labor and trade, requiring both countries to enforce domestic laws protecting internationally recognized labor rights and refrain from compromising labor standards to promote trade.³⁸ Further, the U.S.-Mexico-Canada Agreement ("USMCA") is the first U.S. FTA to prohibit imports made by forced labor and encourage cooperation among

³⁰ *See id.*

³¹ *See* Casey, *supra* note 5.

³² *See* Tariff Act of 1930, title 4, § 411(a), Pub. L. No. 106-200, 114 Stat. 298 (2000) (current version codified as 19 U.S.C.A. § 1307) (inserting "[f]or the purposes of this section, the term 'forced labor or/and indentured labor' includes forced or indentured child labor" at the end in 2000).

³³ *See* Casey, *supra* note 5 (noting that humanitarian and foreign policy concerns caused lawmakers to amend Section 307 to remove the "consumptive demand clause"); 19 U.S.C. § 1307, *amended by* Trade Facilitation and Trade Enforcement Act of 2015, Pub. L. No. 114-125, § 910, 130 Stat. 122, 239–40 (2016).

³⁴ *See* Casey, *supra* note 5.

³⁵ *See id.*

³⁶ *See* Press Release, Off. of the U.S. Trade Representative, USTR Announces the Development of a Focused Trade Strategy to Combat Forced Labor (Jan. 25, 2022), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2022/january/ustr-announces-development-focused-trade-strategy-combat-forced-labor> [<https://perma.cc/2ZRE-BY3P>].

³⁷ *See* Fact Sheet, Off. of the U.S. Trade Representative, The World Trade Organization Works For You (Oct. 29, 1999) (on file with author) (announcing the U.S.'s intention to join the WTO to "negotiate agreements to reduce barriers to trade," establish[] fair trade rules that safeguard American companies and workers," and "advance democratic values abroad, such as . . . the rule of law in commercial transactions").

³⁸ *See* Agreement on the Establishment of a Free Trade Area, Jordan-U.S., art. 6, Oct. 24, 2000, Hein's No. KAV 5970.

the states over identifying such goods.³⁹ The USMCA's Labor Chapter also adopts principles from the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998).⁴⁰ It created the FLETF, which monitors and develops strategies to ensure active enforcement of Section 307.⁴¹ Indeed, the UFLPA places part of its legal basis on the labor provisions of the USMCA: stating that it is the policy of the United States "to coordinate with Mexico and Canada to effectively implement Article 23.6 of the [USMCA] to prohibit the importation of goods produced in whole or in part by forced or compulsory labor, including those goods mined, produced, or manufactured wholly or in part in the [XUAR]."⁴² In 2022, the U.S. Trade Representative announced a "focused trade strategy to combat forced labor," particularly in light of human trafficking, child labor, and unfair competition concerns.⁴³

B. Enforcement of Section 307 and the UFLPA

Section 307 actions begin with initiation by a port director, customs officer, or a report to CBP by any individual with reason to believe that imports were produced by forced labor.⁴⁴ Then, the CBP Commissioner investigates whether the allegations are "warranted" and, if so, issues an order to withhold the release of such goods ("WRO").⁴⁵ At this point, the importer may export the merchandise or contest the WRO.⁴⁶ Next, the CBP Commissioner determines and publishes the finding in the Customs Bulletin and Federal Register.⁴⁷ If the Commissioner finds a violation of Section 307, CBP seizes non-exported merchandise and commences forfeiture proceedings.⁴⁸

Before the implementation of the UFLPA, goods from China, especially those suspected to be from the XUAR, were already the primary target for WROs.⁴⁹ Under the pre-UFLPA regime, the United States had already begun

³⁹ See Casey, *supra* note 5.

⁴⁰ See U.S.-Mex.-Can. Agreement Implementation Act, Pub. L. No. 116-113, § 701, 134 Stat. 11, 80-82 (2020).

⁴¹ See *id.* § 741.

⁴² Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, § 1(3), 135 Stat. 1525, 1525 (2021).

⁴³ Press Release, Off. of the U.S. Trade Representative, *supra* note 36.

⁴⁴ See 19 C.F.R. § 12.42(a)-(b).

⁴⁵ *Id.* § 12.42(d), (e).

⁴⁶ See *id.* § 12.42(e).

⁴⁷ See *id.* § 12.42(f).

⁴⁸ See *id.* § 12.42(g).

⁴⁹ See Casey, *supra* note 5 ("Goods imported from China have been the primary target of WROs due to long-standing concerns about the systemic forced labor of ethnic Uyghurs and other minority groups in Xinjiang and other parts of China.").

utilizing Section 307 with a focus on specific regions, especially when humanitarian problems were implicated.⁵⁰ From 2016 to 2023, CBP issued 39 WROs against Chinese companies.⁵¹ Whereas shipments from the XUAR and China were generally prioritized as a basis for investigation before the UFLPA, the Act formalized an origin-based presumption and allowed for the dedication of specific policies to combat the import of goods associated with forced labor.⁵² Compared to the 39 WROs issued under Section 307, CBP has detained 11,334 shipments from China with suspected forced-labor involvement since the enactment of the UFLPA, with the number being much higher for shipments from other countries, such as Malaysia and Vietnam, which may have goods that were made wholly or in part in the XUAR.⁵³ The UFLPA seeks to strengthen enforcement under Section 307 by “ensuring that the Government of the People’s Republic of China does not undermine the effective enforcement of [Section 307],”⁵⁴ establishing an expressly origin-based system within the statute’s text. It adds a layer to the particularized prohibition against goods made wholly or in part in the XUAR by introducing the high bar of the rebuttable presumption and changing how CBP enforces against goods alleged to fall under the Act.

The UFLPA came into force on June 21, 2022.⁵⁵ As of this date, the executive branch has not published federal regulations on the enforcement procedures of the Act.⁵⁶ Instead, guidance can be gleaned through the CBP’s Operational Guidance for Importers (“CBP Guidance”), published on June 13, 2022, and the FLETF’s Strategy to Prevent the Importation of Goods Mined, Produced, or Manufactured with Forced Labor in the People’s

⁵⁰ See *id.* (detailing the use of Section 307 in China on the basis of humanitarian concerns prior to UFLPA).

⁵¹ See *id.*; *Withhold Release Orders and Findings*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/trade/forced-labor/withhold-release-orders-and-findings> [<https://perma.cc/P94L-B7NQ>] (Mar. 18, 2025).

⁵² See Casey, *supra* note 5; Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, § 1(3), 135 Stat. 1525, 1525 (2021) (establishing an origin-based assumption through a prohibition on the importation of goods produced, mined, or manufactured in XUAR).

⁵³ *Uyghur Forced Labor Prevention Act Statistics*, *supra* note 12.

⁵⁴ Uyghur Forced Labor Prevention Act § 1(1).

⁵⁵ See *id.* § 3(e).

⁵⁶ While Title 19 of the Code of Federal Regulations still applies to UFLPA-prohibited goods as it does to all imports that move through customs, the regulations capture rules and procedures that apply to imports in general, such as procedures for detaining and releasing shipments, but are not tailored to the origin-specific policy enacted by the UFLPA. Regulations that refer to goods from specific regions either reference the Harmonized Tariff Schedule of the United States or codify provisions of a statute enacting an FTA. See, e.g., 19 C.F.R. § 10.195(b)(2) (“Notwithstanding the provisions of 19 U.S.C. 1311 . . .”).

Republic of China (“FLETF Strategy”), first published on June 17, 2022, and amended on July 26, 2023.⁵⁷ Given the scant guidance available, the UFLPA apparently allows for a stricter enforcement process to match the higher standard of contestation.⁵⁸ CBP “takes specific enforcement actions, including identifying, detaining, and/or excluding, or seizing shipments subject to the UFLPA’s rebuttable presumption, depending upon the specific facts involved in each importation.”⁵⁹ CBP can take any of the above actions based on a case-by-case factual determination.⁶⁰ CBP does not need to issue WROs before seizing goods that allegedly violate the UFLPA; rather, it accelerates the investigation into the contestation stage.⁶¹ Furthermore, WROs for goods suspected to be from the XUAR are superseded by the UFLPA.⁶²

When CBP suspects that a shipment falls under the prohibition of the UFLPA, it has 5 days to determine whether to release or detain the goods.⁶³ Once the goods are in CBP’s hands, they are, in effect, already prohibited from entry; whichever action CBP takes—whether it be detention, exclusion, or seizure—the importers have the burden to prove that they qualify for an exception to the UFLPA before CBP releases the goods.⁶⁴ For many, this process takes months.⁶⁵

The UFLPA allows for an exception when the CBP Commissioner determines the importer has (1) fully complied with the FLETF Strategy and

⁵⁷ See U.S. DEP’T OF HOMELAND SEC., U.S. CUSTOMS AND BORDER PROTECTION OPERATIONAL GUIDANCE FOR IMPORTERS (June 13, 2022), https://www.cbp.gov/sites/default/files/assets/documents/2022-Jun/CBP_Guidance_for_Importers_for_UFLPA_13_June_2022.pdf [<https://perma.cc/442B-9QBU>] [hereinafter U.S. CUSTOMS AND BORDER PROTECTION OPERATIONAL GUIDANCE FOR IMPORTERS]; 2023 UPDATES TO THE STRATEGY TO PREVENT THE IMPORTATION OF GOODS, *supra* note 4.

⁵⁸ See generally U.S. CUSTOMS AND BORDER PROTECTION OPERATIONAL GUIDANCE FOR IMPORTERS, *supra* note 57.

⁵⁹ See *id.* at 7.

⁶⁰ See *id.*

⁶¹ See *id.*; see also 19 C.F.R. § 12.42(e) (outlining the basis of CBP’s authority to issue WROs and ability to accelerate to the contestation stage). Currently, there are no federal regulations codified for the UFLPA, so CBP is not directed to issue WROs before initiating actions under the Act. See 19 C.F.R. § 12.42 (nowhere directing CBP to issue a WRO prior to initiating actions under the Act).

⁶² See U.S. CUSTOMS AND BORDER PROTECTION OPERATIONAL GUIDANCE FOR IMPORTERS, *supra* note 57, at 7.

⁶³ See *id.* at 8.

⁶⁴ See *id.*

⁶⁵ See Ana Swanson, *Nike and Coca-Cola Lobby Against Xinjiang Forced Labor Bill*, N.Y. TIMES (Nov. 29, 2020), <https://www.nytimes.com/2020/11/29/business/economy/nike-coca-cola-xinjiang-forced-labor-bill.html>.

requests for information from the CBP and (2) proved that the goods were not made wholly or in part by forced labor by “clear and convincing evidence.”⁶⁶ Despite providing examples of the types of evidence that importers may proffer to meet the “clear and convincing evidence” standard, the FLETF Strategy and CBP Guidance continue to stress that those examples are not exhaustive and the “type, nature, and extent of evidence required from the importer, however, will vary based on the facts and circumstances of the import in question.”⁶⁷ Furthermore, the FLETF Strategy lists some ways to show due diligence and transparency across the supply chain through “assessing, preventing, and mitigating forced labor risk in the production of goods imported into the United States” laid out by the U.S. Department of Labor (“DOL”) Comply Chain.⁶⁸ When CBP grants an exception to the rebuttable presumption, it discloses information submitted by the importer to Congress and the public.⁶⁹ However, to date, CBP has granted zero out of its five requests for an exception, so importers are left without examples as to the quality and quantity of evidence needed to qualify for the exception.⁷⁰

At the trial court level, companies have displayed interest in the first Section 307 case at the U.S. Court of International Trade (“CIT”) that challenged CBP enforcement guidance, which was not decided until 2022, for its potential to shed light on the evidentiary standard.⁷¹ However, the action concluded without any judicial review of CBP’s enforcement actions once the company in the action sought voluntary dismissal and the CIT ruled that voluntary

⁶⁶ See Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, § 3(b), 135 Stat. 1525, 1529 (2021).

⁶⁷ STRATEGY TO PREVENT THE IMPORTATION OF GOODS, *supra* note 17, at 50; see U.S. CUSTOMS AND BORDER PROTECTION OPERATIONAL GUIDANCE FOR IMPORTERS, *supra* note 57, at 13 (stating the goal of the guidance is to “provide importers flexibility to provide documentation consistent with their business operations” through a non-exhaustive list of information CBP may request).

⁶⁸ See STRATEGY TO PREVENT THE IMPORTATION OF GOODS, *supra* note 17, at 41. The DOL Comply Chain suggests eight steps, which are as follows: (1) Engage Stakeholders, (2) Assess Risks and Impacts, (3) Develop a Code of Conduct, (4) Communicate and Train Across a Supply Chain, (5) Monitor Compliance, (6) Remediate Violations, (7) Independent Review, and (8) Report Performance and Engagement. See *Comply Chain*, U.S. DEP’T OF LABOR, <https://www.dol.gov/ilab/complychain/steps/2> [<https://perma.cc/WP5J-AQYT>] (last visited Apr. 5, 2025).

⁶⁹ See Uyghur Forced Labor Prevention Act § 3(c).

⁷⁰ See U.S. CUSTOMS & BORDER PROT., TESTIMONY OF ERIC CHOY FOR A JANUARY 11 HEARING ON FORCED LABOR (Jan. 11, 2024), <https://www.cbp.gov/about/congressional-resources/testimony/Choy-CHS-OIA-11JAN24> [<https://perma.cc/HHW9-J4WB>].

⁷¹ See Memorandum in Support of Motion for Leave to File a Brief as Amicus Curiae at 3–4, *Virtus Nutrition LLC v. United States*, No. 1:21-cv-00165 (Aug. 26, 2021).

dismissal without prejudice was proper,⁷² depriving importers of long-awaited court guidance.⁷³

Many companies had expressed interest in the terms of the UFLPA before its enactment, with several spending close to a million dollars lobbying to have their suggestions included in the Act.⁷⁴ Since its enactment, the CIT has only heard a single case on the UFLPA, in which laser printer importers challenged a decision to place them on the UFLPA Entity List.⁷⁵ In *Ninestar Corporation v. United States*,⁷⁶ the CIT denied the importers' motion for a preliminary injunction on the agency action and maintained the prohibition on their goods.⁷⁷ Through the development of this case, the court held that the CIT had exclusive jurisdiction over UFLPA actions pursuant to 28 U.S.C. § 1581(i) and as such, are subject to the Administrative Procedure Act's abuse of discretion standard of review.⁷⁸ The court weighed the factors for deciding whether to grant the preliminary injunction and did not reach the merits of the agency's prohibition on the importers' goods.⁷⁹ The most recent development in this case was an order resolving various procedural issues.⁸⁰

The lack of guidance on the evidentiary standard has persisted throughout Section 307 enforcement, with the regulations falling silent on how

⁷² See *Virtus Nutrition LLC v. United States*, 606 F. Supp. 3d 1360, 1362 (Ct. Int'l Trade 2022). This case came about when CBP issued a WRO for a shipment of palm oil products, the company followed the CBP Guidance in contesting the WRO, and CBP still refused to release the goods. See *id.* at 1360; see also John Brew et al., *Forced Labor Court Case Ends with a Whimper*, CROWELL & MORING (Dec. 29, 2022), <https://www.cmtradelaw.com/2022/12/forced-labor-court-case-ends-with-a-whimper/> [<https://perma.cc/WDA9-TSK7>].

⁷³ With the dismissal of the action, the motion for leave to file a brief as amicus curiae was also dismissed as moot. See *Virtus Nutrition*, 606 F. Supp. 3d at 1362; John Brew et al., *supra* note 72 ("In the end, the case did not provide insight into the evidence needed to successfully challenge CBP forced labor detentions. The importing community was hoping for such guidance but will have to wait.").

⁷⁴ See Swanson, *supra* note 65. For example, Apple, Inc. requested several revisions to the bill that would ease disclosure requirements for importers, such as extending deadlines, "releasing certain information about supply chains to congressional committees rather than to the public," and requiring the designation of Chinese entities who have had a part in the oppression of Uyghurs in the XUAR. *Id.*

⁷⁵ See generally *Ninestar Corp. v. United States*, 687 F. Supp. 3d 1308 (Ct. Int'l Trade 2024).

⁷⁶ 666 F. Supp. 3d 1351 (Ct. Int'l Trade 2023).

⁷⁷ *Ninestar*, 687 F. Supp. 3d at 1315.

⁷⁸ *Ninestar*, 666 F. Supp. 3d at 1362; *Ninestar*, 687 F. Supp. 3d at 1322.

⁷⁹ See *Ninestar*, 687 F. Supp. 3d at 1327–45 (ultimately denying Ninestar's preliminary injunction request).

⁸⁰ See *Ninestar Corp. v. United States*, 716 F. Supp. 3d 1376 (Ct. Int'l Trade 2024).

to challenge a WRO or CBP finding.⁸¹ With no current Section 307 cases appealed to the United States Court of Appeals for the Federal Circuit (“Federal Circuit”) and cases at the CIT progressing without deciding on the merits, the courts are silent on the matter as well. Therefore, it is extremely difficult to challenge Section 307 and UFLPA action, and more litigation in this area is needed. Given that imports determined to violate the UFLPA may be subject to seizure and forfeiture,⁸² the UFLPA presents a particularly thorny problem for importers to overcome.

C. How Global Supply Chains Contribute to the Enforcement Problem

Several problems related to the very nature of international trade in the modern era create enforcement problems for the UFLPA. Product traceability is traditionally “slow to implement, cumbersome, and often highly imperfect.”⁸³ Besides run-of-the-mill lost invoices or lack of documentation a few steps down the chain, the fact remains that China is one of the largest producers in international trade, and almost all trade in certain industries will pass through China and the XUAR at some point.⁸⁴ The XUAR also plays a key role in cotton, textile, and apparel supply chains⁸⁵ and accounts for more than a third of the world’s production of polysilicon, a key component of solar panels.⁸⁶ Investigating the XUAR in particular is made more difficult by “the limited access of auditors to a region where the Chinese government tightly restricts people’s movements.”⁸⁷

A close analysis of statistics released by CBP shows the effects of these issues on the enforcement of the UFLPA on U.S. imports. From June 21, 2022 to September 1, 2024, CBP examined 10,139 total shipments suspected of containing goods prohibited under the UFLPA, denying 4,718 and releasing 5,351 shipments,⁸⁸ showing that CBP detection of goods originating

⁸¹ See *Trade Compliance Flash: First Court Challenge to CBP Enforcement of Withhold Release Order*, MILLER & CHEVALIER (May 14, 2021), <https://www.millerchevalier.com/publication/trade-compliance-flash-first-court-challenge-cbp-enforcement-withhold-release-order> [<https://perma.cc/N4KT-3TTQ>].

⁸² U.S. CUSTOMS AND BORDER PROTECTION OPERATIONAL GUIDANCE FOR IMPORTERS, *supra* note 57, at 9 (citing 19 U.S.C. § 1595a; 19 C.F.R. Part 171).

⁸³ Lehr, *supra* note 2, at 9.

⁸⁴ See, e.g., CRAWFORD & MURPHY, *supra* note 27, at 1–3 (The XUAR is involved in “the production of materials essential to the manufacture of more than 95% of solar modules.”).

⁸⁵ See Lehr, *supra* note 2, at 6.

⁸⁶ See Crawford, *supra* note 84, at 1.

⁸⁷ Swanson, *supra* note 65.

⁸⁸ See *Uyghur Forced Labor Prevention Act Statistics*, *supra* note 12.

from the XUAR effectively amounted to flipping a coin. CBP has ramped up enforcement of the UFLPA in 2025, with a total of 8,633 shipments denied—compared to 5,558 released—to date.⁸⁹ The thousands of shipments still released suggest that CBP’s detection of XUAR-originating goods remains ineffective, resulting in the common frustration of resources that often comes with inaccurate and inefficient government policy. Companies suffer from both operating costs when they shift policies to comply with the law and losses when their goods are detained at CBP for an extended period of time, and those costs are shifted onto retailers and consumers.⁹⁰

Bifurcated supply chains also exacerbate enforcement inefficiencies because they allow companies to circumvent the UFLPA: “Companies that have created supply chains purportedly free of XUAR inputs continue to source from suppliers or sub-suppliers that have exposure to the Uyghur Region for other product lines.”⁹¹ These XUAR-free product lines are likely made for the U.S. market with UFLPA compliance in mind.⁹² In theory, this takes care of the issue of goods made with forced labor entering the US. In reality, because detection of prohibited goods is based on risk assessment of high-priority sectors and entities,⁹³ the existence of these XUAR-free product lines increases the chances of prohibited goods slipping through the cracks because companies may receive a lower risk assessment through a purportedly XUAR-free product line, then pivot to introduce goods that were manufactured wholly or in part in the XUAR region anyway. This is all the more probable when companies are generally unwilling to make their entire supply chain transparent.⁹⁴ The broader purpose of tackling the use of forced labor in global supply chains is frustrated when bifurcated supply chains allow importers to circumvent the UFLPA.⁹⁵

⁸⁹ See *id.*

⁹⁰ See Ana Swanson, *U.S. Bans Imports From 3 Chinese Companies Over Ties to Forced Labor*, N.Y. TIMES (June 11, 2024), <https://www.nytimes.com/2024/06/11/business/economy/us-ban-china-uyghur-labor.html> (CBP came with no new funding to enforce the UFLPA); Rick Helfenbein, *Retail Recession—Biden Vs Trump: Self-Induced Or Fueled By The Feds?*, FORBES (Oct. 2, 2022), <https://www.forbes.com/sites/rickhelfenbein/2022/10/02/retail-recessionbiden-vs-trump-self-induced-or-fueled-by-the-feds/> [<https://perma.cc/Y48H-6RXK>] (“This change is forcing some branded importers to switch their import status from DDP (Delivery Duty Paid) to FOB (Free On Board) in order to avoid being the importer of record – pushing additional carrying costs, and liability back to the retailers.”).

⁹¹ Crawford, *supra* note 84, at 1.

⁹² See *id.*

⁹³ See STRATEGY TO PREVENT THE IMPORTATION OF GOODS, *supra* note 17, at 2–3, 29.

⁹⁴ See Crawford, *supra* note 84, at 1.

⁹⁵ See *Implementation of the Uyghur Forced Labor Prevention Act and the Impact on Global Supply Chains: Hearing Before the Cong.-Exec. Comm. on China*, 118th Cong. 2 (2023)

Over-regulation may put more pressure on industries already suffering through global supply chain issues, such as the solar industry.⁹⁶ Effective enforcement of the UFLPA is crucial because the United States may need to balance its interests and obligations in other matters, such as promoting open trade and slowing the effects of climate change. If the result of the UFLPA is an impediment to other important matters that affect the world at large, then it should actually make a difference in preventing forced labor.

II. Analysis

The UFLPA sets out an *ad hoc* approach that divides the responsibility of tracing the origins of goods between three parties: (1) the FLETF to develop a strategy, (2) CBP to detain and investigate, and (3) importers to provide evidence.⁹⁷ Despite its origin-based nature,⁹⁸ the UFLPA departs from traditional rules of origin schemes—such as substantial transformation and regional value content, which are applied to goods made in more than one country under international trade law and domestic law—because it does not accept *any* part of a product that is mined, produced, or manufactured within the XUAR.⁹⁹ This lack of a *de minimis* exception ultimately sets the UFLPA apart from other trade laws by creating a unique enforcement situation due to the lack of clarity in the evidentiary standard.¹⁰⁰

A. The Origin Determination Scheme under the UFLPA

The origin-based nature of the Act is built into the text of the statute.¹⁰¹ By expressing that its purpose is “to strengthen the prohibition against the importation of goods made with forced labor, including by ensuring that the Government of the People’s Republic of China does not undermine the effective enforcement of section 307,”¹⁰² the UFLPA focuses on prohibiting imports from one country—China.¹⁰³ The Act further highlights its location-

(explaining how shifting the burden to importers to “prove goods made in Xinjiang and elsewhere” were made without forced labor is part of the “genius” of the UFLPA in preventing importers from circumventing the UFLPA).

⁹⁶ See Mandy Meng Fang, *A Never-ending U.S.–China Solar Trade War? The Uyghur Forced Labor Prevention Act and International Trade Law*, 33 MINN. J. INT’L L. 189, 190 (2024).

⁹⁷ See discussion *infra* Section II.A.

⁹⁸ See discussion *infra* Section II.A.

⁹⁹ See discussion *infra* Section II.C.

¹⁰⁰ See discussion *infra* Section II.C.

¹⁰¹ See Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, § 3(a), 135 Stat. 1525, 1529 (2021).

¹⁰² *Id.* § 1(1).

¹⁰³ See *id.*

specific nature by declaring that its policy is “to address gross violations of human rights in the Xinjiang Uyghur Autonomous Region.”¹⁰⁴ The clause creating the rebuttable presumption states:

The Commissioner of U.S. Customs and Border Protection shall, except as provided by subsection (b), apply a presumption that, with respect to any goods, wares, articles, and merchandise mined, produced, or manufactured wholly or in part *in the Xinjiang Uyghur Autonomous Region of the People’s Republic of China* or produced by an entity on a list required by clause (i), (ii), (iv) or (v) of section 2(d)(2)(B).¹⁰⁵

Throughout the statute’s text, the UFLPA sets out a location-based policy to prevent forced labor through trade sanctions.¹⁰⁶ In theory, the origin-focused nature of the statute might streamline enforcement of the law against forced labor; however, CBP statistics suggest that the outcome has left much to be desired in terms of efficiency and actually addressing forced labor.¹⁰⁷ The statute’s lack of guidance on how to determine a good’s country or region of origin—both in terms of the legal framework applied and the acceptable evidence—has led to confusion in both compliance with and enforcement of the UFLPA.

The only guidance the Act provides for enacting the region-based aspect of its policy lies in Section 2’s “Strategy to Enforce Prohibition on Importation of Goods Made Through Forced Labor in the [XUAR],” which includes: the FLETF’s risk assessment, description, and evaluation of the Chinese government’s forced labor schemes; recommendations and resources for CBP; and guidance to importers.¹⁰⁸ The UFLPA delegates power to the FLETF to develop and support the enforcement strategy and requires that the strategy include several elements.¹⁰⁹ These elements include: “a comprehensive assessment of the risk of importing goods mined, produced, or manufactured wholly or in part with forced labor in the People’s Republic of China, including from the” XUAR; a comprehensive description and evaluation of government labor schemes that includes the forced labor of persecuted groups, such as the Uyghurs, Kazakhs, Kyrgyz, and Tibetans; and lists of entities, products, and facilities that would be subject to the import ban.¹¹⁰ The FLETF completed this step by publishing the 2022 version of the FLETF Strategy, with amendments added in 2023 and an updated XUAR Entity List.¹¹¹

¹⁰⁴ *Id.* § 1(6).

¹⁰⁵ *Id.* § 3(a) (emphasis added).

¹⁰⁶ *See id.*

¹⁰⁷ *See* discussion *supra* Sections I.B–C.

¹⁰⁸ *See* Uyghur Forced Labor Prevention Act § 2(c)–(d).

¹⁰⁹ *See id.*

¹¹⁰ *See id.* § 2(d)(1)–(2).

¹¹¹ *See* discussion *supra* Section I.B.

In its recommendation to accurately identify and trace goods, the FLETF Strategy plans for CBP to use cutting-edge technology, improve supply-chain tracing, and use automated systems to increase data quality and communication.¹¹² The FLETF Strategy also states that “CBP will consider enhancing its use of its detention and exclusion authorities under 19 U.S.C. § 1499, and seizure authorities under 19 U.S.C. § 1595a(c).”¹¹³ All in all, the FLETF Strategy for enforcement of the Act boils down to increasing resources to detect and trace goods and increasing CBP’s legal authority to detain, exclude, and seize goods.¹¹⁴ The UFLPA has no doubt found success through increasing CBP’s legal authorities, as evidenced by the number of WROs sent out as ordinary Section 307 actions before the implementation of the UFLPA (39), compared with the number of shipments detained under the UFLPA without the need for WROs (2,160).¹¹⁵ However, even if CBP has the capacity to do more with the UFLPA, the fact remains that UFLPA enforcement has been inefficient and inaccurate.¹¹⁶

On the importer side, the UFLPA requires the FLETF to “provide guidance” on due diligence and “the type, nature, and extent of evidence” needed to prove that the goods were not made in the XUAR or to beat the rebuttable presumption.¹¹⁷ The FLETF Strategy outlines several practices for ensuring importers meet this standard, such as supply-chain mapping and documentation.¹¹⁸

The successful enactment of the UFLPA evidently requires the cooperation of all three parties named in this section of the Act. The FLETF draws the boundaries of the Act by determining the level of risk of sectors and entities, which then decides which shipments are more or less likely to be detained.¹¹⁹ CBP is the enforcement arm that physically detains, investigates, and makes the decision on whether to deny or release shipments.¹²⁰ Most importantly, CBP actually applies the FLETF Strategy to determine which shipments to detain and which shipments are most suspicious.¹²¹ Finally, importers are responsible for furnishing enough evidence to either pass through customs cleanly, without raising suspicion, or argue their case if CBP does detain their

¹¹² See STRATEGY TO PREVENT THE IMPORTATION OF GOODS, *supra* note 17, at v.

¹¹³ *Id.*

¹¹⁴ See *id.*

¹¹⁵ See discussion *supra* Section I.B (as applied to shipments of Chinese origin).

¹¹⁶ See discussion *supra* Section I.B; see also Swanson, *supra* note 65.

¹¹⁷ Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, § 2(d)(6)(B), 135 Stat. 1525, 1528 (2021).

¹¹⁸ See STRATEGY TO PREVENT THE IMPORTATION OF GOODS, *supra* note 17, at 46.

¹¹⁹ See *id.*; see also discussion *supra* Section I.B.

¹²⁰ See discussion *supra* Section I.B.

¹²¹ See discussion *supra* Section I.B.

shipments.¹²² It is unclear how much cooperation there is between the FLETF and CBP in enacting these guidelines in the first place.

B. Traditional Rules of Origin Schemes under U.S. Law and WTO Law

Understanding the traditional rules of origin schemes under U.S. and international trade law is necessary to develop a comprehensive origin determination scheme under the UFLPA, given that it calls for an inversion of the conventional rules of origin.

1. Rules of Origin under WTO Law

Rules of origin under the WTO are a rather undefined body of law. First brought up during the Uruguay Round of Multilateral Trade Negotiations in 1986 and finalized in 1994, the WTO Agreement on Rules of Origin (“ROO Agreement”) only sets out provisional measures for a transition period as WTO Members negotiate a harmonization of the rules of origin.¹²³ Part IV of the ROO Agreement establishes aspirations and objectives for a future substantive agreement, featuring many of the same objectives that litter the 1994 Marrakesh Agreement and subsequent agreements and understandings, such as equal treatment of Members, predictability, administrability, and positive standards for open markets.¹²⁴ Currently, WTO Members have not completed negotiations for a substantive agreement that harmonizes ROOs for WTO Members.¹²⁵ Thus, rules of origin under international trade law are mostly left to the purview of governmental bodies, holding WTO Members only to general disciplines outlined in Part II of the ROO Agreement.¹²⁶ In particular, the ROO Agreement states, “[i]n cases where the criterion of manufacturing or processing operation is prescribed, the operation that confers origin on the good concerned shall be precisely specified.”¹²⁷

Article 9.2 of the ROO Agreement describes a work programme under the prospective harmonization of rules of origin agreement and calls for the Technical Committee to interpret and provide its opinions on several origin

¹²² See STRATEGY TO PREVENT THE IMPORTATION OF GOODS, *supra* note 17, at 46.

¹²³ See Agreement on Rules of Origin, June 1, 1995, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Apr. 15, 1994, 1868 U.N.T.S. 397 [hereinafter Agreement on Rules of Origin].

¹²⁴ See *id.* art. 9.1. See generally Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154.

¹²⁵ See *Work Programme for the Harmonization of Non-Preferential Rules of Origin*, WTO (Oct. 13, 2022), https://www.wto.org/english/tratop_e/roi_e/info_session_cro_e.htm [<https://perma.cc/9Q4X-R6HT>].

¹²⁶ See Agreement on Rules of Origin, *supra* note 123, art. 2.

¹²⁷ *Id.* art. 2(a)(iii).

determination methods.¹²⁸ In particular, Article 9.2(c) lists “Wholly Obtained and Minimal Operations or Processes,” “Substantial Transformation—Change in Tariff Classification,” and “Substantial Transformation— Supplementary Criteria.”¹²⁹ Under the “Wholly Obtained and Minimal Operations or Processes,” the WTO states that the future harmonized agreement should define “the goods that are to be considered as being wholly obtained in one country.”¹³⁰ For “Substantial Transformation—Change in Tariff Classification,” the WTO contemplates basing the substantial transformation criterion on “the use of change in tariff subheading or heading” and “the minimum change within the nomenclature.”¹³¹ For “Substantial Transformation— Supplementary Criteria,” the WTO contemplates basing the substantial transformation criterion on “other requirements, including ad valorem percentages and/or manufacturing or processing operation.”¹³² Article 9.2 suggests that the members of the WTO contemplated origin determination tests very similar to those listed in the United States.¹³³

2. Rules of Origin under U.S. Law

In the United States, rules of origin are divided into “preferential” and “non-preferential” categories.¹³⁴ The former category applies to trade governed by a bilateral or multilateral trade agreement, while the latter applies to all other trade.¹³⁵

Under the “non-preferential” trade category, the “wholly obtained” criterion applies to goods that are “wholly the growth, product, or manufacture of a particular country,”¹³⁶ while the “substantial transformation” criterion applies on a case-by-case basis to goods that “consist in whole or in part of materials from more than one country.”¹³⁷ Furthermore, CBP specifies that the rules of origin for textile and textile products use the “substantial

¹²⁸ See *id.* art. 9.2.

¹²⁹ *Id.* art. 9.2(c)(i)–(iii).

¹³⁰ *Id.* art. 9.2(c)(i).

¹³¹ *Id.* art. 9.2(c)(ii).

¹³² *Id.* art. 9.2(c)(iii).

¹³³ See *id.* art. 9.2 (establishing a work programme under the prospective harmonization of rules of origin agreement); see also discussion *infra* Section II.B.3.

¹³⁴ See U.S. CUSTOMS & BORDER PROT., WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: U.S. RULES OF ORIGIN 8 (2004), <https://www.cbp.gov/sites/default/files/assets/documents/2020-Feb/ICP-US-Rules-of-Origin-2014-Final.pdf> [<https://perma.cc/QT38-65PY>] [hereinafter WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: U.S. RULES OF ORIGIN].

¹³⁵ See *id.*

¹³⁶ *Id.*

¹³⁷ *Id.* at 9.

transformation” criterion, which is expressed or based exclusively on a tariff-shift method.¹³⁸ CBP states that U.S. non-preferential rules of origin are used for several purposes: “Most-Favored-Nation or Normal-Trade-Relations Treatment,” “Country of Origin Marking,” “Government Procurement,” and “Textiles and Textile Products.”¹³⁹

Rules of origin schemes in the “preferential” trade category are outlined in the trade agreements that establish the preferential treatment.¹⁴⁰ However, the same “wholly obtained” criterion applies to goods that are wholly grown, produced, or manufactured in the country receiving preferential treatment, while either the substantial transformation test or the regional value content test applies to goods that consist in whole or in part of materials from more than one country.¹⁴¹ The substantial transformation test determines country of origin based on “a change in name, character, and use,” while the regional value content test determines preferential treatment based on “a required minimum local value content,” not including the cost of foreign materials unless the goods undergo a double substantial transformation.¹⁴² For example, the U.S.-Jordan FTA uses the regional value content criterion and specifies a 35% appraisal value: “the sum of (i) the cost or value of the materials produced in the exporting Party, plus (ii) the direct costs of processing operations performed in the exporting Party is not less than 35 percent of the appraised value of the article at the time it is entered into the other Party.”¹⁴³

3. Comparing the WTO and U.S. Origin Determination Schemes

Comparing the ROO Agreement’s text and CBP’s description of the U.S. Rules of Origin, similar criteria are considered when defining the rules of origin. The “wholly obtained” criterion uses almost identical language to the ROO Agreement, U.S. non-preferential rules of origin, and U.S. preferential rules of origin.¹⁴⁴ Comparing Article 9.2(c)(ii) of the ROO Agreement to the U.S. substantial transformation test as applied to textiles and textile products, it is clear that substantial transformation based on a tariff-shift is

¹³⁸ See *id.* at 10–11.

¹³⁹ *Id.* at 8.

¹⁴⁰ See *id.* at 12 (listing several special tariff programs such as the North American Free Trade Agreement Implementation Act, U.S.-Chile Free Trade Agreement Implementation Act, and U.S.-Singapore Free Trade Agreement Implementation Act).

¹⁴¹ See *id.*

¹⁴² *Id.*

¹⁴³ Agreement on the Establishment of a Free Trade Area, U.S.-Jordan, Oct. 24, 2000, Hein’s No. KAV 5970, Annex 2.2, art. 1(c).

¹⁴⁴ See Agreement on Rules of Origin, *supra* note 123, art. 9.2(c)(i); WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: U.S. RULES OF ORIGIN, *supra* note 134, at 8, 12.

also a widely accepted criterion.¹⁴⁵ Article 9.2(c)(ii) even contemplates “minimum change within the nomenclature,” which echoes the United States’ “name, character, and use” version of the substantial transformation test, even if the ROO Agreement version limits it to the tariff classification context.¹⁴⁶ Article 9.2(c)(iii) of the ROO Agreement, which refers to “ad valorem percentages,” echoes the United States’ regional value content test, in that both refer to part of the cost or value of the goods in question.¹⁴⁷

Because the UFLPA is origin-specific in its application, it falls more comfortably under the “preferential” category than the “non-preferential,” despite the UFLPA being neither a trade agreement nor a statute enacting an FTA.¹⁴⁸ The purpose of the Act is to establish a trade barrier in the form of an import ban on goods from a particular region or entities with ties to the region.¹⁴⁹ This purpose is more in line with the purposes of trade agreements—to bestow preferential treatment on a specific country—than the purposes of non-preferential rules of origin.¹⁵⁰ The UFLPA expressly breaks away from the Most-Favored-Nation Treatment principle as it treats China differently than other countries.¹⁵¹ The current country of origin marking scheme treats all countries except Canada and Mexico nonreferentially.¹⁵² Government procurement is irrelevant to this decision, and while many textiles and textile products are affected by the UFLPA, the statute does not target that industry specifically.¹⁵³ In essence, the UFLPA’s import ban is a form of negative pref-

¹⁴⁵ Compare Agreement on Rules of Origin, *supra* note 123, art. 9.2(c)(ii), with WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: U.S. RULES OF ORIGIN, *supra* note 134, at 12.

¹⁴⁶ Compare Agreement on Rules of Origin, *supra* note 123, art. 9.2(c)(ii), with WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: U.S. RULES OF ORIGIN, *supra* note 134, at 12.

¹⁴⁷ See Agreement on Rules of Origin, *supra* note 123, art. 9.2(c)(iii); WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: U.S. RULES OF ORIGIN, *supra* note 134, at 12.

¹⁴⁸ See generally Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, 135 Stat. 1525 (2021) (“An Act To ensure that goods made with forced labor in the Xinjiang Uyghur Autonomous Region of the People’s Republic of China do not enter the United States market, and for other purposes.”).

¹⁴⁹ See *id.* § 1(1).

¹⁵⁰ See WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: U.S. RULES OF ORIGIN, *supra* note 134, at 8.

¹⁵¹ See Uyghur Forced Labor Prevention Act § 1(1), (2), (6)(A).

¹⁵² See WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: U.S. RULES OF ORIGIN, *supra* note 134, at 9.

¹⁵³ See Uyghur Forced Labor Prevention Act § 2(d)(2)(B)(viii). The UFLPA names cotton as a high-priority sector for enforcement, in a list with tomatoes and polysilicon, so while

erential treatment akin to antidumping or countervailing duties, and its lack of *de minimis* creates a separate category that overfills the regional content value test: rather than requiring a minimum regional value to receive a tariff reduction, any regional value would result in an outright ban.¹⁵⁴ The origin determination scheme under the UFLPA is necessarily an inversion of traditional rules of origin schemes.

C. The Lack of a *De Minimis* Exception

The UFLPA is unique when it comes to U.S. trade law because it lacks a *de minimis* exception on its face.¹⁵⁵ An importer can defeat the rebuttable presumption only if it exhibits due diligence, full compliance with the CBP Commissioner, and “by clear and convincing evidence, that the good, ware, article, or merchandise was not mined, produced, or manufactured wholly or in part by forced labor.”¹⁵⁶ The language is clear and absolute. If any part of the good was made within the XUAR or by an entity on the UFLPA Entity List, the statute prohibits its entry into the U.S. market.¹⁵⁷

Other trade protective measures under the Tariff Act of 1930 are treated differently. In the case of antidumping and countervailing duties, which seek to prevent foreign governments from enacting trade policies that have a distorting effect on the U.S. market, courts apply the substantial transformation test or look for circumvention under 19 U.S.C. § 1677j.¹⁵⁸ The substantial transformation test is usually the first step in the country of origin inquiry and weighs factors such as “(1) the class or kind of merchandise; (2) the nature and sophistication of processing in the country of exportation; (3) the

the UFLPA does include textiles and textile products, it would be a fallacy of composition to begin and end the analysis at how rules of origin apply exclusively to textiles and textile products. *See id.*

¹⁵⁴ *See* WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: U.S. RULES OF ORIGIN, *supra* note 134, at 12; *Implementation of the Uyghur Forced Labor Prevention Act and the Impact on Global Supply Chains: Hearing Before the Cong.-Exec. Comm. on China*, 108th Cong. 2 (2023) [hereinafter *Hearings*] (statement of Anasuya Syam, Hum. Rts. and Trade Pol’y Dir., Hum. Trafficking Legal Ctr.) (describing the intention to tackle the “*de minimis* loophole,” which allowed shipments under \$800 to be exempt from duties and enter the United States without formal entry documentation).

¹⁵⁵ *See Hearings*, *supra* note 154, at 41 (statement of Kit Conklin, Nonresident Senior Fellow, GeoTech Ctr.).

¹⁵⁶ Uyghur Forced Labor Prevention Act § 3(b).

¹⁵⁷ *See id.*

¹⁵⁸ *See Bell Supply Co., LLC v. United States*, 888 F.3d 1222, 1228 (Fed. Cir. 2018) (“Both the substantial transformation analysis and the circumvention inquiry can apply to imported products that are made in one country, but finished or assembled in a different country.”).

product properties, essential component of the merchandise, and intended end-use; (4) the cost of production/value added; and (5) level of investment.”¹⁵⁹ Section 1677j is an anti-circumvention provision for antidumping and countervailing duties that brings a third country into the country of origin analysis when that third country is used to circumvent U.S. antidumping or countervailing duties.¹⁶⁰ Under the anti-circumvention provision, “Commerce must determine that (1) ‘the process of assembly or completion in the foreign country . . . is minor or insignificant,’ (2) the value added in the country subject to the AD and CVD order is a significant portion of the total value of the merchandise[.]”¹⁶¹ Both the substantial transformation test and the circumvention inquiry are balancing tests, requiring the courts and the agency to weigh a multitude of factors that make it more or less likely to assign a country of origin to an import.¹⁶²

Otherwise, the “clear and convincing evidence” standard under the Tariff Act of 1930 has mainly been applied to cases in which the government must prove by “clear and convincing evidence” that importers fraudulently violated customs laws.¹⁶³ These cases feature the government as the plaintiff, rather than the defendant in an appeal of agency decisions, as UFLPA actions would entail.¹⁶⁴ It has also been applied to a finding of “no reasonable indication” of material injury or threat of such an injury in connection to preliminary determinations regarding antidumping duties.¹⁶⁵ Since these cases involve the government as the defendant and are appeals of agency actions enforcing trade protective measures, they are closest to what a UFLPA action may look like.¹⁶⁶

Ultimately, the UFLPA is unique in expressly foreclosing a *de minimis* exception, in contrast to the other trade actions under the Tariff Act of 1930, which adopt traditional rules of origin schemes like the substantial transformation test or codify an alternative line of inquiry like the anti-circumvention

¹⁵⁹ *Id.* at 1228–29.

¹⁶⁰ *See id.* at 1229.

¹⁶¹ *Id.* (citing 19 U.S.C.A. § 1677j(b)(1)(C)–(D)).

¹⁶² *Id.* at 1228–29.

¹⁶³ *See, e.g.,* *United States v. Inn Foods, Inc.*, 560 F.3d 1338, 1342–43 (Fed. Cir. 2009) (requiring the government to prove with clear and convincing evidence that the defendant had fraudulent intent in double-invoicing scheme for the import of frozen vegetables); *United States v. Hitachi Am., Ltd.*, 172 F.3d 1319, 1326 (Fed. Cir. 1999) (requiring the government to prove with clear and convincing evidence that the defendant fraudulently violated customs laws for the import of Japanese subway cars).

¹⁶⁴ *See* 19 U.S.C. § 1514 (protests against CBP decisions); 28 U.S.C. § 1581(a) (confering the CIT jurisdiction for civil actions against the United States).

¹⁶⁵ *See, e.g.,* *Am. Lamb Co. v. United States*, 785 F.2d 994, 999, 1001 (Fed. Cir. 1986).

¹⁶⁶ *See* 19 U.S.C. § 1514.

provision.¹⁶⁷ Yet, despite the unprecedented bluntness of the UFLPA's presumption, neither the statute itself nor the FLETF have provided clear legal guidance on how to navigate the rebuttal provision under Section 3(b) of the UFLPA.¹⁶⁸ The number of cases that use the "clear and convincing evidence" standard is paltry, and the cases themselves are rather dissimilar to actions that may arise under the UFLPA.¹⁶⁹ While the substantial transformation test and other traditional rules of origin schemes may be codified in the Code of Federal Regulations, they are usually the result of FTA provisions.¹⁷⁰ Section 307 was largely untested, and one would expect more interest in litigating the UFLPA precisely because it is more prolific than run-of-the-mill Section 307 actions.¹⁷¹ However, the lack of a *de minimis* exception may prove to be a barrier to litigation and the subsequent development of case law for the UFLPA because of its unyielding yet shadowy standard.¹⁷²

III. Proposed Solution

To solve the problem of the lack of clarity within the origin determination scheme of the UFLPA, the most straightforward solution, as is the case with most problems of statutory interpretation, would be for Congress to write it into the statute. Nevertheless, rules of origin tests remain under the purview of regulations and FTAs, so it is hard to imagine that such a provision would be added to the text of the Act.¹⁷³ The statute's narrow and absolute terms thus require a creative judicial solution, which the Federal Circuit can enact through the application of traditional rules of origin tests to UFLPA actions appealed from the CIT.

A. The Road to the Federal Circuit

Judicial interpretation can serve as a solution to clarifying the evidentiary standard for UFLPA and Section 307 actions, one which the Federal Circuit

¹⁶⁷ See discussion *supra* Section II.C.

¹⁶⁸ See discussion *supra* Section I.B.

¹⁶⁹ See, e.g., *United States v. Inn Foods, Inc.*, 560 F.3d 1338 (Fed. Cir. 2009) (fraud); *United States v. Hitachi Am. Ltd.*, 172 F.3d 1319 (Fed. Cir. 1999) (fraud); *Am. Lamb Co.*, 785 F.2d 994 (material injury).

¹⁷⁰ See, e.g., 19 C.F.R. § 10.195 (country of origin criteria for the Caribbean Basin).

¹⁷¹ See discussion *supra* Section I.B.

¹⁷² See discussion *supra* Sections I.B, II.C.

¹⁷³ See WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: U.S. RULES OF ORIGIN, *supra* note 134, at 8 (describing U.S. rules of origin as those that apply "in the absence of bilateral or multilateral trade agreements" or "under various trade agreements or special legislation").

can ameliorate through interpreting cases appealed from the CIT.¹⁷⁴ Cases like *Ninestar Corporation* mark the beginnings of future UFLPA cases; given the broad effects on many industries and interest in the UFLPA expressed by large, multinational companies,¹⁷⁵ it is highly likely that UFLPA enforcement will generate a wellspring of litigation. Moreover, as the UFLPA Entity List continues to expand,¹⁷⁶ cases like *Ninestar* are more likely to reach the courts, with companies challenging the agency's decision to place them on the list. When these cases are appealed to the Federal Circuit, it can interpret the UFLPA through the use of traditional rules of origin tests, which will anchor the evidentiary standard of the UFLPA to existing international trade law precedent and alleviate confusion on how companies can litigate UFLPA and Section 307 cases.

B. Recontextualizing and Rebutting the Presumption as Acquiring a Trade Benefit to Apply Traditional Rules of Origin Analysis to the UFLPA

To bridge the conceptual gap between the UFLPA's origin determination scheme to traditional rules of origin, such as the substantial transformation test, the first step is to reframe the rebuttal of the Act's presumption as acquiring a trade benefit—similar to how one would under a traditional preferential country of origin determination scheme.¹⁷⁷ Importers typically bear the burden of proving their eligibility for a trade benefit—for example, demonstrating that a product's country of origin has changed due to the assembly process, such that the product “loses its identity and is transformed into a new product having a new name, character and use.”¹⁷⁸ Similarly, importers must rebut the UFLPA's presumption by proving that a product's place of

¹⁷⁴ See 28 U.S.C. § 1295(a)(5).

¹⁷⁵ See *Ninestar Corp. v. United States*, 687 F. Supp. 3d 1308 (Ct. Int'l Trade 2024); see also Swanson, *supra* note 65 (“Lobbying disclosures show that companies have spent heavily to sway Congress on Xinjiang-related legislation, though they reveal nothing about their specific requests”); John Brew et al., *supra* note 72 (expressing importers' interest in judicial guidance for Section 307 actions).

¹⁷⁶ See U.S. DEP'T OF HOMELAND SEC., DHS ANNOUNCES 26 ADDITIONAL PRC-BASED TEXTILE COMPANIES TO THE UFLPA ENTITY LIST (May 16, 2024), <https://www.dhs.gov/news/2024/05/16/dhs-announces-26-additional-prc-based-textile-companies-ufpla-entity-list> [<https://perma.cc/EU7H-Y5A7>].

¹⁷⁷ See WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: U.S. RULES OF ORIGIN, *supra* note 134, at 8.

¹⁷⁸ *Canadian Solar, Inc. v. United States*, 918 F.3d 909, 913 (Fed. Cir. 2019) (quoting *Bell Supply Co. v. United States*, 888 F.3d 1222, 1228 (Fed. Cir. 2018)).

origin is not, “wholly or in part,” the XUAR.¹⁷⁹ In that sense, rebutting the presumption functions like acquiring a trade benefit, and the UFLPA’s lack of *de minimis* threshold serves as an absolute version of the regional value content test.

An analogy between antidumping or countervailing cases and the prohibition under the UFLPA can further illuminate the UFLPA’s origin determination scheme. The UFLPA prohibition addresses companies that take on unfavorable trade practices,¹⁸⁰ while antidumping and countervailing duties address foreign governments’ unfavorable trade policies and practices. The governmental policy in each case plays out as some sort of burden on trade, and the response from importers is the meat of the enforcement actions. Put another way, each policy sets out an objective, and the agency’s enforcements seek to regulate individual importers’ behavior. In fact, placing the bulk of the burden on the importers accords with the Act’s legislative intent.¹⁸¹ During a hearing on the implementation of the UFLPA and its impact on supply chains, the Chairman of the Congressional-Executive Committee on China and the bill’s primary sponsor stated that the “genius” of the UFLPA is that “the burden is no longer upon the good men and women of the CBP to prove that goods have been made by forced labor, but upon importers to prove that goods made in Xinjiang and elsewhere are free from the taint of forced labor.”¹⁸²

Through this analogy, the Federal Circuit can apply the analytical framework used in traditional origin determination tests—such as substantial transformation or regional content value—to future UFLPA cases appealed from the CIT. This approach alleviates the lack of transparency and predictability that stems from the absence of case law and judicial analysis of Section 307 claims. For example, in cases involving the circumvention of antidumping duties on imported solar panels, the Federal Circuit has affirmed an agency’s *ad hoc* country of origin test.¹⁸³ Under the “reasoned explanation” test, the agency’s actions are not “arbitrary and capricious” when it provides an

¹⁷⁹ See Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, § 3(a), 135 Stat. 1525, 1529 (2021).

¹⁸⁰ See *id.* § 1(1) (“to strengthen the prohibition against the importation of goods made with forced labor”).

¹⁸¹ See *Hearings, supra* note 154 (statement of Rep. Christopher Smith, Chair, Cong.-Exec. Comm. on China).

¹⁸² *Id.*

¹⁸³ See *Canadian Solar*, 918 F.3d at 918 (reviewing a Department of Commerce action that used a country of assembly test instead of the substantial transformation test to determine country of origin for an import of solar panels).

explanation for deviating from a previous policy or practice.¹⁸⁴ The Federal Circuit’s deferential standard of review for antidumping duties claims reflects the UFLPA’s legislative intent to shift the burden away from the CBP.¹⁸⁵ Indeed, the UFLPA’s rebuttable presumption is a brighter line. Moreover, the agency’s decisions in *Canadian Solar, Inc. v. United States*¹⁸⁶ were a response to a circumvention problem localized in one industry from one country,¹⁸⁷ similar to the CBP’s enforcement of the UFLPA, which is localized to certain industries from one region.¹⁸⁸ After establishing a presumption that the agency’s decisions are accurate, barring a lack of “good reasons,” the bulk of the *Canadian Solar* decision focuses on whether there is “substantial evidence” to validate the agency’s factual determination that the importer, in fact, circumvented their customs duties.¹⁸⁹

Here, the type and quality of the evidence furnished by both the importer and the agency may elucidate the UFLPA’s “clear and convincing evidence” standard. By placing the UFLPA within traditional origin determination analysis, importers and litigators may draw inferences from other trade law precedent. Thereon, it becomes a matter of degree: if the UFLPA’s rebuttable presumption is a stricter standard than substantial transformation, then “clear and convincing” requires more than “substantial evidence.” The canons of trade law will provide more than enough examples to clarify the standard for enforcement under the UFLPA, ones that both importers and CBP would be subject to and familiar with.

By employing the proposed origin determination scheme to the evidentiary standard for the UFLPA, existing trade law precedent will allow for greater clarification of CBP enforcement of the UFLPA and other Section 307 claims.

¹⁸⁴ *Id.* at 917 (citing *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 46–49 (1983); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009)).

¹⁸⁵ See *Hearings*, *supra* note 181, at 2 (statement of Rep. Christopher Smith, Chair, Cong.-Exec. Comm. on China).

¹⁸⁶ 918 F.3d 909, 913 (Fed. Cir. 2019).

¹⁸⁷ See *id.* at 915, 921–22 (“It is unnecessary for Commerce to engage in a game of whack-a-mole when it may reasonably define the class or kind of merchandise in a single set of orders, and within the context of a single set of investigations, to include all imports causing injury.”).

¹⁸⁸ See discussion *supra* Section I.B; Uyghur Forced Labor Prevention Act, Pub. L. No. 117-78, § 2(d)(2)(B)(i)–(iv), 135 Stat. 1525, 1527 (2021) (listing entities and facilities located in or localized to Xinjiang).

¹⁸⁹ See *Canadian Solar*, 918 F.3d at 918–22.

Conclusion

The UFLPA is a landmark piece of legislation that creates an intentionally strict trade prohibition to prevent the importation of goods manufactured by forced labor.¹⁹⁰ However, the Act's intentionally strict rebuttable presumption has resulted in inconsistencies in enforcement and a lack of clarity for importers.¹⁹¹ Because the UFLPA is, at its heart, a country-of-origin-based trade law, trade law principles may shed light on the proper interpretation and implementation of the statute.¹⁹²

¹⁹⁰ See Uyghur Forced Labor Prevention Act § 3(a).

¹⁹¹ See discussion *supra* Section I.B.

¹⁹² See discussion *supra* Section III.B.

The Drawback Loophole: How a 1789 Duty Refund Law Can Nullify the Effects of Modern Tariff Policy*

Brian T. Robusto[†]

Introduction

On the 13th anniversary of the United States of America's inception, the 1st U.S. Congress passed the Tariff Act of July 4, 1789.¹ This watershed congressional action established the administration of import tariffs, or customs duties, to fund the infant federal government.² Tariffs or duties—terms often used interchangeably—are defined as “tax[es] levied by governments on the value including freight and insurance of imported products.”³ In lay terms, a tariff or duty is a small percentage of money the government receives when a good is brought into the country. Through these new fees on goods entering America's ports, the Tariff Act sought to increase revenue for a young, growing nation to serve essential functions like paying government wages and funding

* The history of tariffs from the 1789 founding of the United States to now is well limned in this Note, but its research and presentation end, by and large, in January 2025. Readers of this article at later dates should consider the possibility of updates or changes in the form of statute, regulation, or court decision that may have occurred since then.

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¹ See Tariff Act of July 4, 1789, ch. 2, 1 Stat. 24 (1789) (“An act for laying a duty on goods, wares, and merchandise imported into the United States”).

² See *id.*

³ *Import Tariffs Overview and Resources*, INT'L TRADE ADMIN., <https://www.trade.gov/import-tariffs-fees-overview-and-resources> [<https://perma.cc/Y5DF-WZYP>] (last visited Apr. 1, 2025).

federal debt.⁴ But the Tariff Act was also intended to catalyze import-export trade and domestic manufacturing in a quickly industrializing world.⁵

To do so, the Tariff Act contained a giveback of sorts in which 99% of import duties would be refunded, if imports were subsequently exported within a year of tariff payment.⁶ Under this “drawback program” provision, an American merchant, for example, who imported fabrics from abroad, paid tariffs on those imports, refined the fabrics, and then subsequently exported the fabrics for international buyers, could receive a refund on the initial payment of import tariffs.⁷ In this way, the drawback program is central to the Tariff Act by encouraging export and burgeoning trade.⁸

Over the years, the drawback program has evolved and grown, though its core functionality remains largely the same.⁹ Eligibility of imports for drawback has steadily expanded, with the most recent major developments from the Trade Facilitation and Enforcement Act of 2015 (“TFTEA”).¹⁰ However, between the revolutionary beginning of the drawback program in 1789 and today, duty drawback has gathered unintended power and has become

⁴ See Tyler Halloran, *A Brief History of Tariffs in the United States and the Dangers of Their Use Today*, FORDHAM J. CORP. & FIN. L. BLOG (Mar. 17, 2019), <https://news.law.fordham.edu/jcfl/2019/03/17/a-brief-history-of-tariffs-in-the-united-states-and-the-dangers-of-their-use-today/> [<https://perma.cc/Q98F-DTPY>]; see also JOHN M. DOBSON, TWO CENTURIES OF TARIFFS: THE BACKGROUND AND EMERGENCE OF THE U.S. INTERNATIONAL TRADE COMMISSION 6–8 (1976).

⁵ See Alyson Brinkman, *Recent Trade & Tariff Perspectives: Is Duty Drawback Right for You?*, C.H. ROBINSON: INSIGHTS & ADVISORIES (May 11, 2022), <https://www.chrobinson.com/en-us/resources/insights-and-advisories/trade-tariff-insights/05-11-2022/> [<https://perma.cc/6KP9-FC5X>] (“The duty drawback program . . . was initially created to generate jobs, encourage manufacturing, and the exportation of goods.”).

⁶ See Tariff Act of July 4, 1789, § 3 (establishing drawback and initially allowing for duties on goods exported within 12 months).

⁷ See *id.*; see also U.S. GOV’T ACCOUNTABILITY OFF., GAO-20-182, CUSTOMS AND BORDER PROTECTION: RISK MANAGEMENT FOR TARIFF REFUNDS SHOULD BE IMPROVED (2019) (generally discussing the history and functioning of the drawback program).

⁸ See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 7.

⁹ See generally U.S. CUSTOMS & BORDER PROT., WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT: DRAWBACK (2004) [hereinafter WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT] (outlining the changes and updates to drawback over the past two centuries, highlighting particular tariff legislation passed by Congress).

¹⁰ 19 U.S.C. §§ 4311–4323 (2016).

misused.¹¹ Certain exploitations of the law must be rooted out to maximize policies to achieve fair trade and stimulate domestic manufacturing.¹²

Nearly two centuries after the creation of the drawback program, Congress established importers' rights to claim a refund on *any* import duty imposed by the federal government.¹³ Today, some import duties—such as anti-dumping, countervailing duties, and Section 232 tariffs—are exceptions to this legal standard and do not qualify for duty drawback, because doing so would contradict their mitigating effects on commerce and trade.¹⁴

19 C.F.R. § 191.3(b) establishes the duties, taxes, and fees not eligible for drawback refund; however, § 191.3(b) should be expanded to exclude Section 301 tariffs from drawback eligibility.¹⁵ Section 301 tariffs are duties imposed on certain goods from a specified foreign country after the U.S. Trade Representative (“USTR”) investigates the country's trade practices and determines that they unreasonably or discriminatorily burden U.S. commerce.¹⁶ At present, these tariffs can be almost entirely refunded using the drawback program, a system that counteracts the mitigating effects of these tariffs on combatting predatory trade practices abroad.¹⁷

Expanding 19 C.F.R. § 191.3(b) to exclude Section 301(b) tariffs from drawback eligibility would accomplish three functional, administrative, and legal goals. First, it would stop duty drawback from being used as a loophole

¹¹ See, e.g., Urvaksh Karkaria, *How Volvo Overcomes U.S. Tariffs on Its Vehicles Made in China*, AUTOMOTIVE NEWS (Aug. 8, 2023, 12:20 PM), <https://www.autonews.com/manufacturing/volvo-sidesteps-25-tariff-china-made-vehicles> [<https://perma.cc/B3YE-PEXE>] (evidencing one instance of industry actors utilizing drawback to avoid policy-based heightened tariffs); John F. McKenzie, *Commercial, Professional Perspective – Section 301 Duty Mitigation Strategies*, BLOOMBERG L. (Dec. 2018), <https://www.bloomberglaw.com/external/document/XBSGSLHO000000/commercial-professional-perspective-section-301-duty-mitigation-> [<https://perma.cc/T5CS-M48K>] (explaining how industry actors can avoid paying increased tariffs using drawback from the perspective of legal counsel).

¹² See Karkaria, *supra* note 11; see also McKenzie, *supra* note 11; Brinkman, *supra* note 5.

¹³ See HISTORY AND OPERATION OF THE DRAWBACK LAWS, <https://www.reginfo.gov/public/do/eoDownloadDocument?pubId=&eodoc=true&documentID=3680> [<https://perma.cc/NG4P-6WDX>] (last visited Jan. 7, 2025) (citing Act of Dec. 28, 1980, Pub. L. No. 96-609, § 201, 94 Stat. 3555, 3560 (1980) (codified at 19 U.S.C. § 1313 (2018))).

¹⁴ See 19 C.F.R. § 191.3(b)(3) (2018) (listing anti-dumping and countervailing duties as excluded from drawback eligibility); Proclamation No. 9739, 83 Fed. Reg. 20677 (Apr. 30, 2018) (excluding Section 232 tariff on aluminum from drawback eligibility); Proclamation No. 9740, 83 Fed. Reg. 20683 (Apr. 30, 2018) (excluding Section 232 tariff on steel from drawback eligibility).

¹⁵ 19 C.F.R. § 191.3(b) (2018).

¹⁶ See 19 U.S.C. § 2411(b) (2018).

¹⁷ Compare 19 C.F.R. § 191.3(b) (2018), with 19 U.S.C. § 1313 (2018).

in undermining the government's objectives in implementing tariffs to offset the economic effects of unfair and unethical trade policies abroad.¹⁸ Second, it would help purify the drawback program in its original goal of supporting the U.S. economy, facilitating domestic manufacturing, and promoting fair trade.¹⁹ Finally, it would ease the burden on the administering agency, U.S. Customs and Border Protection ("CBP" or "Customs"), and the caseloads of the United States Court of International Trade ("CIT") and United States Court of Appeals for the Federal Circuit ("Federal Circuit") in processing and reviewing complex drawback and tariff claims.²⁰

This Note is organized into three sections: Part I reviews the history of the drawback program and its developments over the years. Part I also analyzes the administrative structure of the drawback program, some relevant import tariffs, and how they work. Part I specifically outlines Section 301 tariffs through comparison and contrast to drawback-exempt tariffs. Part II explains how modern drawback law is used as a loophole around paying increased tariff rates on imports from foreign countries with discriminatory trade policies in place. Part II also briefly overviews the debate surrounding the true market effects of tariffs but defers from drawing any new conclusion as tariffs appear locked into the future of U.S. policy regardless. Part III introduces this Note's novel proposal to exclude Section 301 tariffs from drawback eligibility, explains the policy benefits of this exclusion as well as potential counterarguments, broadly evaluates how the proposal could be enacted within the existing legal and administrative framework, and briefly discusses recent legislative proposals and policy developments in the sphere of tariffs and drawback.

¹⁸ See 19 U.S.C. § 2411(b) (2018); Will Kenton, *Anti-Dumping Duty: What It Is, How It Works, Examples*, INVESTOPEDIA: ECON., <https://www.investopedia.com/terms/a/anti-dumping-duty.asp> [<https://perma.cc/F7HZ-4DSQ>] (Oct. 6, 2020); Will Kenton, *Understanding Countervailing Duties (CVDs) in Global Trade*, INVESTOPEDIA: ECON., <https://www.investopedia.com/terms/c/countervailingduties.asp> [<https://perma.cc/4PRA-4HHX>] (Oct. 20, 2021).

¹⁹ Brinkman, *supra* note 5.

²⁰ See generally *In re* Section 301 Cases, 524 F. Supp. 3d 1355 (Ct. Int'l Trade July 6, 2021); *EchoStarTechs, L.L.C. v. United States*, 391 F. Supp. 3d 1316 (Ct. Int'l Trade Jun. 17, 2019); *Cal. Indus. Prods. v. United States*, 436 F.3d 1341, (Fed. Cir. 2006); *Aectra Ref. & Mktg., Inc. v. United States*, 565 F.3d 1364, (Fed. Cir. 2009).

I. Background: Drawback from 1789 to Present

A. Drawback: Legislative History

There have been significant changes to the drawback program since its enactment in Section 3 of the Tariff Act of 1789.²¹ This Section will trace the program's inception and outline its evolution over the past two centuries.

The initial scope of drawback "provided for a drawback of 99% of duties paid on merchandise (except distilled spirits) if exported within a year after duty was paid or security given for duty."²² At the time, tariffs were brand new to the nascent United States, so the drawback program, too, was relatively narrow and limited in application.²³ Over time, drawback evolved as tariff policy became more essential to the growing economy.²⁴

During the 19th century, tariffs accounted for approximately 95% of the federal government's revenue in some years.²⁵ Throughout this era of tariff necessity, drawback expanded to meet the country's growing needs, with other imported goods, such as salt and construction materials, becoming eligible for duty refunds.²⁶ But, while merchandise eligibility grew, the functionality of drawback remained restrictive.²⁷ By 1930, drawback law was codified in the Smoot-Hawley Tariff Act, a bill that saw Congress raise import duties by an average of 20%.²⁸

1. 1980: Unused Merchandise Drawback

In the 1980s, the drawback program underwent the most significant evolutions since its inception.²⁹ In Section 201 of the Act of December 28, 1980, Congress created the "Same Condition Drawback" provision, known in the

²¹ See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 7, at 7.

²² *Id.*

²³ See *id.*

²⁴ See Halloran, *supra* note 4 (explaining how drawback grew to be the central source of revenue for the U.S. government for a large part of the 19th century); see also U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 7.

²⁵ Halloran, *supra* note 4.

²⁶ See WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT, *supra* note 9, at 14.

²⁷ Compare WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT, *supra* note 9, with HISTORY AND OPERATION OF THE DRAWBACK LAWS, *supra* note 13 (showing that drawback had not functionally or procedurally evolved in kind at the time).

²⁸ See Halloran, *supra* note 4; see also 19 U.S.C. § 1313 (2018).

²⁹ See WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT, *supra* note 9, at 7 (outlining changes and amendments to drawback during the 1980s).

trade community today as the unused merchandise drawback.³⁰ This provision allows for duty drawback on imported merchandise not used in the United States and ultimately exported in essentially unaltered condition.³¹ The unused merchandise drawback allows a wide array of commercial activity, such as reselling, to avoid import duties.³² For example, if an American company imports a truck from Europe, pays duties, and then exports the truck to a buyer in South America, that American company can claim a duty refund under the unused drawback provision, 19 U.S.C. § 1313(j)(1).³³ By allowing commercial actors in the United States to import duty-free this way, the unused merchandise drawback helps grow opportunities for export as the drawback program originally intended.³⁴

2. 1984: Substitution Merchandise Drawback

In 1984, Congress again expanded drawback with a seemingly innocuous extension that fundamentally altered the practice of drawback law.³⁵ Among the amendments to 19 U.S.C. § 1313, “the concept of *substitution* was added for same condition drawback and exchange, or tradeoff, of domestic merchandise for imported merchandise[.]”³⁶ Substitution in drawback is self-explanatory in function: an American company imports a truck from Europe, pays import duties, and then sells the truck in the United States. Soon after, if the same company exports a truck of the same model to a foreign buyer, it can then claim drawback on the import duties of the first truck, recouping the previously paid duty amount.³⁷

³⁰ Act of Dec. 28, 1980, Pub. L. No. 96-609, § 201, 94 Stat. 3555, 3560 (1980) (codified at 19 U.S.C. § 1313 (2018)); *see also* WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT, *supra* note 9.

³¹ *See* WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT, *supra* note 9, at 16–20 (describing the unused merchandise drawback function).

³² *See Unused Merchandise Drawback Explained*, ALL. DRAWBACK SERVS.: DUTY DRAWBACK, <https://alliancechb.com/duty-drawback/unused-merchandise-drawback/> [<https://perma.cc/G6Z6-CK9U>] (last visited Mar. 31, 2025).

³³ *See id.* The importer can “use” the product in certain ways before exporting and still be eligible for the unused merchandise drawback. *Id.* For instance, in the truck example above, the importer can assess the truck for defects and test the vehicle in the U.S. without losing unused merchandise drawback eligibility. *See id.*

³⁴ *See* U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 7, at 4.

³⁵ *See* HISTORY AND OPERATION OF THE DRAWBACK LAWS, *supra* note 13.

³⁶ WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT, *supra* note 9.

³⁷ *See Substitution Drawback Matching Explained*, ALL. DRAWBACK SERVS., <https://alliancechb.com/duty-drawback/substitution-drawback/> [<https://perma.cc/NS2A-JY44>] (last visited Mar. 31, 2025) (spelling out the same process which underscores the substitution drawback).

In principle, the substitution provision makes sense to the core function of drawback, applying the same logic as the 1980 unused merchandise drawback—after all, there is no market difference between exporting the exact same imported merchandise and exporting the same model/type of merchandise.³⁸

And yet, it is difficult to conceptualize just how significant the addition of substitution was to drawback eligibility. Consider the before and after of the 1984 drawback amendment. Before substitution, in theory, only merchandise once imported to the United States could be eligible for drawback refund upon its eventual exportation.³⁹ After this addition, domestically produced merchandise could earn drawback refunds for equivalent merchandise previously imported, opening up a massive new class of merchandise for duty refunds and allowing domestic producers and manufacturers to ease their tariff burdens.⁴⁰ By practically removing origin requirements for duty refunds, drawback post-1984 began to truly bolster domestic manufacturing in direct ways by acting as a subsidy, of sorts, for vigorous trade activity from multi-dimensional commercial participants.⁴¹

3. 2016: *Trade Facilitation and Trade Enforcement Act*

The final step in the evolution of drawback law was enacting the TFTEA.⁴² Essentially, the TFTEA continued the trend of expanding drawback eligibility while also making the program more consistent and accessible for everyday use.⁴³

In particular, the bill created a more efficient substitution eligibility system in which goods matching Harmonized Tariff Schedule classifications could be substituted in the import-export process of claiming a drawback.⁴⁴ This replaced a previously discretionary “commercially interchangeable” threshold—one that had to be weighed and applied for every substitution drawback claim—with a much more concrete standard in the modern world of trade.⁴⁵

³⁸ Compare *Unused Merchandise Drawback Explained*, *supra* note 32, with *id.*

³⁹ See WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT, *supra* note 9.

⁴⁰ See *Substitution Drawback Matching Explained*, *supra* note 37.

⁴¹ Compare HISTORY AND OPERATION OF THE DRAWBACK LAWS, *supra* note 13, with *Substitution Drawback Matching Explained*, *supra* note 37.

⁴² 19 U.S.C. §§ 4311–4323 (2016).

⁴³ See *id.*; see also U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 7, at 18–24 (outlining the trend of expanding drawback eligibility over time).

⁴⁴ See 19 U.S.C. §§ 4311–4323 (2016); see also HISTORY AND OPERATION OF THE DRAWBACK LAWS, *supra* note 13, at 1, 3 (analyzing the amended substitution program in more detail).

⁴⁵ See HISTORY AND OPERATION OF THE DRAWBACK LAWS, *supra* note 13, at 1 (alluding generally to the commercially interchangeable threshold and its burdens).

The TFTEA also made various practical changes to drawback operations, such as requiring all claims to be filed electronically as opposed to processing burdensome paper claims.⁴⁶

B. Functional Structure of Drawback and Authorizing Statutes

The sum of these developments and expansions of drawback has led to the program's current three general categories of usage: manufacturing drawback (which includes original drawback use and substitution drawback), unused merchandise drawback (the 1980 addition), and rejected merchandise drawback.⁴⁷ This Section will briefly analyze each functional category of drawback in the context of its statutory authority and definition.

Manufacturing drawback is governed by 19 U.S.C. §§ 1313(a) and (b).⁴⁸ Using a manufacturing drawback, “drawback is available when imported—or an eligible substitute—merchandise is used to manufacture an article which is exported or destroyed within 5 years of import.”⁴⁹ For manufacturing drawback, recall the earlier example of refining fabrics: a merchant imports fabrics from Asia and pays import duties, refines and fashions the fabrics’ clothing, and exports that clothing to Europe, receiving a drawback refund on the initial import duties.

Unused merchandise drawback is governed by 19 U.S.C. § 1313(j), which states that “[d]rawback is available when imported merchandise is exported or destroyed within 3 years of import without being used in the U.S.”⁵⁰ For unused merchandise drawback, think purely reselling an imported good. According to 19 U.S.C. § 1313(j)(3), “performing of any operation or combination of operations (including, but not limited to, testing, cleaning, repacking, inspecting, sorting, refurbishing, freezing, blending, repairing, reworking, cutting, slitting, adjusting, replacing components, relabeling, disassembling, and unpacking), not amounting to manufacture or production[,]” is not considered “use” under drawback law.⁵¹

Finally, 19 U.S.C. § 1313(c) outlines the rejected merchandise drawback and explains that, in this category, drawback refunds are available when the imported goods do not conform “to sample or specifications,” are “shipped

⁴⁶ See Brinkman, *supra* note 5.

⁴⁷ See WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT, *supra* note 9, at 7–20 (illustrating the three categories of drawback).

⁴⁸ 19 U.S.C. §§ 1313(a)–1313(b) (2018).

⁴⁹ WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT, *supra* note 9, at 8 (if substitution manufacturing drawback is being used, the imported merchandise and the substituted merchandise must be used within three years).

⁵⁰ 19 U.S.C. § 1313(j) (2018).

⁵¹ 19 U.S.C. § 1313(j)(3) (2018).

without consent,” or are found to be “defective” when received.⁵² The concept of rejected merchandise drawback is self-evident in lay terms: if an imported good is defective or arrives not-as-ordered, import duties will be refunded when the rejected merchandise is returned to Customs.

C. Administering Authority of Drawback: CBP, DHS, and Treasury

This Section will overview the administrative authorities tasked with regulating and effectuating the drawback program. Drawback is administered by CBP, an executive agency within the U.S. Department of Homeland Security (“DHS”).⁵³ CBP “is the primary agency charged with ensuring the smooth flow of trade through U.S. ports of entry.”⁵⁴ As such, CBP oversees the duty collection and disbursement of import tariffs and drawback refunds.⁵⁵ As of 2019, CBP was refunding around \$1 billion in drawbacks per year.⁵⁶

Drawback can be complicated to administer even for the simplest claims, let alone in more complex substitution cases.⁵⁷ Regardless, the drawback process typically follows the same uniform procedures.⁵⁸ Drawback-eligible merchandise is imported, then the importer of the merchandise applies for a duty drawback with CBP, and finally, the importer exports or destroys the drawback-eligible merchandise or applicable substitute.⁵⁹ One can only claim a duty drawback if they (1) are the original importer of the merchandise, (2) have properly paid all import duties, taxes, and fees, and (3) have maintained proper records/documentation to prove the export/future export of the merchandise that drawback is being sought for.⁶⁰

⁵² 19 U.S.C. § 1313(c) (2018).

⁵³ See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 7, at 1.

⁵⁴ VIVIAN C. JONES & MARC R. ROSENBLUM, CONG. RSCH. SERV., U.S. CUSTOMS AND BORDER PROTECTION: TRADE FACILITATION, ENFORCEMENT, AND SECURITY (2013).

⁵⁵ See U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 7, at 45.

⁵⁶ See *id.*

⁵⁷ See, e.g., *EchoStarTechs, L.L.C. v. United States*, 391 F. Supp. 3d 1316, 1318 (Ct. Int'l Trade Jun. 17, 2019); *Cal. Indus. Prods. v. United States*, 436 F.3d 1341, 1343 (Fed. Cir. 2006); *Aectra Ref. & Mktg., Inc. v. United States*, 565 F.3d 1364, 1366 (Fed. Cir. 2009).

⁵⁸ See Prateek Gaur, *The Customs Duty Drawback Process: Everything You Need to Know*, CARGOFLIP, <https://www.cargoflip.com/post/customs-duty-drawback> [<https://perma.cc/SQL5-9378>] (July 23, 2023) (defining the uniform procedural process of a drawback claim in practice).

⁵⁹ See *id.*; see also *Substitution Drawback Matching Explained*, *supra* note 37 (referencing the process of exporting or destroying drawback eligible merchandise or its applicable substitute).

⁶⁰ See Gaur, *supra* note 58 (proper documentation includes: proof of duties paid (CBP Form 7552), information about imported commodity (CBP Form 7501), proof of import

However, CBP does not work alone in administering duty drawback. 19 U.S.C. § 1313(j) provides that “regulations prescribed by the Secretary of the Treasury” govern the drawback refund calculations and overall prescription.⁶¹ In this way, drawback administration and oversight is a bifurcated jurisdictional process working through the authority of the U.S. Department of Treasury (“Treasury Department”) and under the supervision of CBP.⁶²

D. Drawback Eligibility and Ineligibility Explained

This Section will provide an abbreviated overview of the sweeping eligibility of duties for drawback refunds and, conversely, outline certain tariffs excluded from drawback eligibility as a matter of policy.

It is worth noting that the previously discussed Act of 1980 not only expanded drawback eligibility to include unused, same-condition merchandise, it also “codified the right to claim drawback of ‘any duty, tax, or fee imposed under Federal law because of its importation.’”⁶³ The breadth of this right cannot be overstated: after the Act of 1980, drawback could effectively negate any and *all* duties, taxes, and fees imposed on imports by the federal government.⁶⁴ Today, up to 99% of the total amount of ordinary Customs duties paid will be eligible for drawback for all manufacturing, unused, and rejected merchandise drawbacks.⁶⁵ Additionally, drawback refunds extend to marking duties and internal revenue taxes imposed on merchandise applicable in any three-drawback category.⁶⁶

1. Limitations and Exclusions of Drawback Eligibility

The power and reach of drawback is, in reality, not as absolute as it may seem.⁶⁷ For instance, when seeking manufacturing drawback, the 0.34%

form (CBP Form 7551), proof of export form (bill of lading, commercial or sales invoices, other export-evidentiary documents)).

⁶¹ 19 U.S.C. § 1313(j) (2018).

⁶² See *id.* § 1313(a); 1313(c)(1).

⁶³ HISTORY AND OPERATION OF THE DRAWBACK LAWS, *supra* note 13, at 1.

⁶⁴ Compare *id.*, with David E. Birenbaum, *The Omnibus Trade Act of 1980: Trade Law Dialectics*, 10 U. PA. J. INT’L BUS. L. 653, 657–60 (1988) (showing drawback exclusion laws had not yet been passed at the time of and for the years following the Act of 1980).

⁶⁵ See 19 U.S.C. § 1313(c); 1313(l).

⁶⁶ See *Duty Drawback: A 101 Guide*, ASCENT (July 18, 2019), <https://ascentlogistics.com/blog/duty-drawback-a-101-guide/> [<https://perma.cc/S8M4-SAU8>] (listing marking duties and internal revenue taxes as “subject” to duty drawback).

⁶⁷ See 19 C.F.R. § 191.3(b) (2018) (evidencing some of the many duties not eligible for drawback).

ad valorem “Merchandise Processing User Fee” cannot be refunded.⁶⁸ Moreover, drawback eligibility has, at various times, been explicitly curbed or revised.⁶⁹ Effective 1994, the North American Free Trade Agreement (“NAFTA”) was a massive trilateral trade agreement between the United States, Mexico, and Canada.⁷⁰ Among the many provisions of the new law, Article 303 of NAFTA placed sunset dates, or points of expiration, on drawback eligibility for exports to Canada and Mexico.⁷¹ Likewise, the Omnibus Trade Act of 1988 marked a significant moment for drawback when Congress excluded an entire class of tariffs—anti-dumping and countervailing duties—from drawback eligibility.⁷² Of all import tariffs imposed throughout America’s history, anti-dumping and countervailing duties were novel in their exclusion from drawback.⁷³ And for good reason.

Anti-dumping duties are defined as “protectionist tariff[s] that a domestic government imposes on foreign imports that it believes are priced below fair market value.”⁷⁴ In short, because the influx of these priced-down goods could diminish the need for and value of locally manufactured and produced merchandise with normal pricing, a foreign government may support or subsidize this “dumping” activity to weaken a target economy’s domestic commerce, so anti-dumping duties are imposed as a protective measure.⁷⁵ Likewise, countervailing duties “are tariffs levied on imported goods to offset subsidies made to producers of these goods in the exporting country.”⁷⁶ Like anti-dumping duties, countervailing tariffs are used to protect a domestic economy from a foreign country subsidizing exports predatory to undercut or disrupt that economy’s established chain of manufacturing and production.⁷⁷

⁶⁸ See 19 C.F.R. § 191.3(b)(2) (2018) (“ad valorem” refers to a tax based on the value of the good).

⁶⁹ See, e.g., Drawback, 63 Fed. Reg. 10970 (Mar. 5, 1998) (to be codified at 19 C.F.R. pts. 7, 10, 145, 173, 174, 178, 181, 191) (significantly revising Customs regulation of drawback in accordance with NAFTA); Merchandise Processing Fee Eligible To Be Claimed as Unused Merchandise Drawback, 66 Fed. Reg. 9647, 9649 (Feb. 9, 2001) (to be codified at 19 C.F.R. pt. 191) (adding merchandise processing fees to eligible unused merchandise drawbacks); Modernized Drawback, 83 Fed. Reg. 64942, 65064 (Dec. 18, 2018) (to be codified at 19 C.F.R. pts. 181, 190, 191) (providing comprehensive update and modernization to the drawback program).

⁷⁰ North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289.

⁷¹ See *id.* at art. 303.

⁷² See Birenbaum, *supra* note 64, at 657, 660.

⁷³ See *id.*

⁷⁴ Kenton, *Anti-Dumping Duty*, *supra* note 18.

⁷⁵ See *id.*

⁷⁶ Kenton, *Understanding Countervailing Duties*, *supra* note 18.

⁷⁷ See *id.*

2. Section 232 Tariffs and Drawback

However, anti-dumping and countervailing duties are not the only class of tariffs excluded from drawback today.⁷⁸ In Section 232 of the Trade Expansion Act of 1962, Congress delegated authority to the executive to enact import restrictions like tariffs on imports that “threaten to impair the national security.”⁷⁹

Pursuant to Section 232, interested parties, or government entities themselves, may request that the executive branch investigate certain imports potentially harming national security.⁸⁰ Upon such a request, the U.S. Department of Commerce (“Commerce Department” or “Commerce”) immediately undertakes an investigation to determine if import restrictions on certain goods are advisable.⁸¹ Similar to the rationale for instituting anti-dumping and countervailing duties, Section 232 tariffs are applied when foreign actors threaten domestic industry by displacing locally manufactured products.⁸² However, Section 232 tariffs differ from anti-dumping and countervailing duties in two major ways.

First, anti-dumping and countervailing duties are more pointed, applying only when foreign goods are sold below fair value in the U.S. market or subsidized by a foreign adversary.⁸³ In contrast, Section 232 tariffs can apply to any import practice threatening national security.⁸⁴ Second, anti-dumping and countervailing duties are imposed without presidential action, triggering automatically when the ITC and Commerce Department investigate and confirm dumping or predatory subsidizing.⁸⁵ On the other hand, after a Section 232 investigation by Commerce determines certain import practices threaten national security, the President still must decide whether to concur with the findings and whether actions such as tariffs will be instituted.⁸⁶

In 2018, over a half-century after the codification of the Trade Expansion Act of 1962, the Commerce Department determined that the circumstances surrounding the import of steel and aluminum into the United States

⁷⁸ Both Proclamation No. 9739, 83 Fed. Reg. 20677 (Apr. 30, 2018), and Proclamation No. 9740, 83 Fed. Reg. 20683 (Apr. 30, 2018), announce Section 232 tariffs to be excluded from any drawback claims for steel and aluminum articles.

⁷⁹ 19 U.S.C. § 1862.

⁸⁰ See *id.*; see also RACHEL F. FEFER, CONG. RSCH. SERV., IF10667, SECTION 232 OF THE TRADE EXPANSION ACT OF 1962 (2022).

⁸¹ See 19 U.S.C. § 1862; see also FEFER, *supra* note 80.

⁸² See FEFER, *supra* note 80.

⁸³ See Kenton, *Anti-Dumping Duty*, *supra* note 18; see also Kenton, *Understanding Countervailing Duties*, *supra* note 18.

⁸⁴ See FEFER, *supra* note 80.

⁸⁵ See *id.*

⁸⁶ See *id.*

constituted a national security threat.⁸⁷ As a result, President Trump instituted Section 232 actions in the form of a 25% tariff on steel imports and a 10% tariff on aluminum imports.⁸⁸ But the executive action did not stop there. In a watershed move, President Trump exempted the Section 232 tariffs on steel and aluminum from drawback refunds through presidential proclamation, assuring the higher price on imports would be paid by the market actors who threaten national security.⁸⁹

3. Section 301 Tariffs and Drawback

Given the mitigating nature of anti-dumping, countervailing, and Section 232 tariffs, it follows logically that Congress and the executive branch would want to exclude these duties from drawback eligibility.⁹⁰ Claiming a drawback on these tariff classes would force entities in the U.S. government, such as CBP, to pay (refund) the higher import prices on “dumping” or foreign subsidized goods, while foreign exporters see no interruption to their targeted trade activity.⁹¹ It may seem surprising to learn that this is exactly what CBP must do for other tariffs still currently eligible for drawback: perhaps none more illogical than Section 301 tariffs.⁹²

Section 301 of the Trade Act of 1974 (“Section 301”) established the USTR, an executive agency tasked with administering trade policy.⁹³ Section 301 grants the USTR “a range of responsibilities and authorities to investigate and take action to enforce U.S. rights under trade agreements and respond to certain foreign trade practices.”⁹⁴ In practice, the USTR—at the behest of the President—investigates foreign countries for trade practices restrictive of U.S. commerce, and when such practices are found, takes trade action to mitigate those practices in a process similar to Section 232.⁹⁵ One example

⁸⁷ See Proclamation No. 9739, 83 Fed. Reg. 20677 (Apr. 30, 2018); Proclamation No. 9740, 83 Fed. Reg. 20683 (Apr. 30, 2018).

⁸⁸ See proclamations cited *supra* note 87. The steel and aluminum tariffs originally applied to every country, with exemptions for Brazil, South Korea, Canada, Mexico, Argentina, and Australia. See *id.*

⁸⁹ See proclamations cited *supra* note 87.

⁹⁰ Compare FEFER, *supra* note 80, with U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 7 (outlining the mitigating purpose of such tariffs, whereas refunding the increased tariffs would offset those tariffs’ effects as the refund cost is borne by Customs and the U.S. government).

⁹¹ Compare FEFER, *supra* note 80, with GOV’T ACCOUNTABILITY OFF., *supra* note 7.

⁹² See generally McKenzie, *supra* note 11.

⁹³ 19 U.S.C. § 2171 (2018).

⁹⁴ ANDRES B. SCHWARZENBERG, CONG. RSCH. SERV., SECTION 301 OF THE TRADE ACT OF 1974 (2024).

⁹⁵ See 19 U.S.C. §§ 2411(a)(1)(A)–(B)(i)(ii) (2018); see also 19 U.S.C. § 1862.

of this exercise of power was USTR's investigation into China's trade practices in 2017.⁹⁶

Between August 2017 and April 2018, the USTR determined the Chinese Government was participating in a multitude of unreasonable or discriminatory trade policies and practices relative to U.S. commerce.⁹⁷ Publishing its findings in the Federal Register, the USTR asserted China was employing targeted licensing requirements of U.S. companies, implementing foreign ownership restrictions on U.S. companies, overseeing hacking initiatives into U.S. networks, and enabling unfair investment and acquisition of U.S. companies and assets, among other things.⁹⁸ As a result, and for similar balancing and security goals of anti-dumping, countervailing, and Section 232 duties, the USTR recommended instituting up to 25% tariffs on a variety of Chinese imports.⁹⁹

II. Analysis: Drawback Loophole Explained

A. Drawback Loophole: Consequences of Section 301 Drawback Eligibility

Though these tariffs are relatively new in imposition, it is difficult to understand why these heightened Section 301 duties, when deemed appropriate, are currently eligible for drawback refunds given the purpose and nature of investigations by the USTR.¹⁰⁰

Consider the policy basis for the Section 301 tariffs: the higher cost associated with increased import tariffs logically deters American imports from certain countries of origin, which is the desired effect when an exporting country, such as China, discriminates against U.S. commerce through targeted initiatives.¹⁰¹ However, when an American importer can claim drawback on up to 99% of import duties paid, they are avoiding the mechanism of deterrence altogether, instead finding a way around the increased tariffs by simply passing along the cost of imports to Customs.¹⁰² Undoubtedly, this was not Congress's

⁹⁶ See SCHWARZENBERG, *supra* note 94.

⁹⁷ See McKenzie, *supra* note 11 (beginning with a discussion of Section 301 tariff history).

⁹⁸ See Notice of Determination and Request for Public Comment Concerning Proposed Determination of Action Pursuant to Section 301: China's Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation, 83 Fed. Reg. 14906 (Apr. 6, 2018).

⁹⁹ See McKenzie, *supra* note 11.

¹⁰⁰ *Contra* McKenzie, *supra* note 11 (discussing strategies to avoid Section 301 tariffs without rationalizing their eligibility for drawback).

¹⁰¹ See generally SCHWARZENBERG, *supra* note 94 (expressing the goal of Section 301 tariffs to combat discriminatory trade practices from China).

¹⁰² See generally Birenbaum, *supra* note 64.

intent when formulating the drawback program or establishing executive authority to impose targeted tariffs like Section 301 duties.¹⁰³ Customs should not bear this burden, and discriminatory trade adversaries like China should not be able to continue their predatory practices undeterred.¹⁰⁴

The following Sections will show how commercial actors utilize drawback in practice to avoid paying Section 301 tariffs in the long run and how this scheme impacts the trade policy outcomes of an administrative burden on the U.S. government.

1. Section 301 Drawback Eligibility in Practice—Volvo & Polestar

In 2023, international manufacturing corporations—such as automaker Volvo and electric vehicle manufacturer Polestar—utilized drawback law to avoid tens of millions of dollars in Section 301 and other import tariffs.¹⁰⁵ This is not an isolated incident of leveraging a “niche” trade program within the industry: General Motors, the only other prominent automaker that imports vehicles manufactured in China into the United States, also took advantage of drawback law to refund import duties in 2023.¹⁰⁶ These automakers have utilized manufacturing drawback in conjunction with a clever geographic business strategy to avoid the increased cost of importing under Section 301 and other tariffs.¹⁰⁷

In the case of Volvo and Polestar, the automakers have pursued manufacturing (and subsequently exporting) the Volvo and Polestar 3 vehicle models in the United States to import other models of the same tariff classification produced in China at the significantly reduced rate (avoiding Section 301 tariffs) by using drawback refunds.¹⁰⁸ By utilizing the manufacturing drawback in this way, Volvo and Polestar, in effect, gain a “competitive leg up” among other automakers who import from countries other than China and receive a less lucrative drawback refund, or produce domestically and export without

¹⁰³ Compare WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT, *supra* note 9, with FEFER, *supra* note 80 (comparing the reality of Customs and the U.S. government financing drawback refunds with the materiality of the tariffs implementation purposes to mitigate and offset through increased taxing).

¹⁰⁴ See Kimberly Glas, *Dispelling the Section 301 China Tariff-Inflation Myth*, SOURCING J. (Jan. 22, 2024, 3:30 PM), <https://sourcingjournal.com/topics/thought-leadership/dispelling-myth-section-301-china-tariff-inflation-consumer-us-kimberly-glas-489984/> [<https://perma.cc/8XUX-M7L3>] (arguing the importance of Section 301 tariffs on U.S. trade policy goals and challenging contrary perspectives).

¹⁰⁵ Karkaria, *supra* note 11.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

importing at all, thus not reaping the tariff benefits earned through their domestic production and export.¹⁰⁹

Most importantly, maneuvering of the drawback program by companies like Volvo and Polestar continues to create a high demand for imports from China, which is the outcome Section 301 tariffs sought to prevent.¹¹⁰ Drawback law does more than just present an opportunity for automakers to avoid import tariffs and create unwanted demand, as an estimated three billion dollars of duties are available for drawback refund by Customs every year across all industries.¹¹¹

2. Section 301 Drawback Administrative Burden

As previously explained, CBP handles almost all drawback-related matters, including processing drawback claims, ruling on drawback eligibility and other drawback determinations, and payment of drawback claims.¹¹² Aside from specific manufacturing drawback rulings—which are processed by the Office of International Trade—Customs is the primary arbiter of general drawback administration.¹¹³ In recent years, Customs has processed, on average, an estimated 12,500 drawback claims per year, for an estimated average of \$863.35 million in drawback refunds claimed per year by the overburdened Customs agency.¹¹⁴ However, while Customs bears the brunt of the massive administrative workload regarding drawback claims, claimants can protest rulings on their drawback requests by Customs to the CIT and further appeal to the Federal Circuit.¹¹⁵ In fact, U.S. law firms advertise themselves

¹⁰⁹ *Id.*

¹¹⁰ See Ken Moritsugu, *Chinese Auto Exports Rose 64% In 2023, With Strong Push by EVs, as Makers Expanded Overseas*, ASSOCIATED PRESS NEWS (Jan. 11, 2024, 9:09 PM), <https://apnews.com/article/china-auto-exports-ev-hybrid-7d553c31597125d6702b6691a8542cb1#> [<https://perma.cc/4YEJ-VY2A>] (evidencing the continuing growth in demand for Chinese exports); see also McKenzie, *supra* note 11 (showing other companies can capitalize on the same drawback loophole).

¹¹¹ See *Duty Drawback, A Simple Guide*, CJ INT'L, <https://www.cjinternational.com/drawback/> [<https://perma.cc/R8DM-XJ42>] (last visited Mar. 31, 2025).

¹¹² See U.S. CUSTOMS AND BORDER PROT., *DRAWBACK: A REFUND FOR CERTAIN EXPORTS* (2013).

¹¹³ See *id.*

¹¹⁴ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 7.

¹¹⁵ See generally *Chrysler Motors Corp. v. United States*, 14 Ct. Int'l Trade 807, 755 F. Supp. 388 (1990), *aff'd*, 945 F.2d 1187 (Fed. Cir. 1991); *Marathon Oil Co. v. United States*, 24 Ct. Int'l Trade 211, 93 F. Supp. 2d 1277 (2000); *Graham Eng'g Corp. v. United States*, 510 F.3d 1385 (Fed. Cir. 2007); *Int'l Light Metals v. United States*, 194 F.3d 1355 (Fed. Cir. 1999).

as willing and able to assist importers in properly utilizing drawback law to obtain tariff refunds through available means.¹¹⁶

Simply put, while duty drawback may be considered niche to certain manufacturers and trade professionals, the loophole of refunding increased import duties such as Section 301 tariffs is a well-known trick of the trade among legal professionals who may seek to improve clients' financial bottom lines, even if it works contrary to government objectives of protecting fair international trade and domestic manufacturing.¹¹⁷ But taking advantage of drawback law to counteract import tariffs is far from a black-and-white practice.¹¹⁸

B. Drawback Loophole: Debate in Theory, Consensus in Practice

While debate exists about the long-term market effects of tariffs, the U.S. government has seemingly agreed that tariffs are a necessary trade policy tool for the time being and would likely agree that amending the drawback program to purify the goals of mitigating tariffs is necessary.¹¹⁹

A prominent macroeconomic school of thought argues that raising import duties on certain products, in turn, increases the cost of those products, which must be borne, ultimately, by American consumers.¹²⁰ If this were the

¹¹⁶ See *Section 301 Tariffs on China*, SANDLER, TRAVIS & ROSENBERG, P.A., <https://shorturl.at/M9ch1> [<https://perma.cc/5W96-CVQM>] (last visited Apr. 1, 2025); see also *Litigation Against USTR Section 301 – List 3 & 4a (“Trump”) Tariffs*, TRADE L. COUNSEL, <https://www.tradelawcounsel.com/litigation-against-section-301-aka-trump-tariffs> [<https://perma.cc/42B8-LQCY>] (Feb. 22, 2024).

¹¹⁷ See Karkaria, *supra* note 11; McKenzie, *supra* note 11; SCHWARZENBERG, *supra* note 94; Birenbaum, *supra* note 64.

¹¹⁸ See generally McKenzie, *supra* note 11 (“Although the intent of those Section 301 duties is to encourage the Chinese government to abandon certain unreasonable and discriminatory trade practices, which unfairly restrict and burden United States commerce, the practical effect is to raise the cost of Chinese products to United States importers, and ultimately to United States consumers. This paper, therefore, suggests various strategies by which United States importers may be able to mitigate the effect of those Section 301 duties on merchandise imported into the United States.”).

¹¹⁹ Compare Notice of Modification: China’s Acts, Policies and Practices Related to Technology Transfer, Intellectual Property and Innovation, 89 Fed. Reg. 76581 (Sept. 18, 2024), and Proclamation No. 10782, 89 Fed. Reg. 57339 (July 10, 2024), and Proclamation No. 10783, 89 Fed. Reg. 57347 (July 10, 2024), with Proclamation No. 9739, 83 Fed. Reg. 20677 (Apr. 30, 2018), and Proclamation No. 9740, 83 Fed. Reg. 20683 (Apr. 30, 2018) (highlighting that former President Biden and President Trump both took various multifaceted actions to institute relevant tariffs that lack the desired mitigating effect without drawback exclusion).

¹²⁰ See generally McKenzie, *supra* note 11; Halloran, *supra* note 4; *Tariffs on China Weigh on the American Economy at a Critical Time*, U.S.-CHINA BUS. COUNCIL, <https://www.uschina>.

case, continuing to allow Section 301 and other increased tariffs to be drawback-eligible could mitigate the economic impact of such trade policies on consumers.¹²¹ Whether such tariffs really affect the market in this way, though, is contested.¹²²

Regarding Section 301 tariffs, in particular, analyses of consumer price inflation and market demand found that the tariffs *did not* cause the negative macroeconomic outcomes other economists claimed would come.¹²³ In 2022, the Economic Policy Institute published findings that post-pandemic increased inflation rates were not causally related to increased import duties like Section 301 tariffs.¹²⁴ The following year, the U.S. International Trade Commission (“ITC”) issued a broad report regarding the effects of Section 232 and Section 301 tariffs, finding mixed results; in particular, the tariffs increased U.S. production and decreased imports of targeted goods, but also increased prices.¹²⁵ The Federal Reserve Board published a report with similarly mixed findings, such as a relative reduction in domestic manufacturing employment and relative price increases balanced against import protection benefits.¹²⁶

Clearly, consensus does not exist regarding the actual, comprehensive market effects of import tariffs.¹²⁷ Solving such debate is beyond the scope of this Note and will be left to economists and other experts. Instead, to advance its claims, this Note relies on the decisions of those determining

org/wp-content/uploads/2020/08/tariffs_on_china_weigh_on_the_american_economy_at_a_critical_time.pdf [https://perma.cc/56C7-YYRP] (last visited Apr. 1, 2025).

¹²¹ See McKenzie, *supra* note 11 (claiming that “the practical effect” of Section 301 tariffs is increased prices for American consumers that drawback refunds could mitigate).

¹²² Compare McKenzie, *supra* note 11, and Halloran, *supra* note 4, and U.S.-CHINA BUS. COUNCIL, *supra* note 120, with Jeff Ferry, *Why Tariffs Are Not Raising Prices*, COAL. FOR A PROSPEROUS AM. (Dec. 4, 2018), <https://prosperousamerica.org/why-tariffs-are-not-raising-prices/> [https://perma.cc/DR5V-FACU]; Robert E. Scott & Adam S. Hersh, *Tariff Increases Did Not Cause Inflation, and Their Removal Would Undermine Domestic Supply Chains*, ECON. POL’Y INST. (Jan. 19, 2022, 11:19 AM), <https://www.epi.org/blog/tariff-increases-did-not-cause-inflation-and-their-removal-would-undermine-domestic-supply-chains/> [https://perma.cc/BYM9-2BWK].

¹²³ See Ferry, *supra* note 122.

¹²⁴ See Scott & Hersh, *supra* note 122.

¹²⁵ See U.S. INT’L TRADE COMM’N, ECONOMIC IMPACT OF SECTION 232 AND 301 TARIFFS ON U.S. INDUSTRIES 21–23 (2023).

¹²⁶ See AARON FLAAEN & JUSTIN PIERCE, FED. RSRV. BD., *DISENTANGLING THE EFFECTS OF THE 2018–2019 TARIFFS ON A GLOBALLY CONNECTED U.S. MANUFACTURING SECTOR* 3 (2019).

¹²⁷ Compare McKenzie, *supra* note 11, and Halloran, *supra* note 4, and U.S.-CHINA BUS. COUNCIL, *supra* note 120, with Ferry, *supra* note 122, and Scott & Hersh, *supra* note 122.

international trade policy and administering the implementation, execution, and oversight of tariffs.

Section 301 tariffs were originally announced in 2018 under the authority of the Trump administration but were renewed and extended multiple times under the authority of the Biden administration.¹²⁸ This fact should not be extrapolated to mean that the Biden administration had fully endorsed its predecessor's tariff strategy. However, in September 2024, the USTR under the Biden administration issued its 187-page report on President Trump's 2018 Section 301 tariffs on China, determining the tariffs were effective, reduced the effects on the U.S. of China's predatory trade practices, and should be continued in force.¹²⁹

The same can be said for Section 232 tariffs. In 2024, President Biden issued Proclamation 10782 and Proclamation 10783, announcing the decision to keep in place the Section 232 tariffs on steel and aluminum from the previous Trump administration.¹³⁰ Seeing as the federal government continues to pursue Section 232 and Section 301 tariffs consistently and across partisan governance, this Note argues that Section 301 tariffs should be similarly excluded from drawback eligibility to combat predatory trade practices and stimulate domestic manufacturing.¹³¹

III. Novel Proposal: Exclusion of Section 301 Tariffs

A. Excluding Section 301 Tariffs from Drawback Eligibility

This Note advocates for excluding Section 301 tariffs from drawback eligibility either by expanding 19 C.F.R. § 191.3(b)'s list of duties not subject to drawback or by executive action.

At present, 19 C.F.R. § 191.3(b) excludes three categories of duties from drawback eligibility: harbor maintenance taxes, merchandise processing fees,

¹²⁸ See SANDLER, TRAVIS & ROSENBERG, P.A., *supra* note 116; *see also* Extension of Exclusions and Request for Comments: China's Acts, Policies and Practices Related to Technology Transfer, Intellectual Property and Innovation, 88 Fed. Reg. 90225 (Dec. 26, 2023).

¹²⁹ See Notice of Modification: China's Acts, Policies and Practices Related to Technology Transfer, Intellectual Property and Innovation, 89 Fed. Reg. 76581 (Sept. 18, 2024); *see also* Press Release, Off. of the U.S. Trade Rep., USTR Finalizes Action on China Tariffs Following Statutory Four-Year Review (Sept. 13, 2024), <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2024/september/ustr-finalizes-action-china-tariffs-following-statutory-four-year-review> [<https://perma.cc/86J7-7LUW>].

¹³⁰ See Proclamation No. 10782, 89 Fed. Reg. 57339 (July 10, 2024); Proclamation No. 10783, 89 Fed. Reg. 57347 (July 10, 2024).

¹³¹ See generally SCHWARZENBERG, *supra* note 94 (overviewing the USTR directive of Section 301 tariffs and their purpose for combatting predatory trade action).

and anti-dumping and countervailing duties.¹³² 19 C.F.R. § 191.3(c) also provides that drawback is not allowed when the good in question “consists of an agricultural product which is duty-paid at the over-quota rate of duty established under a tariff-rate quota[.]”¹³³

Harbor maintenance taxes refer to 0.125% fees imposed on those who import through and benefit from U.S. ports and harbors, which are serviced and maintained at the cost of the U.S. government, just as everyday Americans pay taxes for public services such as roads.¹³⁴ Similarly, merchandise processing fees refer to the 0.346% *ad valorem* fee on all imported merchandise, covering the processing costs of entry and transport of goods, as the name suggests.¹³⁵

The odd fees out, so to speak, are anti-dumping and countervailing duties. Customs notices explain that these duties are not fees meant to account for government labor, maintenance, etc., but rather “are intended to offset the value of dumping and/or subsidization, thereby leveling the playing field for domestic industries injured by such unfairly traded imports.”¹³⁶ It seems that, in addition to regular maintenance and processing fees being exempt from drawback eligibility, there is precedent for excluding fees that mitigate predatory trade practices abroad and promote a level playing field for domestic commerce.¹³⁷ This is especially true when considering that, via presidential proclamation, Section 232 tariffs have already been excluded from drawback eligibility when the import circumstances regarding certain goods threaten the United States and its security.¹³⁸

Compare, once more, the purpose of countervailing, anti-dumping, and Section 232 duties with Section 301’s retaliatory duties, which are imposed in situations including when “(1) a violation [] denies U.S. rights under a trade agreement, (2) an ‘unjustifiable’ action [] ‘burdens or restricts’ U.S. commerce, and (3) an ‘unreasonable’ or ‘discriminatory’ action [] burdens or restricts’ U.S. commerce.”¹³⁹ Retaliatory action by the USTR under Section

¹³² See 19 C.F.R. § 191.3(b)(1)–(3) (2018).

¹³³ See 19 C.F.R. § 191.3(c) (2018).

¹³⁴ See 19 C.F.R. § 24.24 (1987).

¹³⁵ See 19 C.F.R. § 24.23 app. B (2018).

¹³⁶ See *Antidumping and Countervailing Duties (AD/CVD) Frequently Asked Questions*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/trade/priority-issues/adcvd/antidumping-and-countervailing-duties-adcvd-frequently-asked-questions> [<https://perma.cc/77GH-LSLU>] (last visited Jan. 7, 2025).

¹³⁷ Compare 19 C.F.R. § 191.3(b) (2018), with SCHWARZENBERG, *supra* note 94.

¹³⁸ See Proclamation No. 9739, 83 Fed. Reg. 20677 (Apr. 30, 2018); see also Proclamation No. 9740, 83 Fed. Reg. 20683 (Apr. 30, 2018).

¹³⁹ Compare Kenton, *Understanding Countervailing Duties*, *supra* note 18, and Kenton, *Anti-Dumping Duty*, *supra* note 18, and 19 U.S.C. § 1862, with SCHWARZENBERG, *supra* note

301 is meant to offset the effects of those acts that burden or restrict commerce just as anti-dumping, countervailing, and Section 232 duties do, and these Section 301 retaliatory actions such as increased import tariffs should not be subject to drawback refunds that counteract their effects.¹⁴⁰

B. Administrative Framework of Excluding Section 301 Tariffs from Drawback

Although drawback law is administered almost entirely through Customs and Border Protection, the bigger administrative picture is more complex, so restructuring existing drawback qualifications and Section 301 eligibility must consider the following factors outlined in this Section.¹⁴¹

Beyond Customs, the Office of International Trade processes certain specific manufacturing drawback claims.¹⁴² The Office of International Trade is organizationally located within the U.S. Small Business Administration—itsself an independent agency.¹⁴³ Customs, on the other hand, operates within the executive agency DHS.¹⁴⁴ 19 U.S.C. § 1313(i) authorizes the Secretary of the Treasury Department, also an executive agency, to issue rules and regulations governing the administration of drawback privileges.¹⁴⁵ The administration of Section 301 falls under the jurisdiction of the USTR, the independent agency with the authority to initiate investigations into potential discriminatory trade practices against U.S. commerce and to implement retaliatory actions.¹⁴⁶

To exclude Section 301 tariffs from drawback eligibility through traditional channels, 19 U.S.C. § 1313(l) would be central to the overhaul.¹⁴⁷ The Treasury Department could issue an amended 19 C.F.R. § 191.3(b) in conjunction with DHS—which shares in the regulation of 19 C.F.R. § 191.3—and under the delegated authority of 19 U.S.C. § 1313(i) to include Section 301 tariffs

94 (“commerce” is defined in the statute as goods, services, and/or investment).

¹⁴⁰ Compare 19 C.F.R. § 191.3(b) (2018), and 19 U.S.C. § 1862m, with SCHWARZENBERG, *supra* note 94.

¹⁴¹ See generally 19 U.S.C. § 1313(i) (2018); U.S. CUSTOMS & BORDER PROT., U.S. CUSTOMS AND BORDER PROTECTION (CBP) ORGANIZATIONAL STRUCTURE (2025); SCHWARZENBERG, *supra* note 94.

¹⁴² U.S. CUSTOMS & BORDER PROT., DRAWBACK: A REFUND FOR CERTAIN EXPORTS, *supra* note 112.

¹⁴³ Office of International Trade, U.S. SMALL BUS. ADMIN., <https://www.sba.gov/about-sba/sba-locations/headquarters-offices/office-international-trade> [<https://perma.cc/ZKH9-TDVW>] (last visited Apr. 1, 2025).

¹⁴⁴ JONES & ROSENBLUM, *supra* note 54.

¹⁴⁵ 19 U.S.C. § 1313(l) (2018).

¹⁴⁶ See SCHWARZENBERG, *supra* note 94.

¹⁴⁷ 19 U.S.C. § 1313(l) (2018).

in the list of duties not subject to drawback.¹⁴⁸ However, the link between the administration of the drawback program and Section 301 tariffs is ultimately executive authority, as the executive guides both independent agencies, such as the USTR, and executive agencies, like the Treasury Department and DHS.¹⁴⁹ As a result, the unilateral exclusion of Section 301 tariffs from drawback eligibility—administrative action that touches a variety of agencies and administering authorities—would require presidential support due to its interagency nature.¹⁵⁰

But presidential support for excluding Section 301 tariffs from drawback eligibility may be *all* needed to achieve this proposed outcome. After all, the President singlehandedly excluded certain Section 232 tariffs from eligibility through a presidential proclamation in 2018.¹⁵¹ If 2018 was any indication, it seems plausible that now, in its second term, the Trump administration could similarly exclude Section 301 tariffs from drawback eligibility by issuing a presidential proclamation.

C. Practical Effects of Excluding Section 301 Tariffs from Drawback Eligibility

By excluding Section 301 tariffs from drawback eligibility, the practical change to the drawback claims process would be straightforward: claimants would still be able to seek refunds on all the same merchandise and utilize the same procedures outlined in 19 U.S.C. § 1313 and 19 C.F.R. § 190, but additional Section 301 tariffs would no longer be calculated into those refunds.¹⁵² For example, say the D.B. Corporation imported products valued at \$10,000 from China and paid \$3,000 in duties on those products, including Section 301 tariffs.¹⁵³ Before, if the D.B. Corporation utilized a manufacturing, unused merchandise, or rejected merchandise drawback claim, the D.B. Corporation could ultimately refund up to \$2,475.00 on Section 301 tariffs alone using drawback, compared to the \$34.60 and \$12.50 it could refund respectively on merchandise processing and harbor maintenance

¹⁴⁸ See *id.*; 19 C.F.R. § 191.3 (2018).

¹⁴⁹ See 19 U.S.C. § 1313(*h*) (2018); 19 C.F.R. § 191.3 (2018); SCHWARZENBERG, *supra* note 94; *Executive Agencies Under Federal Law*, JUSTIA (May 2024), <https://www.justia.com/administrative-law/executive-agencies/> [<https://perma.cc/Y9DF-TMKB>].

¹⁵⁰ SCHWARZENBERG, *supra* note 94.

¹⁵¹ See Proclamation No. 9739, 83 Fed. Reg. 20677, 20679 (Apr. 30, 2018); see also Proclamation No. 9740, 83 Fed. Reg. 20683, 20685 (Apr. 30, 2018).

¹⁵² See 19 U.S.C. § 1313 (2018); see also 19 C.F.R. § 190.51(a)(2)(vii) (2018).

¹⁵³ These values and tariff calculations are completely arbitrary, made for clarity purposes and not to reflect actual tariff calculations assessed in practice.

fees.¹⁵⁴ If the proposed change to drawback eligibility was adopted, the D.B. Corporation could still claim a drawback on other import duties—like the harbor maintenance and merchandise processing fees—but would have to stomach up to 25% additional tariffs imposed due to the exporting country's trade practices, which would interrupt and burden U.S. commerce if left unchecked.¹⁵⁵ Considering the massive hike in price associated with this additional tariff, the D.B. Corporation would likely seek imports from other countries of origin, driving down demand for Section 301-identified predatory exporters and achieving the desired outcome for the stream of U.S. commerce.¹⁵⁶

While changing the administration of a legal program as complex as drawback will be burdensome to a degree on the regulating authorities, compare this potential burden to the current administrative process regarding classifying duties such as anti-dumping and countervailing tariffs for drawback eligibility.¹⁵⁷ Commerce and the ITC must investigate claims of dumping and unfair subsidization in a multi-pronged analysis of foreign export and domestic injury. Commerce, upon the proper findings, then directs CBP to suspend liquidation of the entries in question and begin the collection process of anti-dumping and countervailing duties, which must consider both future and retroactive effects. All of this will not come to pass unless a domestic industry files a petition claiming the unfair dumping and subsidization with all the relevant agencies for review.¹⁵⁸ Given that this Section 301 drawback proposal simplifies the drawback program by only removing one duty from the potential calculation, this change pales compared to the administrative burden from other drawback exclusions.¹⁵⁹

Finally, consider the potential effects of the proposed change to drawback eligibility on the Federal Circuit. To be sure, international trade jurisdiction makes up a small percentage of the Federal Circuit's caseload (4% in 2023).¹⁶⁰ However, individuals do protest the denial of drawback and other

¹⁵⁴ Compare 19 C.F.R. § 181.44(c) (2018), with 19 U.S.C. § 1313 (2018).

¹⁵⁵ See 19 U.S.C. § 1313 (2018); SCHWARZENBERG, *supra* note 94.

¹⁵⁶ See McKenzie, *supra* note 11; SCHWARZENBERG, *supra* note 94.

¹⁵⁷ *Drawback Frequently Asked Questions (FAQs)*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/trade/automated/news/drawback/drawback-ace-frequently-asked-questions-faqs> [<https://perma.cc/2KLM-E28U>] (June 27, 2024).

¹⁵⁸ *Antidumping and Countervailing Duties (AD/CVD) Frequently Asked Questions*, *supra* note 136.

¹⁵⁹ Compare 19 C.F.R. § 181.44(c) (2018), and 19 U.S.C. § 1313 (2018), with *Antidumping and Countervailing Duties (AD/CVD) Frequently Asked Questions*, *supra* note 136.

¹⁶⁰ See U.S. CT. OF APPEALS FOR THE FED. CIR.: APPEALS FILED, BY CATEGORY (2023), <https://cafc.uscourts.gov/wp-content/uploads/reports-stats/FY2023/CaseloadbyCategory-FY2023.pdf> [<https://perma.cc/NX2U-PQNX>].

drawback-related determinations to the ITC and appeal to the Federal Circuit.¹⁶¹ And while Section 301 retaliatory tariffs are relatively new in implementation, petitions exist before the Federal Circuit as of 2024 challenging Section 301 tariffs and considering their potential refund—petitions that would be simplified in the future if Section 301 tariffs were not subject to drawback.¹⁶²

Section 232 tariffs provide a useful point of comparison. Since their exclusion from drawback eligibility in 2018, constitutional challenges have still been raised regarding the President's implementation and determination processes of Section 232 tariffs.¹⁶³ However, two critical conclusions are clear from these legal challenges: such claims have never succeeded as a matter of law, and the cases do not take issue with the excluded drawback eligibility of Section 232.¹⁶⁴ If Section 301 tariffs follow a similar path of drawback eligibility as Section 232 tariffs, broad legal challenges to the validity of Section 301 tariffs may remain, but the removal of drawback refunds would only stand to simplify the complex administrative and legal questions surrounding the modern tariff system in the United States

D. Recent Legislative Developments

In addition to the outstanding appeals and petitions before the Federal Circuit regarding Section 301 tariffs broadly, a variety of recent legislative proposals implicate the positions, administrative systems, policies, and laws

¹⁶¹ See generally *Chrysler Motors Corp. v. United States*, 14 Ct. Int'l Trade 807, 755 F. Supp. 388 (1990), *aff'd*, 945 F.2d 1187 (Fed. Cir. 1991); *Marathon Oil Co. v. United States*, 24 Ct. Int'l Trade 211, 93 F. Supp. 2d 1277 (2000); *Graham Eng'g Corp. v. United States*, 510 F.3d 1385 (Fed. Cir. 2007); *Int'l Light Metals v. United States*, 194 F.3d 1355 (Fed. Cir. 1999).

¹⁶² See *In re Section 301 Cases*, 628 F. Supp. 3d 1235 (Ct. Int'l Trade Mar. 17, 2023), *appeal docketed sub nom.* HMTX Indus. LLC v. United States, No. 23-1891 (Fed. Cir. argued Jan. 9, 2025); see also Scott E. Diamond et al., *Plaintiffs File Notice of Appeal in China Section 301 Tariff Refund Litigation*, THOMPSON HINE: SMART TRADE (May 12, 2023), <https://www.thompsonhinesmartrade.com/2023/05/plaintiffs-file-notice-of-appeal-in-china-section-301-tariff-refund-litigation/> [<https://perma.cc/TZ43-HGP6>].

¹⁶³ See *PrimeSource Bldg. Prods. v. United States*, 59 F.4th 1255 (Fed. Cir. 2023), *cert. denied*, 144 S. Ct. 345 (2023); see also *Oman Fasteners, LLC v. United States*, 520 F. Supp. 3d 1332 (Ct. Int'l Trade June 10, 2021), *cert. denied*, 144 S. Ct. 561 (2024); *Am. Inst. for Int'l Steel, Inc. v. United States*, 806 Fed. Appx. 982 (Fed. Cir. 2020), *cert. denied*, 141 S. Ct. 133 (2020).

¹⁶⁴ See *PrimeSource Bldg. Prods.*, 59 F.4th at 1255; see also *Oman Fasteners, LLC*, 520 F. Supp. 3d at 1332; *Am. Inst. for Int'l Steel*, 806 Fed. Appx. at 982.

discussed in this Note and thus merit discussion.¹⁶⁵ The introduction of these bills to Congress evidences not only the current legislative climate regarding U.S. tariff policy and foreign trade threats, but also provides insight into possible future implications for drawback law and administration of Section 301-style tariffs.¹⁶⁶

In the 118th Congress, numerous bills came to the floor advancing additional tariffs or stricter trade regulations on predatory trade adversaries, particularly China.¹⁶⁷ These proposed legislative measures consistently advocated for increased standalone or based tariff rates on imports from foreign entities that burden U.S. commerce, or otherwise proposed tightening U.S. trade law to mitigate discriminatory practices abroad.¹⁶⁸ One of the final legislative proposals of the 118th Congress was a bill to revoke China's "Permanent Normal Trade Relations" status that gave the country preferential tariff treatment under U.S. trade law.¹⁶⁹

Notably, some of these legislative proposals directly addressed methods in which importers avoid paying duties like those imposed by Section 301.¹⁷⁰ A pair of bills introduced in the 118th Congress sought to end one method U.S. importers currently use to avoid paying Section 301 tariffs—a small loophole within this larger drawback loophole.¹⁷¹

Some U.S. importers take advantage of Section 301's "country of origin" requirement (Section 301 tariffs only apply to articles whose country of origin is the identified foreign commerce disruptor) to avoid paying the increased tariffs altogether.¹⁷² Importers essentially pass the merchandise through a third country—one not subject to Section 301 tariffs—and "transform" the merchandise in some way (often by shipping the parts to a third country for final assembly in that country) and, as a result, have avoided Section 301 duties entirely, regardless of if the materials and parts all originated and

¹⁶⁵ See, e.g., *In re Section 301 Cases*, 628 F. Supp. 3d at 1235; Diamond et al, *supra* note 162; S. 3831, 118th Cong. (2024); S. 3868, 118th Cong. (2024); S. 2004, 118th Cong. (2023).

¹⁶⁶ Compare McKenzie, *supra* note 11 (guiding U.S. importers to utilize country of origin shifting to avoid Section 301 tariffs), with Closing Auto Tariffs Loopholes Act, S. 3863, 118th Cong. § 2(a) (2024) (stating that motor vehicles produced by a foreign adversary will be classified as originating in the adversary country).

¹⁶⁷ See, e.g., S. 3831; S. 3868; S. 2004.

¹⁶⁸ See S. 3831; S. 3868; S. 2004 § 2.

¹⁶⁹ See H.R. 10127, 118th Cong. §§ 2(a)(8), 3, 4 (2024) (suspending normal trade relations with the People's Republic of China and modifying rates of duties imposed).

¹⁷⁰ See S. 3831 § 3(c) (overhauling rules of origin classifications for automobiles manufactured in China to include third-party producers); S. 3863 § 2.

¹⁷¹ See S. 3831 § 3(c); S. 3863 § 2.

¹⁷² See generally McKenzie, *supra* note 11.

were manufactured in the adversary country.¹⁷³ Recent legislative proposals would close this loophole for automobiles by tightening country of origin classifications.¹⁷⁴

Those proposals sought to treat a symptom as opposed to curing the problem. Implementing more stringent country of origin or other Section 301 regulations could affect one way in which U.S. importers avoid the laws implementing heightened tariff prices, but excluding these tariffs from drawback eligibility entirely would rectify the system of laws itself that, in effect, invites refunding heightened import tariffs.¹⁷⁵ Perhaps such legislative proposals would be an effective supplement to this Note's novel proposal.

E. Recent Executive Developments & Impact

The most significant recent development in discussing tariff law and its drawbacks has been the U.S. Presidential Election of 2024. Now-President Trump once quipped that “the most beautiful word in the dictionary is tariff,” and with his levity aside, the victor of the 2024 U.S. Presidential Election has made the significant role tariff policy will play in the future of U.S. trade relations abundantly clear.¹⁷⁶

Then-President-Elect Trump had indicated his plans to implement new tariff tranches and build out existing tariff policy from his first presidency on his first day back in the Oval Office, for instance, establishing additional tariffs on China, and a 25% tariff on all goods from Canada and Mexico, two of the United States' largest importers.¹⁷⁷ Interestingly, the new administration has suggested that tariffs will be used as a policy tool, not only in areas of international trade, manufacturing, and production, but also to ameliorate problems such as the nation's drug and immigration crises.¹⁷⁸ One such

¹⁷³ *See id.*

¹⁷⁴ *See* S. 3831 § 3(c); S. 3863 § 2.

¹⁷⁵ *Compare* 19 C.F.R. § 181.44(c) (2018), *with* 19 U.S.C. § 1313 (2018). *See also* SCHWARZENBERG, *supra* note 94.

¹⁷⁶ Then-Republican Presidential Nominee Donald Trump, Speech at the Econ. Club of Chi., at 2:55 (Oct. 15, 2024).

¹⁷⁷ *See* Ana Swanson, *What to Know About Trump's Tariffs: Higher Prices, Trade Wars and More*, N.Y. TIMES, <https://www.nytimes.com/2024/11/07/business/economy/trump-tariffs-canada-mexico-china.html> [<https://perma.cc/K77Y-4UKA>] (Nov. 26, 2024).

¹⁷⁸ *See* David Pierson, *Fentanyl Rises Again, This Time as Trump's Diplomatic Weapon Against China*, N.Y. TIMES, (Nov. 26, 2024), <https://www.nytimes.com/2024/11/26/world/asia/trump-china-tariff-fentanyl.html> [<https://perma.cc/U8JS-8E43>] (discussing then-nominee Donald Trump's planned imposition of tariffs on China if the transport of fentanyl into the United States was not mitigated); *see* Stephanie Brewer et al., *Trump's Threats of Tariffs as a Response to Migration and the Fentanyl Overdose Crisis*, WASH. OFF. ON LATIN AMERICA, (Dec. 5, 2024), <https://www.wola.org/analysis/>

example is President Trump's threat to impose tariffs on China if the Chinese government does not crack down on fentanyl producers and the flow of the drug into the United States¹⁷⁹ President Trump offered a similar warning to Canada and Mexico regarding fentanyl trafficking and undocumented immigration into the United States: solve the problem or heightened tariffs are coming.¹⁸⁰

Reactions to President Trump's new and expanded tariff plans have varied. Some industry groups have already begun to lobby Congress and organize efforts to oppose Trump's tariff authority.¹⁸¹ In contrast, others have heralded Trump's tariff threats as effective bargaining chips to accomplish a myriad of policy priorities, from international trade goals to drug trafficking.¹⁸² However, it is fair to wonder whether this new direction of tariff utility is a development unique to the reelection of President Trump. After all, in the months prior to the election, President Biden continued to impose additional tariffs on trade adversaries such as China, and allies such as the European Union passed similar tariffs just before President Trump's second election.¹⁸³

President Trump has asserted his intention to levy Section 301 tariffs of at least 60% on Chinese goods, and it is clearer, now more than ever, that

trumps-threats-of-tariffs-as-a-response-to-migration-and-the-fentanyl-overdose-crisis/[https://perma.cc/A7XB-CGBR] (referencing then-nominee Trump's threat to implement tariffs if problem of undocumented migration from Canada and Mexico into the United States was not "solve[d]").

¹⁷⁹ See Pierson, *supra* note 178.

¹⁸⁰ See Brewer et al., *supra* note 178.

¹⁸¹ See Shannon Pettypiece & Lawrence Hurley, *Trump's Authority to Impose Sweeping Tariffs to be Put to the Test*, NBC NEWS, (Nov. 16, 2024, 5:00 AM), <https://www.nbcnews.com/politics/economics/trumps-authority-impose-sweeping-tariffs-put-test-rcna179848> [https://perma.cc/XU4E-J3ET] (overviewing industries and actors that have indicated opposition to Trump's tariff agenda or announced plans to lobby opposition to the tariffs).

¹⁸² See Matt Egan, *The Case for Donald Trump's Tariffs*, CNN BUSINESS, <https://www.cnn.com/2024/12/10/business/tariffs-trump-trade-china/index.html> [https://perma.cc/5UCU-2YX5] (Dec. 10, 2024, 7:25 AM) (arguing for the utility of tariffs in bargaining and bureaucratic negotiations across areas such as manufacturing, agriculture, and drug trafficking).

¹⁸³ See Ana Swanson & Jordyn Holman, *Biden Administration Ratchets Up Tariffs on Chinese Goods*, N.Y. TIMES, (Sept. 13, 2024), <https://www.nytimes.com/2024/09/13/us/politics/biden-tariffs-chinese-goods-clothing.html> [https://perma.cc/32SG-DFPV] (overviewing additional tariffs imposed on China by Biden administration); Melissa Eddy & Jenny Gross, *Europe Imposes Higher Tariffs on Electric Vehicles Made in China*, N.Y. TIMES (Oct. 30, 2024), <https://www.nytimes.com/2024/10/30/business/european-union-china-electric-vehicle-tariffs.html#> [https://perma.cc/ZF2J-5CY7] (outlining tariffs implemented by European Union on electric vehicle manufacturing and exports from China).

tariffs sit at the center of U.S. policy for the foreseeable future.¹⁸⁴ As U.S. law and government systems prepare to confront this developing tariff world, the drawback loophole must first be closed to avoid entering the proverbial fight with one arm tied behind the back.

Conclusion

As this Note demonstrates, drawback law must be modernized to comport with a modern system of tariff administration by the U.S. government. Section 301 tariffs represent a careful exercise of government authority to retaliate against predatory international trade actors, promote domestic industry, and protect national security.¹⁸⁵ But refunding tariffs of this nature inhibits their intended goals.¹⁸⁶ With other tariffs imposed for identical reasons currently ineligible for drawback, it is illogical that Section 301 tariffs are continuously refunded.¹⁸⁷ The drawback program is a necessary means of fostering a balanced, functioning stream of commerce at home and abroad, but its consequences can do more harm to those ends than good.¹⁸⁸

However, it remains to be seen whether excluding Section 301 tariffs from drawback eligibility will be *enough* to close all loopholes in modern drawback law. Other methods of avoiding Section 301 tariffs, such as altering the origin point of merchandise exports, are already utilized and could still be taken advantage of even if the tariffs were not subject to drawback.¹⁸⁹ Moreover, new

¹⁸⁴ See R. Neal Martin et al., *2024 Post-Election Analysis: Trade and Tariffs*, MINTZ, (Dec. 2, 2024), https://www.mintz.com/insights-center/viewpoints/55001/2024-11-27-_024-post-election-analysis-trade-and-tariffs [<https://perma.cc/H3KC-L9F5>] (referencing then-President Elect Trump's stated intention to impose 60% Section 301 tariffs on China and discussing the Trump administration's general tariff policy).

¹⁸⁵ See generally SCHWARZENBERG, *supra* note 94.

¹⁸⁶ Compare WHAT EVERY MEMBER OF THE TRADE COMMUNITY SHOULD KNOW ABOUT, *supra* note 9, with FEFER, *supra* note 80 (contrasting drawback refund payments by Customs and the U.S. government with the mitigating purposes of anti-dumping, countervailing, and Section 232 tariffs showing a lack of accord in purpose and outcome).

¹⁸⁷ Compare Proclamation No. 9739, 83 Fed. Reg. 20677 (Apr. 30, 2018), and Proclamation No. 9740, 83 Fed. Reg. 20683 (Apr. 30, 2018), and Birenbaum, *supra* note 64, with FEFER, *supra* note 80 (juxtaposing the exclusion of Section 232, anti-dumping, and countervailing duties from drawback eligibility with the currently eligible Section 301 tariffs despite their functionally indistinguishable policy justifications).

¹⁸⁸ Compare Halloran, *supra* note 4, and DOBSON, *supra* note 4, at 6–8, with McKenzie, *supra* note 11 (collating the revolutionary purpose of drawback to stimulate domestic commerce and international trade with modern examples of commercial actors shirking import tariffs).

¹⁸⁹ See generally McKenzie, *supra* note 11.

tariffs are seemingly floated daily in today's administrative climate.¹⁹⁰ As such, recent legislative proposals addressing other methods of shirking increased tariff rates are noteworthy.¹⁹¹

What is clear is that the scope of drawback currently works against the goals of tariffs imposed through procedures like Section 301, and a slight amendment of the current law is a step in the right direction to remedying the existing gaps.¹⁹²

¹⁹⁰ See, e.g., Pierson, *supra* note 178; Brewer et al., *supra* note 178.

¹⁹¹ See S. 3831, 118th Cong. § 3(c) (2024); see also S. 3863, 118th Cong. § 2 (2024).

¹⁹² FEFER, *supra* note 80 (explicating the circumstances in which Section 232, anti-dumping, and countervailing are deemed appropriate and referencing their mitigating purposes). See Proclamation No. 10782, 89 Fed. Reg. 57339 (July 10, 2024); Proclamation No. 10783, 89 Fed. Reg. 57347 (July 10, 2024) (demonstrating that these tariffs, such as Section 232 tariffs, are being renewed and continued for their mitigating effects, and should be excluded from drawback eligibility like Section 232 tariffs to achieve such outcomes).

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