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Left Out in the Cold?: The Customs' Country of Origin Marking Requirements, the Section 516 Procedure, and the Lessons of Norcal/Crosetti

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LEFT OUT IN THE COLD?: THE CUSTOMS' COUNTRY OF
ORIGIN MARKING REQUIREMENTS, THE SECTION 516
PROCEDURE, AND THE LESSONS OF *NORCAL/CROSETTI*

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I. INTRODUCTION AND SCOPE

United States Customs law¹ requires every import to be marked with its country of origin² in such a manner that purchasers can easily find the mark and “read it without strain.”³ Because consumers presumably use this knowledge to “buy American,”⁴ domestic manufacturers encourage the enforcing agency, the United States Customs Service (“Customs”),⁵ to interpret⁶ the marking statute strictly.⁷ Until recently, a domestic manufacturer accomplished this by requesting Customs to issue an interpretive “letter ruling”⁸ requiring a particular good to carry a more “conspicuous”

1. 19 U.S.C. § 1304 (1988); 19 C.F.R. § 134 (1994) (implementing § 304). For a detailed analysis of the statutory requirements, see *infra* part II.A.1.

2. For further discussion of the determination of the country of origin, see *infra* note 67 and accompanying text.

3. 19 C.F.R. § 134.41(b) (1994) (“The ultimate purchaser in the United States must be able to find the marking easily and read it without strain.”).

4. Robert F. Ruyak, Note, *United States Country of Origin Marking Requirements: The Application of a Nontariff Trade Barrier*, 6 LAW & POL’Y INT’L BUS. 485, 487 (1974) (“Presumably, if U.S. consumers were given a clear choice—which would be supplied by the marking requirements—they would be persuaded by a sense of national pride and a confidence in ‘U.S. quality’ to purchase domestic items over their foreign counterparts.”). However, this commentator notes that no empirical studies have proved or disproved this theory. *Id.* at 487. For further discussion of the use of “buy American” sentiment in legislation, see *infra* note 33 and accompanying text.

5. For a discussion of the history and responsibilities of the Customs Service, see *infra* part II.A.2.

6. Congress granted Customs the power to interpret the provisions of § 304 as needed. 19 U.S.C. § 1304(a) (1988). For instance, Customs may “[d]etermine the character of words and phrases or abbreviations thereof and prescribe any reasonable method of marking . . . and a conspicuous place on the article (or container) where the marking shall appear.” 19 U.S.C. § 1304(a)(1) (1988).

7. See, e.g., Letter from Paul C. Rosenthal, Esq., of Collier, Shannon, Rill & Scott on behalf of the American Brass & Iron Foundry, Charlotte Pipe and Foundry Co., and Tyler Pipe Industries, to Carol Hallett, Commissioner of Customs, U.S. Customs Service (July 27, 1992) [hereinafter Letter to Hallett] (on file with author). Pursuant to § 177, the letter requests that Customs rule on “whether the markings on imported pipe are ‘conspicuous’ and ‘legible’ within the meaning of [§ 304].” *Id.* at 1. A related letter sent earlier from Rosenthal to Customs states in pertinent part:

Plumbing contractors and general contractors might or might not choose to use domestically-produced cast iron soil pipe if informed of the country of origin by conspicuous marking, but U.S. Customs laws mandate that they should be given a choice. Presently, however, they are not being given the opportunity to make such a choice because Venezuelan pipe is not being marked conspicuously or legibly.

Letter from Paul C. Rosenthal, Esq., of Collier, Shannon, Rill & Scott on behalf of the American Brass & Iron Foundry Co., and Tyler Pipe Industries, to Thomas Lobred, Chief, Value and Marking, U.S. Customs Service, 4 (Jan. 21, 1992) [hereinafter Letter to Lobred] (on file with author).

8. Section 177 of the Customs regulations provides for “letter rulings” which “interpret[] and appl[y] the provisions of the Customs and related laws to a specific set of facts.” 19 C.F.R. § 177.1(d) (1994). For a detailed discussion of these rulings, see *infra* part II.B.1.

or “legible”⁹ country of origin mark.¹⁰ In *Norcal/Crosetti Foods, Inc. v. United States*,¹¹ however, the United States Court of Appeals for the Federal Circuit banned the use of this procedure for marking issues.¹² Instead, the court required domestic interested parties to file section 516 petitions with the Secretary of the Treasury.¹³ If successful, these petitions result in the assessment of an additional duty on mismarked imports.¹⁴

However, section 516 petitions are a poor vehicle for bringing country of origin marking issues before customs. First, section 516 petitions misrepresent the concerns of domestic manufacturers by seeking additional duties in lieu of alternative statutory interpretation. Second, section 516 petitions¹⁵ impose redundant procedural burdens on petitioning parties,¹⁶ while failing to provide measurable due process benefits to importers.¹⁷ Therefore, Congress should act to create more effective ruling and appeal provisions.

This Note analyzes the ability of domestic manufacturers to influence Customs’ interpretation and application of the country of origin marking statute, both before and after the *Norcal/Crosetti* decision. Part II is divided into three sub-parts. Sub-part A presents section 304,¹⁸ the substantive marking law, and offers a brief overview of Customs’ history and responsibilities. Sub-part B presents the two procedural provisions:

9. For a discussion of these terms, see *infra* note 29.

10. See, e.g., Letter to Hallett, *supra* note 7, at 1 n.1; Letter to Lobred, *supra* note 7.

11. 963 F.2d 356 (Fed. Cir. 1992).

12. *Id.* at 360.

13. *Id.* See also 19 U.S.C. § 1516 (1988); 19 C.F.R. § 175 (1994) (implementing § 1516). For a detailed discussion of this procedure, see *infra* part II.B.2.

14. Section 304 provides for, *inter alia*, an additional duty of 10% ad valorem when goods are not properly marked with the country of origin. 19 U.S.C. § 1304(f) (1988). For further discussion of penalties on mismarked goods, see *infra* notes 35-40 and accompanying text.

15. The *Norcal/Crosetti* court failed to recognize the distinction between the letter rulings process and the § 516 administrative procedure mandated by its holding. There is a significant distinction between writing a letter asking Customs to construe the marking statute in a certain manner, and filing a petition demanding that Customs charge an importer additional duties because his goods do not conform with the existing interpretation of the statute. See *infra* part III.A.2. Should Congress fail to enact a legislative remedy, the § 516 procedure will be strained beyond its intended scope as domestic industry attempts to adapt the procedure to address its true concerns.

16. Section 516 petitions result in redundant notice-and-comment requirements that increase petitioning parties’ transaction costs and restrict their access to the courts. For further discussion of these problems, see *infra* part III.B.1.

17. For further discussion of how § 516’s notice-and-comment opportunities fail to provide importers with additional meaningful due process, see *infra* part III.B.2.

18. 19 U.S.C. § 1304(a) (1988).

section 177,¹⁹ the provision governing the letter rulings employed by domestic manufacturers prior to *Norcal/Crosetti*, and section 516,²⁰ the provision governing the domestic interested party petitions required by *Norcal/Crosetti*. Sub-part C presents the *Norcal/Crosetti* case.²¹ Part III focuses on the problems caused by “shoe-horning”²² marking issues into the section 516 administrative procedure. Finally, Part IV suggests a legislative remedy for the unique problem of country of origin marking issues. Specifically, this Note proposes adapting certain North American Free Trade Agreement (“NAFTA”) dispute resolution procedures to apply on a multinational basis.²³ This would provide predictable and transparent procedures for all parties involved, in compliance with the United States’ obligations under the General Agreement on Tariffs and Trade (“GATT”).²⁴

II. BACKGROUND

A. *The Substantive Law: Getting Imports In*

1. *Section 304: The Marking Statute*

Section 304 of the Tariff Act of 1930, as amended by the Omnibus Trade and Competitiveness Act of 1988,²⁵ requires every foreign²⁶

19. 19 C.F.R. § 177 (1994).

20. 19 U.S.C. § 1516 (1988).

21. *Norcal/Crosetti Foods v. United States Customs Service*, 758 F. Supp. 729 (Ct. Int’l Trade 1991), *rev’d*, 963 F.2d 356 (Fed. Cir. 1992).

22. Justice Musgrave first used this term in *Norcal/Crosetti*, 758 F. Supp. at 733. He noted the “[in]appropriateness of shoe-horning” marking issues into the § 516 administrative procedure. *Id.*

23. See North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, Dec. 17, 1992, art. 1805 (G.P.O. 1993) [hereinafter NAFTA].

24. See Agreement on Technical Barriers to Trade, Uruguay Round of Multilateral Trade Negotiations, General Agreement on Tariffs and Trade, Apr. 15, 1994, arts. 2.2, 2.9.1, 2.9.4 (U.S.T.R. ed., 1994). Article 2.2 of this agreement, which echoes GATT Article III obligations, requires that “Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating obstacles for international trade.” *Id.* at 2.2. Article 2.9 further requires publication and opportunity to comment. *Id.* at 2.9.1, 2.9.4. One might argue that the marking statute violates Article 2.2 entirely. This Note, however, takes a more functional approach, operating under the premise that § 304, the marking statute, does exist, and therefore, domestic manufacturers have a right to use it as Congress intended.

25. 19 U.S.C. § 1304(a) (1988). This statute provides:

(a) Marking of articles

Except as hereinafter provided, every article of foreign origin (or its container, as provided in subsection (b) hereof) imported into the United States shall be marked in a conspicuous

import²⁷ destined for American consumers²⁸ to be marked conspicuously, legibly, and permanently²⁹ with its country of origin.³⁰ Congress, a historically protectionist institution,³¹ passed the marking provision³² to

place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such a manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article.

Id.; see also 19 C.F.R. § 134.11 (1994). Section 134 contains the Customs regulations interpreting and implementing § 304.

26. Section 304 only applies to foreign origin goods. 19 U.S.C. § 1304 (1988). United States components sent abroad for further processing may qualify for special marking under the Customs regulations, in which case the label can read "Assembled in __ from U.S. materials." 19 C.F.R. § 10.22 (1994). However, the country of assembly is the country of origin for marking purposes only. Letter from John Durant, Director, Commercial Rulings Division, U.S. Customs Service, to Katten, Muchin & Zavis (Mar. 25, 1991), available in LEXIS, ITRADE Library, ALLCUS File. For duty assessment, the normal rules of origin apply. See *infra* note 67.

27. Section 304, the country of origin marking statute, imposes substantive marking requirements on each "article" in a shipment of goods. 19 U.S.C. § 1304 (1988); 19 C.F.R. § 134.1 (1994) (definitions). However, the term "article" is not defined in the statute. If the nature of an article prevents it from being marked, the article's container must still be marked. 19 C.F.R. § 134.22(a) (1994). Some inherently unmarkable goods are specifically exempted from marking by subsection (J) of § 304. 19 U.S.C. § 1304(a)(3)(J). Examples of these "J-list" items include works of art, chemicals and drugs, paper, furs and feathers, wire, livestock, sugar, and Christmas trees. 19 C.F.R. § 134.33 (1994). J-list exceptions are granted on the basis of policy. Ruyak, *supra* note 4, at 507.

28. The marking statute aims to inform the "ultimate purchaser" of the country of origin of the good. 19 U.S.C. § 1304(a) (1988). "Ultimate purchaser" is defined as "the last person in the United States who will receive the article in the form in which it was imported." 19 C.F.R. § 134.1(d) (1994). The question of who constitutes an ultimate purchaser has been the subject of judicial review. See, e.g., *Pabrini, Inc. v. United States*, 630 F. Supp. 360 (Ct. Int'l Trade 1986); *Uniroyal, Inc. v. United States*, 542 F. Supp. 1026 (Ct. Int'l Trade 1982), *aff'd*, 702 F.2d 1022 (Fed. Cir. 1983); *Gibson-Thomsen Co. v. United States*, 2 Cust. Ct. 172 (1939), *aff'd*, 27 C.C.P.A. 267 (1940).

29. These terms evade concrete definition due to the infinite fact-specific variables of each case, resulting in generalized rules and item-by-item determinations. See Ruyak, *supra* note 4, at 490. Generally, the mark must be easily identifiable from a casual inspection, with printing that is comparatively large, contrastingly colored, and not smudged or otherwise obscured. *Id.* at 490-91. The permanence requirement has been interpreted to mean that the mark need only stay on long enough to reach the ultimate purchaser, who may then remove the mark. *Id.* at 491-92.

30. "Country of origin" is defined as "the country of manufacture, production, or growth of any article. . . ." 19 C.F.R. § 134.1(b) (1994). The definition also provides that "[f]urther work or material added to an article in another country must effect a *substantial transformation* in order to render such other country the 'country of origin.'" *Id.* (emphasis added). See generally *United States v. Murray*, 621 F.2d 1163 (1st Cir. 1980), *cert. denied*, 449 U.S. 837 (1980) (defining country of origin and substantial transformation). For further discussion of rules of origin and substantial transformation, see *infra* note 67.

31. In 1928, the United States Supreme Court upheld a blatantly protectionist tariff act and acknowledged Congress' propensity to protectionism, stating:

[N]o historian, whatever his view of the wisdom of the policy of protection, would contend that Congress since the first Revenue Act, in 1789, has not assumed that it was within its power . . . to encourage the growth of the industries of the nation by protecting home production against foreign competition.

improve the competitive position³³ of domestic industry by capitalizing on consumer tendencies to “buy American.”³⁴ If a good does not bear the proper mark at the time of importation and the importer fails to rectify the situation, Customs imposes an “additional” duty³⁵ of ten percent ad valorem, i.e., ten percent of the value of the goods.³⁶ However, payment of this duty does not relieve the importer from the duty to mark,³⁷ and

J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 411 (1928).

32. Tariff Act of 1890, ch. 1244, § 6, 26 Stat. 613 (1890).

33. See *Diamond Match Co. v. United States*, 49 C.C.P.A. 52, 61 (1962) (Martin, J., dissenting) (“[M]any consumers prefer to ‘buy American’ or will not purchase merchandise originating in a particular country for one reason or another . . . Because of this attitude . . . the domestic manufacturer’s competitive position is improved and he has the right to protect this position.”).

34. 1 BRUCE E. CLUBB, UNITED STATES FOREIGN TRADE LAW § 19.13, at 396 (1991) (“The purpose of the marking requirement was to inform the United States consumer of the country of origin of imported articles because Congress believed that the knowledge could influence the consumer’s choice of products.”) (citing H.R. REP. NO. 1466, 51st Cong., 1st Sess. 6-7 (1890) (stating that the purpose of the marking statute is “to protect both our own people from imposition of inferior goods and the revenue from possible loss through undervaluation.”)). See also *United States v. Friedlaender & Co.*, 27 C.C.P.A. 297, 302 (1940) (“The evident purpose of [the statute] is to mark goods so that at the time of purchase the ultimate purchaser may, by knowing where the goods are produced, be able to buy or refuse to buy them, if such marking will influence his will.”); *Globemaster, Inc. v. United States*, 340 F. Supp. 974, 976 (Cust. Ct. 1972) (“Congress was also aware of the fact that many consumers prefer merchandise produced in this country, and sought . . . to confer an advantage on domestic producers.”).

35. The statute specifically deems the 10% duty merely “additional” and states that it “shall not be construed to be penal.” 19 U.S.C. § 1304(f) (1988). However, given the construction of the statute, the duty serves no other purpose than to coerce importers to properly mark the goods; therefore, the duty is actually a penalty for noncompliance. See *infra* note 37. Of note, Customs officials themselves refer to the duty as a penalty. See Letter from John Durant, Director, Commercial Rulings Division, United States Customs Service, to Newark International Airport 1 (Feb. 12, 1991), available in LEXIS, ITRADE Library, ALLCUS File (referring to “a penalty case involving failure to mark the country of origin of tin-lead ingots”) (emphasis added).

36. 19 U.S.C. § 1304(f) (1988). The provision also requires the violating importer to pay the costs of the supervising Customs officials. *Id.*; see also 19 C.F.R. § 134.55 (1994) (detailing billable costs). For a discussion of the term “ad valorem,” see *infra* note 75 and accompanying text.

37. In *Globemaster, Inc. v. United States*, 340 F. Supp. 974, 978 (Cust. Ct. 1972) (quoting *United States v. Hammond Lead Products, Inc.*, 440 F.2d 1024, 1029 (C.C.P.A. 1971)), the court invoked § 304(g) and held that “an importer who pays the duty [for not marking] cannot thereby obtain the right to import without marking.” Subsection (g) of § 304 provides:

(g) Delivery withheld until marked

No imported article held in Customs custody for inspection, examination, or appraisement shall be delivered until such article and every other article of the importation . . . shall have been marked in accordance with the requirements of this section or until the amount of duty estimated to be payable under subsection (f) [the 10% duty plus costs] has been deposited. *Nothing in this section shall be construed as excepting any article . . . from the particular requirements of marking*

19 U.S.C. § 1304(g) (1988) (emphasis added).

Originally, the penalty for mismarking was complete denial of entry. Tariff Act of 1890, ch. 1244, § 6, 26 Stat. 613 (1890). An 1894 amendment provided that mismarked goods were not to be delivered

failure to mark can result in forced exportation or destruction of the goods,³⁸ liquidated damages,³⁹ and even criminal sanctions.⁴⁰ Thus, the marking statute creates a two-part trade barrier: First, the statutory marking requirements act as an "entry barrier." Second, the mark itself serves as a "sales barrier" in the marketplace.⁴¹

to the importer until they were properly marked, thereby granting Customs supervisory powers. Tariff Act of 1894, ch. 349, § 5, 28 Stat. 547 (1894). The ad valorem "penalty" duty was added in the Tariff Act of 1922, ch. 356, § 304(a), 42 Stat. 936 (1922). One commentator argues that the language of § 304(g) indicates that the 10% duty was merely to "insure that there would be no delivery of imported articles [to the importer] until they were properly marked." David Silverstein, *Country of Origin Marking Requirements under Section 304 of the Tariff Act: An Importer's Map Through the Maze*, 25 AM. BUS. L.J. 285, 287 (1987). On the other hand, in his treatise on trade law, Clubb states that "[w]here the goods have *already been sold* by the importer to the general public, an additional duty of 10 percent of the value of the goods may be assessed for the marking violation." CLUBB, *supra* note 34, § 19.16, at 409 (emphasis added). This implies that the additional duty is a disfavored substitute for actual marking and is imposed only when goods that have been released on bond cannot be retrieved. *Globemaster* supports this analysis. 340 F. Supp. at 977 (discussing importing practice and the release of goods under bond). For a discussion of bond, see *infra* note 58.

38. 19 C.F.R. § 134.51(a) (1994). The Customs regulations provide:

§ 134.51 Procedure when importation found not legally marked.

(a) Notice to mark or redeliver. When articles or containers are found upon examination not to be legally marked, the district director shall notify the importer . . . to arrange . . . to properly mark the article or containers, or to return all released articles to Customs custody for marking, exportation, or destruction.

Id. (emphasis added). On the issue of redelivery, Customs "may demand that the goods be recalled to Customs' custody and properly marked by the importer before they are released again from Customs' custody." CLUBB, *supra* note 34, § 19.16, at 409.

39. 19 C.F.R. § 134.54(a) (1994). This section provides:

§ 134.54 Articles released from Customs custody.

(a) Demand for liquidated damages. If within 30 days . . . the importer does not properly mark or redeliver all merchandise previously released to him, the district director shall demand payment of liquidated damages incurred under the bond in an amount equal to the entered value of the articles not properly marked or redelivered, plus any estimated duty thereon as determined at the time of entry.

Id.

40. 19 U.S.C. § 1304(h) (1988). Criminal sanctions were first added for intentional marking violations in 1909. Tariff Act of 1909, ch. 6, § 8, 36 Stat. 86 (1909). Today, criminal fines up to \$250,000 and/or imprisonment terms not exceeding one year can be imposed if the violation is committed with the intent to defraud Customs. 19 U.S.C. § 1304(h) (1988).

41. Ruyak, *supra* note 4, at 485-87. Thus, the marking provision is a blatantly protectionist measure. However, it is beyond the scope of this Note to pursue in depth the free trade/protectionism debate inherent in the battle between importers and domestic manufacturers. Briefly, free trade adherents posit that "all consumers in all countries will be better off if there are no restrictions on imports, since there will be a wider variety of goods available in greater quantity and at a lower price." CLUBB, *supra* note 34, at lxii. Conversely, protectionists point out that "people are not only consumers but are also workers and factory owners and, if they have no jobs, they lack the income to buy goods either foreign or domestic no matter how plentiful and inexpensive the goods may be." *Id.* Therefore, protectionists wholeheartedly support governmental intervention on behalf of domestic industry to restrict imports, typified in measures like § 304. See *id.* at lxii-lxiii. Free-traders, on the other hand, would like to see

2. *The History and Purpose of the Customs Service*

Article I, Section 8 of the United States Constitution grants Congress the authority to regulate commerce with foreign nations⁴² and to levy duties⁴³ on imported goods.⁴⁴ Pursuant to this authority, Congress passed a provision imposing duties on all imports almost immediately after the Constitution came into force.⁴⁵ The duty provision had two goals: to create revenue for the federal government and to protect America's infant industries.⁴⁶ To enforce the duty provision, Congress created the United States Customs Service.⁴⁷

As international commerce has increased in both volume and complexity, so have Customs' responsibilities.⁴⁸ These responsibilities can be classified

§ 304 stricken from the books. As it stands, § 304 exists and until Congress decides otherwise, domestic manufacturers have the right to use it for the purposes Congress envisioned. For a detailed analysis of the negative aspects of protectionist United States trade laws, see Thomas J. Schoenbaum, *The International Trade Laws and the New Protectionism: The Need for a Synthesis with Antitrust*, 19 N.C. J. INT'L L. & COM. REG. 394 (1994).

42. U.S. CONST. art. I, § 8, cl. 3 ("The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.").

43. This Note uses the words "duty" and "tariff" interchangeably to mean the tax on imports mandated by Congress and enforced by Customs. See BLACK'S LAW DICTIONARY 1014-15 (6th ed. 1991); see also Walter E. Doherty, *An Introduction to Customs Law and Practice*, 11 SUFFOLK TRANSNAT'L L.J. 301, 302-04 (1987) (explaining the history of duties and tariffs).

44. U.S. CONST. art. I, § 8, cl. 1 ("The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises . . . but all Duties, Imposts and Excises shall be uniform throughout the United States.").

45. Act of July 4, 1789, ch. 2, 1 Stat. 24 (1789). That this Act was Congress' second indicates the importance with which Congress viewed tariffs. See CLUBB, *supra* note 34, § 1.7, at 14, § 12.2, at 254; Daniel K. Tarullo, *Law and Politics in Twentieth Century Tariff History*, 34 UCLA L. REV. 285, 286 (1986).

46. The Act stated that the imposition of tariffs was "necessary for the support of the government . . . and the encouragement of protection of manufacturers." Act of July 4, 1789, ch. 2, 1 Stat. 24 (1789). See also CLUBB, *supra* note 34, § 1.7, at 14; Tarullo, *supra* note 45, at 286. One commentator argues that the protectionist goals of the first tariff act were second to the goal of creating much-needed revenue. Doherty, *supra* note 43, at 305. Whether or not this commentator is correct, the differences of opinion between those advocating tariffs for revenue only and those seeking to use the tariffs to protect industry have been manifested over the years in alternating high and low tariffs. Ruth F. Sturm, *Customs: Past, Present, and Future*, 37 FED. B. NEWS & J. 151 (1990). These differences of opinion are currently reflected in the views of the two political parties. *Id.*

47. Act of July 31, 1789, ch. 5, 1 Stat. 29-49 (1789).

48. Other responsibilities include monitoring export controls, preventing smuggling, collecting trade statistics, administering the bonded warehouse system, and regulating coastal shipping. CLUBB, *supra* note 34, § 12.5, at 257-61, § 12.2, at 270.

as either three categories: fiscal, regulatory, or statistical in nature.⁴⁹ Fiscal activities can be described as those necessary for and having the ultimate goal of collecting or disbursing money.⁵⁰ By contrast, regulatory activities determine “whether [goods] shall be allowed to enter the country,” are “explicitly forbidden” or are allowed “only if they are of certain prescribed standards.”⁵¹

a) Fiscal Responsibilities: Assessing Duties

To achieve uniform and consistent collection of duties, foreign goods arriving in a United States port are immediately received into the custody of the Customs Service.⁵² This requires the importer to satisfy Customs, rather than placing the burden on Customs to chase down every importer.⁵³ To “clear Customs,”⁵⁴ an importer must present certain documentation⁵⁵ associated with a shipment of goods to the Customs officials at the port of entry.⁵⁶ At that time, Customs officials examine the goods and

49. LAWRENCE F. SCHMECKEBIER, *THE CUSTOMS SERVICE: ITS HISTORY, ACTIVITIES AND ORGANIZATION* 32, 126 (AMS Press 1974) (1924). Customs’ statistical activities are currently limited to the collection of raw data. *Id.* at 29. In 1923, responsibility for the compilation and publication of Customs data was transferred to the Department of Commerce. *Id.* at 29-30 (citing Act of Jan. 5, 1923, ch. 23, 42 Stat. 1109 (1923)).

50. *Id.* at 33. This Note is concerned only with Customs’ collection responsibilities. The Customs’ disbursement function involves the refund of duties on United States components further processed abroad and returned to the United States under section 9802.00.80 of the Harmonized Tariff Schedule of the United States. *See id.* at 32; U.S. INT’L TRADE COMM’N, PUB. NO. 2567, HARMONIZED TARIFF SCHEDULE OF THE UNITED STATES, (1993) [hereinafter HTSUS]; *supra* note 25 (discussing special marking requirements for goods further processed abroad). For an explanation of the HTSUS, see *infra* notes 60-62 and accompanying text.

51. SCHMECKEBIER, *supra* note 49, at 72-73.

52. 19 C.F.R. § 141 (1994).

53. In 1815, Congress passed a law against smuggling that permitted any naval officer or Customs inspector to stop and search suspect vehicles for goods which had not paid the import tax. Act of March 3, 1815, ch. 94, § 2, 3 Stat. 231, 232 (1815). The Act allowed the inspectors to “seize the goods in anticipation of trial” if probable cause existed for the belief that the importer had evaded duty payment. CLUBB, *supra* note 34, § 12.5.2, at 259.

54. This non-legal term encompasses the entire process that is required to satisfy Customs’ regulations.

55. Such documentation includes: an entry form conforming with 19 C.F.R. § 141.61 (1994), naming the importer as the importer of record, describing the merchandise, and showing the amount of duties due; a copy of the commercial invoice showing what is contained in the shipment and the amount that the importer paid for it, per 19 U.S.C. § 1484(b) (1988); a bill of lading, per 19 U.S.C. § 1484(c) (1988); a check for the amount of the estimated duties due, per 19 C.F.R. §§ 141.101-105 (1994); and, if necessary, a power of attorney authorizing the broker to act on behalf of the importer, per 19 C.F.R. § 141.31(a) (1994). *See also* CLUBB, *supra* note 34, § 19.4, at 382.

56. CLUBB, *supra* note 34, at 380.

perform their statutorily mandated functions which include, *inter alia*, the assessment of duties.⁵⁷ If the importer does not have the necessary documentation or does not pay the duties, Customs will not release the goods.⁵⁸

Assessment of duties involves a two-step process of "classification" and "valuation."⁵⁹ In classification, a Customs official fits an importer's goods into one of approximately 8,000 descriptive "tariff schedule" categories according to the nature of the goods.⁶⁰ The tariff schedule, known as the Harmonized Tariff Schedule of the United States ("HTSUS"),⁶¹ lists the categories in an outline format, with each tabulation describing goods with increasing specificity. Each category, or "tariff heading," has been assigned a percentage duty rate by Congress.⁶² Because duties differ from heading to heading, the tariff heading under which a Customs official classifies an import is of utmost importance to the importer.⁶³

The duty rate assigned to each tariff heading is further broken down on a country-specific basis. The HTSUS has two columns of duty rates, and the application of one column over the other turns on the country of origin of the import.⁶⁴ The first column contains a concessionary rate for goods

57. For a descriptive list of additional Customs responsibilities, see *supra* note 48 and accompanying text.

58. See CLUBB, *supra* note 34, § 19.4, at 382 ("Customs will not release the goods to the broker without [the bill of lading]."); § 19.14.2, at 407 ("In order to obtain release of the goods from Customs' custody, the importer must put up a bond, under which a surety undertakes to 'pay any and all such duties and taxes found to be due.'") (citing 19 C.F.R. § 143.3(a)-(b) (1989)).

59. CLUBB, *supra* note 34, at 383; Charles Routh, *A Few Pointers on Customs Law*, 40 PRAC. LAW. 43, 44 (1994).

60. One commentator notes, "classification of commodities . . . gives the greatest trouble in customs administration. [This is] due to the fact that there is often doubt regarding which one of several classifications in the [HTSUS] is applicable to the particular article." SCHMECKEBIER, *supra* note 49, at 42. See generally Routh, *supra* note 59, at 44-46; Peggy Chaplin, *An Introduction to the Harmonized System*, 12 N.C. J. INT'L L. & COM. REG. 417 (1987).

61. HTSUS, *supra* note 50.

62. See *id.*

63. In one recent example, Customs' New York office issued a letter ruling classifying a mylar glove liner under HTSUS 6116.93.1000, "gloves, mittens and mitts, knitted or crocheted: other: of synthetic fibers: ski or snowmobile gloves, mittens and mitts," dutiable at a rate of 5.5 percent ad valorem. Letter from John Durant, Director, Commercial Rulings Division, U.S. Customs Service, to Lee, Smith, Wells and Lamont (Oct. 24, 1994), available in LEXIS, ITRADE Library, ALLCUS File. Based on *Stonewall Trading Co. v. United States*, 64 Cust. Ct. 482 (1970), which outlined the necessary characteristics of "ski gloves," the Washington office believed that classification was an error. *Id.* Customs re-issued a letter ruling classifying the gloves under HTSUS 6116.93.9400, "gloves, mittens and mitts, knitted or crocheted: other: of synthetic fibers: other: other: with fourchettes," dutiable at 19.8 percent ad valorem. *Id.* This change represented a 14.3 percent increase in price for the importer. *Id.*

64. CLUBB, *supra* note 34, § 19.7, at 387-89.

from nations benefitting from special trade agreements.⁶⁵ The second column represents a higher “statutory rate” for products from nations not parties to special trade agreements, mostly former Soviet nations.⁶⁶ Thus, an article’s country of origin⁶⁷ is significant for classification purposes because the HTSUS applies a higher or lower duty rate depending on the country of origin.⁶⁸

65. *Id.* This column is further broken down into a General and a Special subcolumn. *Id.* The General subcolumn applies to countries benefitting from Most Favored Nation (“MFN”) status (mainly signatories of GATT). *Id.* The Special subcolumn is reserved for more specific United States trade initiatives such as the Generalized System of Preferences (“GSP”), the Caribbean Basin Economic Recovery Act (“CBERA”), and the United States-Israel Free Trade Area. *Id.*

66. *Id.* As these countries convert to market economies, it seems likely that the use of the statutory rate will decline into near obscurity.

67. The manner in which Customs determines origin, referred to as the “rules of origin,” is beyond the scope of this Note. Generally, the rules of origin provide that an import is a product of either the country in which a majority of the work has taken place, or the last country in which the item underwent a “substantial transformation.” 19 C.F.R. § 134.1(b) (1994). The rules of origin, and especially the substantial transformation test, have been attacked by commentators as ambiguous and unpredictable when applied. See Michael P. Maxwell, *Formulating Rules of Origin for Imported Merchandise: Transforming the Substantial Transformation Test*, 23 GEO. WASH. J. INT’L L. & ECON. 669, 671 (1990); John P. Simpson, *Rules of Origin in Transition: A Changing Environment and Prospects for Reform*, 22 LAW & POL’Y INT’L BUS. 665, 667 (1991); C. Edward Galfand, Comment, *Heeding the Call for a Predictable Rule of Origin*, 11 U. PA. J. INT’L BUS. L. 469, 470 (1989). These commentators prefer a “tariff shift test,” which imputes substantial transformation if the tariff classification of an imported good has changed upon export due to further processing. See Gary Sampliner and Brian J. O’Shea, *Rules of Origin for Foreign Acquisitions Under the Trade Agreements Act of 1979, NAFTA, and the New GATT Accords*, 23 PUB. CONT. L.J. 207, 232-33 (1994) (explaining the tariff shift approach). For a discussion of NAFTA’s new rules of origin, see *infra* note 68; see also *United States v. Gibson-Thomsen Co., Inc.*, 27 C.C.P.A. 267 (1940) (addressing the substantial transformation test under the marking regulations); *Koru North America v. United States*, 701 F. Supp. 229 (Ct. Int’l Trade 1988) (discussing the substantial transformation test with respect to marking requirements); *Uniroyal, Inc. v. United States*, 542 F. Supp. 1026 (Ct. Int’l Trade 1982), *aff’d*, 702 F.2d 1022 (Fed. Cir. 1983); see generally *Anheuser-Busch Brewing Association v. United States*, 207 U.S. 556 (1908); *Superior Wire v. United States*, 669 F. Supp. 472 (Ct. Int’l Trade 1987), *aff’d*, 867 F.2d 1409 (Fed. Cir. 1989); *Ferrostaal Metals Corp. v. United States*, 664 F. Supp. 535 (Ct. Int’l Trade 1987).

68. In addition to determining the HTSUS duty rate, country of origin determines whether various substantive trade restrictions apply. Some of the restrictions constitute fiscal activities and others, regulatory. For example, enforcement of antidumping and countervailing duty orders, which impose extra duties, qualifies as fiscal activity. SCHMECKEBIER, *supra* note 49, at 40-42. Enforcement of other restrictions, such as embargoes, quotas, and health-related prohibitions, which completely bar the entry of goods, constitutes a regulatory responsibility. *Id.* at 72-78.

Note that substantive country of origin rules are important in the context of § 304 country of origin marking only in that such rules determine which country must be marked on an item. They do not prescribe the manner in which the item must be marked. These are two distinct issues. See *Rules for Determining the Country of Origin of a Good for Purposes of Annex 311 of the North American Free Trade Agreement*, 59 Fed. Reg. 110 (1994) (changing the rules for determining country of origin from

In the second step, valuation, Customs appraises how much a shipment of goods is worth.⁶⁹ Value is based on the market worth of the goods.⁷⁰ While Customs prefers to use the actual transaction value of a particular shipment of goods,⁷¹ sometimes such information is not yet available or is not accurate. When this occurs, Customs establishes value using one of four other value methodologies: identical goods value, similar goods value, deductive value, or computed value.⁷² Customs applies these in descending order, employing the first usable definition on the list.⁷³ In other words, only if Customs is unable to use actual transaction value will it turn to identical goods value, and then only if Customs cannot use identical goods value will it turn to similar goods value, and so on.⁷⁴

The value is multiplied by the percentage duty rate, resulting in an "ad valorem" duty.⁷⁵ Again, because the net worth of the goods serves as the base factor in the duty equation, the amount at which the goods are appraised greatly concerns the importer: the lower the value of the goods, the lower the duty imposed.⁷⁶

a substantial transformation test to a tariff shift test as required by paragraph 1 of Annex 311 of NAFTA).

69. CLUBB, *supra* note 34, § 19.5.2, at 385; Routh, *supra* note 59, at 47.

70. The Uruguay Round of GATT requires signatory nations to "use market transaction prices for valuation, as opposed to published list prices, or administered control prices." JOE COBB, HERITAGE FOUNDATION REPORTS, BACKGROUNDER REP. NO. 985, A GUIDE TO THE NEW GATT AGREEMENT (1994). *See generally*, Michael E. Roll, *Nissho Iwai American Corp. v. United States: Customs Appraisal and Middleman Pricing Under Section 402 of the Tariff Act of 1930*, 17 FORDHAM INT'L L.J. 190 (1993).

71. *See* 19 U.S.C. § 1401a(a)(1)(A) (1988). The commercial invoice is used for this purpose. CLUBB, *supra* note 34, § 19.4, at 382. However, the value appearing on the commercial invoice often requires certain deductions or additions in order to reflect the correct transaction value. Roll, *supra* note 70, at 197; Routh, *supra* note 59, at 50-51. *See also* 19 U.S.C. §§ 1401a(b)(1), 1401a(b)(3) (1988).

72. CLUBB, *supra* note 34, § 19.5.2, at 386; Routh, *supra* note 59, at 50. These methodologies are mandated by GATT. Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade, Apr. 12, 1979, T.I.A.S. No. 10,402 (1979) (implemented by The Trade Agreements Act of 1980, Pub. L. No. 96-39, 93 Stat. 144 (1980)). *See also* Roll, *supra* note 70, at 198 (discussing the history of the U.S. and GATT provisions).

73. CLUBB, *supra* note 34, § 19.5.2, at 386-87; Routh, *supra* note 59, at 50.

74. For a detailed discussion of these methodologies, see Izzet M. Sinan, *European Community Customs Duties: A Significant Trading Consideration for U.S. Companies*, 18 W. MITCHELL L. REV. 401, 423 (1992).

75. SCHMECKEBIER, *supra* note 49, at 33. Although not relevant to § 304, two other types of duties exist: specific and compound. A specific duty is a charge per quantitative unit, "such as the duty of 35 cents a bushel of wheat." A compound duty incorporates both ad valorem and specific duties, resulting in, for example, the duty on "benzoic acid, which is . . . 2½ cents a pound plus 15 per cent on the value." *Id.*

76. *See id.* at 34-35.

b) Regulatory Responsibilities: Checking for Marking

In contrast to classification and valuation, which result directly in the collection of duties and therefore, constitute fiscal activities, section 304 requires Customs to perform a regulatory function.⁷⁷ The ultimate goal of trade regulation is “to foster, protect, control, and restrain” trade for the purpose of advancing domestic commerce.⁷⁸ According to section 304, if goods are not conspicuously, legibly, and permanently marked with the English name of the country in which they were produced, Customs must exclude them from entry.⁷⁹ If the importer chooses to comply with the statute and properly marks the goods, Customs will not impose the ten percent duty on the shipment.⁸⁰ Based on legislative history and the practical operation of the statute, it is clear that the aim of the marking statute is to “restrain” entry of unmarked goods in order to “foster” and “protect” United States industry by capitalizing on nationalist sentiment.⁸¹ The ten percent duty is merely one of several sanctions used to enforce compliance with the law.⁸² Thus, enforcement of section 304 cannot be construed as a fiscal activity; instead, it is a regulatory activity.

B. The Procedural Law: Keeping Imports Out

The activities described above illustrate the extent of Customs’ discretion, whether it involves choosing one of 8,000 overlapping HTSUS headings or determining whether a tar-covered, but die-sunk, country of origin mark on a pipe is conspicuous. Needless to say, any given Customs’ decision has the potential to make those affected by it unhappy or confused.

To address these concerns, the tariff and trade statutes provide importers and other interested parties with various methods to clarify or dispute

77. *Id.* at 74.

78. BLACK’S LAW DICTIONARY 1286 (6th ed. 1990) (citing *Virginian Ry. Co. v. System Federation No. 40*, 84 F.2d 641, 650 (4th Cir. 1936), *aff’d*, 300 U.S. 515 (1937)).

79. 19 C.F.R. § 134.51 (1994). For the text of this section, see *supra* note 38.

80. 19 U.S.C. § 1304(f) (1988). The section provides that the 10% duty will only be imposed if the mismarked or unmarked goods are not re-exported, destroyed, or made to conform. *Id.* Additionally, the duty will be imposed even if the goods are not subject to any “ordinary customs duties.” *Id.*

81. See *Unites States v. American Sponge & Chamois Co.*, 16 Ct. Cust. 61, 66 (Ct. Cust. App. 1928) (“The [marking] law was not intended so much to derive revenue as it was to protect the American manufacturer and purchaser of the merchandise.”).

82. For a discussion of other available sanctions, see *supra* notes 38-40 and accompanying text. For a discussion of the role of the 10% penalty duty, see *supra* note 37.

Customs' decisions.⁸³ Should an interested party avail itself of one of these methods and then disagree with Customs' ruling on the issue, the party may challenge that ruling.⁸⁴ Depending on the type of dispute resolution procedure employed by the party, specific administrative appeal procedures may exist.⁸⁵ If so, the party must follow these procedures in order to "exhaust its administrative remedies" and place the case within the jurisdiction of the courts.⁸⁶ If administrative appeal procedures do not apply to the situation or do not afford an adequate remedy, the party may take its case to the Court of International Trade ("CIT") and, on the appellate level, the Court of Appeals for the Federal Circuit ("CAFC").⁸⁷

I. Pre-Norcal/Crosetti: Section 177 Letter Rulings

Prior to the *Norcal/Crosetti* case,⁸⁸ which expressly ordered the use of

83. See, e.g., 19 U.S.C. §§ 1514-16 (1988); 19 C.F.R. § 177 (1994). For a discussion of §§ 1514-15, see *infra* note 98.

84. See *id.*; see also 28 U.S.C. § 1581 (1993) (describing the occasions upon which the CIT may hear such a challenge).

85. See, e.g., 19 C.F.R. §§ 175.22, 175.23 (1994).

86. *American Air Parcel Forwarding Co., Ltd. v. United States*, 557 F. Supp. 605 (Ct. Int'l Trade 1983), *aff'd*, 718 F.2d 1546 (Fed. Cir. 1983), *cert. denied*, 466 U.S. 937 (1984).

87. Customs controversies are heard exclusively by the CIT. 28 U.S.C. § 1581 (1993); *Cornet Stores v. Morton*, 632 F.2d 96 (9th Cir. 1980), *cert. denied*, 451 U.S. 937 (1981). Congress created the CIT in 1980 to replace the United States Customs Court. Customs Court Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (codified at 28 U.S.C. § 293(a) (1988)). Appeals are heard by the CAFC, formerly the Court of Customs and Patent Appeals. 28 U.S.C. § 1295(a)(5) (1994); Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25, 38 (codified as amended in various sections of Title 28 of the United States Code)).

The statute defining the jurisdiction of the CIT, 28 U.S.C. § 1581 (1993), has been criticized by commentators as confusing and arbitrary. See Gregory W. Carman, *Jurisdiction and the Court of International Trade: Remark of the Honorable Gregory W. Carman at the Conference on International Business Practice Presented by the Center for Dispute Resolution on February 27-28, 1992*, 13 J. INT'L L. BUS. 245, 250 (1992) ("If Congress had set out to create a jurisdictional gauntlet for litigants, it is difficult to imagine how it could have designed a better system than that which has resulted since the enactment of the Customs Courts Act of 1980."). Thus, a comprehensive analysis of the jurisdictional questions raised by *Norcal/Crosetti* is beyond the scope of this Note. This Note does, however, present the arguments on jurisdiction raised by counsel in *Norcal/Crosetti Foods, Inc. v. United States Customs Service*, 731 F. Supp. 510 (Ct. Int'l Trade 1990), and the court's rulings on them. See *infra* part II.C.2.

For further discussion of the CIT's history, formation, jurisdiction, and operations, see Eugene C. Brooks, *The Customs Courts Act of 1980—Pub. L. No. 96-417, 94 Stat. 1785 (to be Codified in Scattered Sections of Titles 19 and 28 U.S.C.)*, 7 N.C. J. INT'L L. & COM. REG. 85 (1982) (a step-by-step analysis of the legislative provisions); Joseph S. Kaplan, *Litigation in the Court of International Trade*, 17 AM. J. TRIAL ADVOC. 719 (1994) (illustrating procedure in the forum by way of sample cases); David E. Ovaska, *Customs Courts Act of 1980*, 94 Stat. 1727, 6 SUFFOLK TRANSNAT'L L.J. 239 (1982).

88. *Norcal/Crosetti Foods v. United States Customs Service*, 963 F.2d 356 (Fed. Cir. 1992).

the section 516 procedure for marking issues, domestic manufacturers would raise concerns about Customs' interpretation of the marking statute by requesting binding⁸⁹ letter rulings, as provided for in 19 C.F.R. § 177.⁹⁰ In a letter ruling, Customs replies in writing to an inquiry⁹¹ made by any interested party.⁹² Customs states its "definitive interpretation of applicable law" with respect to a given fact pattern.⁹³ In its inquiry, the interested party may suggest the conclusion that it believes Customs should reach if the party provides the basis for the assertion and cites "all relevant supporting authority."⁹⁴ When a ruling made under section 177 results in a change of Customs' practice and in either (1) a higher rate of duty or (2) a restriction or prohibition on an import, Customs publishes the ruling in the Federal Register and allows interested parties to comment.⁹⁵ If, on the other hand, Customs refuses to change its practice, the requesting party they take its case to the CIT.⁹⁶

89. 19 C.F.R. § 177.9(a) (1994) ("A ruling letter issued by the Customs Service under the provisions of this part represents the official position of the Customs Service with respect to the particular transaction or issue described therein and is binding on all Customs Service personnel . . . until modified or revoked.")

90. 19 C.F.R. § 177 (1994). *See, e.g.*, Letter to Hallett, *supra* note 7, at 1 n.1; Letter to Lobred, *supra* note 7. Counsel initially submitted the ruling request on Jan. 21, 1992, without reference to statutory or regulatory provisions. Letter to Lobred, *supra* note 7. Customs rejected the request as contrary to the holding of *Norcal/Crosetti Foods, Inc. v. United States*, 963 F.2d 356 (Fed. Cir. 1992), and required resubmission in accordance with 19 U.S.C. § 1516, as implemented by 19 C.F.R. § 175.1. Letter to Hallett, *supra* note 7, at 1 n.1 (referring to a March 18, 1992 letter from John Durant, Director of the Commercial Rulings Division). The initial letter, dated January 21, provides evidence that such informal letters regarding marking issues were an accepted practice before *Norcal/Crosetti*. *See* Letter to Lobred, *supra* note 7.

91. "A request for a ruling should be in the form of a letter." 19 C.F.R. § 177.2(a) (1994).

92. 19 C.F.R. § 177.1(c) (1994). This subsection provides that "any person who, as an importer or exporter of merchandise, or otherwise, has a direct and demonstrable interest in the question" may request a ruling under § 177. *Id.*

93. 19 C.F.R. §§ 177.1(a)(1), (d)(1) (1994). The request must "contain a complete statement of all relevant facts . . . in sufficient detail to permit the proper application of relevant Customs and related laws." 19 C.F.R. § 177.2(b)(1) (1994). "Customs and related laws" are defined as "any provision of the Tariff Act of 1930, as amended, . . . or the Customs Regulations." 19 C.F.R. § 177.1(d)(5) (1994). Additionally, an importer or interested party must request a letter ruling in advance of importation and cannot request a ruling on goods currently the object of a dispute. 19 C.F.R. § 177.1(a)(1) (1994).

94. 19 C.F.R. § 177.2(b)(6) (1994).

95. 19 C.F.R. § 177.10(c) (1994).

96. The CIT may take jurisdiction because no specific appeal procedures are listed for adverse letter rulings. *See* 19 C.F.R. § 177 (1994). Also, jurisdiction in such cases is explicitly allowed under the CIT's jurisdictional statute. 28 U.S.C. § 1581(h) (1993). Section 1581(h) provides that "[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review . . . a refusal to issue or change . . . a ruling, relating to classification, rate of duty, marking, restricted merchandise, entry requirements . . . or similar matters." *Id.* As a matter of statutory construction, it is

2. *Post-Norcal/Crosetti: Section 516 Domestic Interested Party Petitions*

Section 516 of the Tariff Act⁹⁷ is another ruling and appeal mechanism⁹⁸ available to domestic interested parties⁹⁹ to protest Customs' decisions concerning the classification, valuation, or duty rate¹⁰⁰ of an import.¹⁰¹ If a domestic interested party disagrees with Customs' assessment of a particular import, the party may file a petition requesting a ruling on the accuracy of the assessment and may set forth the rate of duty it believes proper.¹⁰² Customs then publishes notice in the Federal Register that a petition has been filed and opens the issue to written comment.¹⁰³ If

interesting to note that Congress was aware of the differences between these categories of disputes, but chose to include only the first three in § 516. *Id.*

97. 19 U.S.C. § 1516 (1988); 19 C.F.R. § 175 (1994) (implementing § 1516).

98. In addition to § 516 and § 177, other administrative dispute resolution procedures include those contained in 19 U.S.C. §§ 1514-15. Section 514 allows importers and others with a monetary interest in a particular shipment concerning Customs decisions on value, classification, exclusion, liquidation, drawback, and other charges to file protests. 19 U.S.C. § 1514 (1993). Section 515 deals with reconsideration of decisions made under § 514 and accelerates disposition of such appeals. 19 U.S.C. § 1515 (1993).

99. 19 U.S.C. § 1516(a)(2) (1988). An interested party is defined as:

- (A) a manufacturer, producer, or wholesaler in the United States;
- (B) a certified union . . . which is representative of an industry engaged in the manufacture, production, or wholesale in the United States; or
- (C) a trade or business association a majority of whose members are manufacturers, producers, or wholesalers in the United States, of goods of the same class or kind as the designated imported merchandise.

Id.

100. The provision does not define valuation, classification, or rate of duty in this context. *See* 19 U.S.C. § 1516 (1988). However, for a discussion of these concepts, *see supra* part II.A.2.

101. The text of the provision provides that "[t]he Secretary [of the Treasury] shall, upon written request by an interested party furnish the classification and the rate of duty imposed upon designated imported merchandise of a class or kind manufactured, produced, or sold at wholesale by such interested party." 19 U.S.C. § 1516(a)(1) (1988).

102. *Id.* The petition must set forth:

- (A) a description of the merchandise,
- (B) the appraised value, the classification, or the rate of duty that it believes proper, and
- (C) the reasons for its belief.

Id. For a discussion of the implications of subsection (B), *see infra* note 165 and accompanying text.

103. 19 C.F.R. § 175.21(a) (1994). This initial publication is not mandated by the statute, 19 U.S.C. § 1516 (1988), but is provided for only in the Customs regulations. *See* 19 C.F.R. § 175.21(a) (1994). Further, the regulation does not specify the length of time during which the opportunity to comment must remain open. *Id.* The Administrative Procedures Act requires that publication of proposed substantive rules "be made not less than 30 days before its effective 1994 date." 5 U.S.C. § 553(d) (1994). Customs' practice, however, is to provide close to sixty days notice and comment opportunity. *See, e.g.,* 60 Fed. Reg. 6464 (1995) (published Feb. 2, 1995, comments due Mar. 20, 1995); 59 Fed. Reg. 14,579 (1994) (published Mar. 29, 1994, comments due May 31, 1994); 59 Fed. Reg. 10,764-65 (1994) (comments due "60 days" after publication); 58 Fed. Reg. 47,413 (1993) (published Sept. 9,

Customs determines that its original assessment was erroneous, Customs notifies the petitioner and publishes the amended assessment.¹⁰⁴ If, on the other hand, Customs believes the assessment to be correct, only the petitioner is notified and no publication follows.¹⁰⁵ Should the petitioner disagree with the ruling, it must file notice of a desire to contest,¹⁰⁶ which Customs again publishes in the Federal Register.¹⁰⁷ If the petitioner receives another negative determination, only then, having exhausted all administrative remedies, may it take the case before the courts.¹⁰⁸

C. *The Caselaw*

Despite the importance of the *Norcal/Crosetti* holding¹⁰⁹ for current manufacturers, the issues raised in the case regarding the section 516 procedure are not new. Two pre-*Norcal/Crosetti* cases, *Bradford Co. v. American Lithograph*¹¹⁰ and *Way Distributors v. United States*,¹¹¹ illustrate the judicial disagreement over the purpose and scope of section 516. Specifically, debate has centered around whether marking issues can be considered classification or rate of duty disputes for purposes of section 516 and whether section 516 is an exclusive remedy for all issues raised by domestic manufacturers.

1. *Pre-Norcal/Crosetti: Judicial Disagreement*

In *Bradford Co. v. American Lithographic Co.*,¹¹² the Court of Cus-

1993, comments due November 8, 1993).

It is beyond the scope of this Note to delve into the complexities of the Administrative Procedures Act and other administrative law. This Note confines discussion of notice-and-comment rights to those required by the Customs regulations for the § 516 procedure and § 177 letter rulings.

104. 19 C.F.R. § 175.22(a) (1994).

105. 19 C.F.R. § 175.22(b) (1994).

106. 19 C.F.R. § 175.23 (1994).

107. 19 C.F.R. § 175.24 (1994). The provision does not explicitly require opportunity to comment. *Id.* However, it appears that Customs' practice is to allow comments if marking issues are pursued under § 516. *See, e.g.*, Country-of-Origin Marking Requirement on Frozen Produce Packages, 56 Fed. Reg. 24115 (1991). Assuming, arguendo, that this is not the case, it seems likely that a notice of petitioner's desire to contest will draw interested party comments if such parties also filed comments when the issue was first published. Furthermore, it seems that this is realistically the only purpose for publication of the notice to contest.

108. For a discussion of the CIT and CAFC, see *supra* note 87 and accompanying text.

109. *Norcal/Crosetti Foods v. United States Customs Service*, 963 F.2d 356 (Fed. Cir. 1992).

110. 12 Ct. Cust. 318 (Ct. Cust. App. 1924).

111. 653 F.2d 467 (C.C.P.A. 1981).

112. 12 Ct. Cust. at 318.

toms Appeals¹¹³ held that failure to properly mark per section 304 was a classification issue within the purview of section 516.¹¹⁴ Because the marking issue was a classification dispute, the jurisdiction of the lower court, which was limited to classification and rate of duty disputes,¹¹⁵ was properly invoked.¹¹⁶ In that case, the plaintiff filed its marking protest under section 516, alleging improper classification and improper rate of duty.¹¹⁷ In condoning the use of the section 516 procedure, the court reasoned that the determination of whether a good belonged in the group of legally marked goods or the group of illegally marked goods constituted classification.¹¹⁸ Because a good's classification into one of these two groups determined whether the additional ten percent duty applied, the court held that the dispute was also properly a rate of duty dispute.¹¹⁹ Thus, plaintiff was entitled to bring its marking protest under section 516.¹²⁰

In *Way Distributors v. Unites States*,¹²¹ the Court of Customs and Patent Appeals held that while section 516 was one available avenue for filing a classification protest, it was not the only method open to domestic producers.¹²² The court stated that:

113. The Court of Customs Appeals reviewed decisions of the Board of General Appraisers, the body which heard *Bradford* in the first instance. Doherty, *supra* note 43, at 312-20 (discussing the history and operations of the Board); *see also supra* note 87 (discussing the Customs Court and the CIT). In 1926, the Board of General Appraisers was converted into the Customs Court, the predecessor of the CIT. Tariff Act of 1926, ch. 411, §§ 1, 2, 44 Stat. 669 (1926), *repealed by* Customs Court Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980).

114. *Bradford*, 12 Ct. Cust. at 323-24.

115. *See* Doherty, *supra* note 43, at 312-20. The Board acquired specific jurisdiction over § 516 protests in 1922. *Id.* at 319 (citing Act of Sept. 21, 1922, ch. 356, § 489, 42 Stat. 858 (1922), *repealed by* Tariff Act of 1930, ch. 497, § 651(a)(1), 46 Stat. 590, 762 (1930) (codified at 19 U.S.C. § 378 (1982))). Only when Congress created the CIT did the line of Customs courts gain full Article III powers. *Id.* at 340.

116. *Bradford*, 12 Ct. Cust. at 324.

117. *Id.* at 319.

118. *Id.* at 323. This argument seems to be a bit of a stretch. In general trade usage, classification refers only to HTSUS classification.

119. *Id.* at 323-24.

120. *See also* *Diamond Match Co. v. United States*, 49 C.C.P.A. 52 (1962). In *Diamond Match*, like *Bradford*, the plaintiff specifically alleged improper rate of duty, which Norcal/Crosetti did not. *Id.* at 52; *see Bradford*, 12 Cust. Ct. at 319; *Norcal/Crosetti Foods, Inc. v. United States Customs Service*, 731 F. Supp. 510, 511 (Ct. Int'l Trade 1990).

121. 653 F.2d 467 (C.C.P.A. 1981).

122. *Id.* at 467. This holding was later overruled in the context of strict classification disputes by *Nat'l Corn Growers Ass'n v. Baker*, 840 F.2d 1547, 1554 (Fed. Cir. 1988). *National Corn Growers* left much room for doubt as to whether the same held true for marking issues, however. *See Norcal/Crosetti*, 731 F. Supp. at 516 ("In so holding [that § 516 provided the exclusive method for

Interested parties may communicate their views to the agency at any time and in any manner not inconsistent with statute or law. The existence of Section 516 . . . does not mean that [it] is the only permissible way for American Manufacturers to attempt to bring about a change in import classification.¹²³

The court also stated that although the importer safeguard provisions present in the section 516 procedure do not exist when a domestic party uses a more informal procedure, the lack of such safeguards did “not deprive the Customs Service of the authority to issue an interpretative ruling.”¹²⁴ Thus, the court held that section 516 was not an exclusive remedy procedure for domestic interested parties.¹²⁵

2. Norcal/Crosetti: *The Debate Resolved*

*Norcal/Crosetti*¹²⁶ resolved this long-standing debate by holding that (1) marking was indeed a classification/rate of duty dispute and (2) section 516 was the only manner in which domestic manufacturers could bring such issues to the attention of the government.¹²⁷ The case involved three opinions: two CIT decisions, hereinafter referred to collectively as *Norcal/Crosetti I*,¹²⁸ and a CAFC decision, hereinafter referred to as *Norcal/Crosetti II*.¹²⁹

a) *Norcal/Crosetti I (1990)*

In May of 1988, *Norcal/Crosetti* and two other California-based frozen produce packers requested a binding ruling from Customs that country-of-origin marks on the back panels of packages of frozen vegetables did not

American manufacturers to challenge classification and rate of duty, the CAFC] implicitly ruled that if, as domestic industry claimed, the matter at issue involved a subject other than classification and rate of duty, jurisdiction of [the CIT] under 1581(i) [residual jurisdiction] might be permissible.”)

123. *Way Distributors*, 653 F.2d at 467.

124. *Id.*

125. *Id.* at 471.

126. *Norcal/Crosetti Foods v. United States Customs Service*, 763 F.2d 356 (Fed. Cir. 1992).

127. *Id.* at 359-60.

128. *Norcal/Crosetti Foods, Inc. v. United States Customs Service*, 758 F. Supp. 729 (Ct. Int'l Trade 1991); *Norcal/Crosetti Foods, Inc. v. United States Customs Service*, 731 F. Supp. 510 (Ct. Int'l Trade 1990). In the 1990 case, the CIT denied Customs' motion to dismiss for lack of jurisdiction. 731 F. Supp. at 515. In the 1991 case, the CIT granted *Norcal/Crosetti's* motion for summary judgment, deciding the merits of the case, 758 F. Supp. 510 (Ct. Int'l Trade 1991).

129. 963 F.2d 356 (Fed. Cir. 1992). In this appeal, the CAFC reversed the CIT and ordered the CIT holding vacated for want of jurisdiction. *Id.* at 360.

meet section 304's requirements of conspicuousness.¹³⁰ At the end of November of 1988, Customs responded by issuing a ruling letter denying Norcal/Crosetti's request.¹³¹ Customs stated that because the markings were legible and located near the nutritional information and expiration date, they satisfied both section 304 and Customs Regulation section 134.41(b).¹³² Following this denial, Norcal/Crosetti filed suit against Customs in the CIT, claiming that because foreign-grown vegetables posed greater health risks than domestically-grown vegetables, consumers had a right to make an informed decision concerning the purchase of such vegetables.¹³³ In order to have this opportunity, the country of origin had to be marked "conspicuously" per the legislative intent of section 304, which meant on the front panels.¹³⁴ Norcal/Crosetti sought injunctive relief, claiming that Customs interpretation of the conspicuousness requirement was incorrect.¹³⁵

Customs immediately challenged the CIT's jurisdiction and moved to dismiss, claiming that *Norcal/Crosetti's* request for a ruling was ultimately a section 516 petition not properly before the court.¹³⁶ Customs argued first that because it had failed to assess the ten percent ad valorem duty applicable to mismarked goods, *Norcal/Crosetti's* marking question was actually a classification issue.¹³⁷ Customs then reasoned that such classification disputes were necessarily governed by section 516.¹³⁸ Jurisdiction for CIT review of section 516 proceedings is granted by § 1581(b) of Title 28 of the United States Code.¹³⁹ Customs contended

130. *Norcal/Crosetti Foods, Inc. v. United States Customs Service*, 758 F. Supp. 729, 731 (Ct. Int'l. Trade 1991), *vacated*, 790 F. Supp. 302 (Ct. Int'l Trade 1992). A large rise in frozen vegetable imports that were adversely affecting the domestic industry motivated *Norcal/Crosetti* to seek the rulings. *Id.*

131. *Priv. Ltr. Rul. HRL 731830* (Nov. 21, 1988).

132. *Id.*

133. *Norcal/Crosetti Foods*, 758 F. Supp. at 732.

134. *Id.*

135. *See Norcal/Crosetti Foods*, 963 F.2d 356, 358 (Fed. Cir. 1992) (reversing the CIT's decision on the issue of jurisdiction).

136. *Norcal/Crosetti Foods*, 731 F. Supp. 510 (Ct. Int'l Trade 1990) (separate opinion denying Customs' motion to dismiss for lack of jurisdiction).

137. *Id.* at 512. The fallacy of this argument lies in the fact that the 10% duty is only applied to goods that have already been imported and sold to consumers; thus, the duty is a *retrospective* penalty. *See supra* note 37. However, *Norcal/Crosetti* sought *prospective* relief in the form of a revised standard. 731 F. Supp. at 512. *See also* 19 C.F.R. § 177.1(a)(1) (1994).

138. *Id.*

139. Section 1581(b) provides simply that "[t]he Court of International Trade shall have exclusive jurisdiction of any civil action commenced under § 516 of the Tariff Act of 1930." 28 U.S.C. § 1581(b) (1993).

that because *Norcal/Crosetti* had failed to exhaust its administrative remedies pursuant to section 516, *Norcal/Crosetti* did not meet the jurisdictional prerequisites for filing a claim in the court under § 1581(b).¹⁴⁰

In response, *Norcal/Crosetti* argued that the request for a determination of the propriety of the country of origin marking was not a classification or rate of duty dispute, but an "action . . . providing for . . . administration or enforcement" of section 304.¹⁴¹ Section 1581(i)(4) of Title 28 of the United States Code, commonly referred to as the CIT's "residual jurisdiction" clause, provides the CIT with immediate and exclusive jurisdiction of administration and enforcement claims,¹⁴² so long as the claim could not have been brought under any other clause within § 1581.¹⁴³ *Norcal/Crosetti* argued that because section 516 was inapplicable, the residual jurisdiction clause was the proper basis for jurisdiction.¹⁴⁴ The CIT agreed with *Norcal/Crosetti* and rejected Customs' assertion that plaintiffs could have used § 1581(b). The CIT held that because the complaint did not involve a classification or rate of duty dispute governed by section 516,¹⁴⁵ the CIT could properly take jurisdiction pursuant to the residual jurisdiction clause.¹⁴⁶

One year after this preliminary ruling on jurisdiction and over two and one half years after *Norcal/Crosetti*'s initial ruling request, the court decided the merits of the case, holding that Customs had indeed misinterpreted the requirements of section 304.¹⁴⁷ The court found that the

140. *Norcal/Crosetti Foods*, 731 F. Supp. at 512-13.

141. *Id.* at 515 n.7 (citing 28 U.S.C. § 1581(i)(4)).

142. 28 U.S.C. § 1581(i)(4) (1993). The residual jurisdiction clause provides:

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a) - (h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for . . .

(4) administration and enforcement with respect to the matters referred to in . . . subsections (a) - (h) of this section.

Id.

143. See *Miller & Co. v. United States*, 824 F.2d 961, 963 (Fed. Cir. 1987), cited in *Norcal/Crosetti Foods*, 731 F. Supp. at 531 ("Section 1581(i) jurisdiction may not be invoked when jurisdiction under another subsection of § 1581 is or could have been available, unless the remedy provided under that other subsection would be manifestly inadequate.").

144. *Norcal/Crosetti Foods*, 731 F. Supp. at 514.

145. *Id.* at 521-33.

146. *Id.* at 515.

147. *Norcal/Crosetti Foods*, 758 F. Supp. at 741-42. The decision resulted in the granting of plaintiff's motion for summary judgment. *Id.* at 742.

manner in which frozen vegetables were sold to the consumer was prohibitive of package inspection.¹⁴⁸ Interpreting Congress' intent in drafting section 304, the court found that the country-of-origin mark located on the rear panel was not conspicuous.¹⁴⁹ The Court ordered Customs to rescind their letter ruling and to issue a new one within 90 days.¹⁵⁰ The new letter was to find that, in order for frozen vegetables to comply with the requirements of section 304, the "country of origin marking must be located on the front panel of the package and must be marked in a type size and style so as to be conspicuous."¹⁵¹

b) Norcal/Crosetti II (1992)

On appeal, the CAFC reversed the CIT's decision for lack of jurisdiction.¹⁵² The court rejected the notion that plaintiffs could not have secured the desired relief—a ruling on the proper interpretation of section 304—by proceeding under section 516.¹⁵³ Because jurisdiction under the residual jurisdiction clause is improper if any other clause *could have* been used, the court held that plaintiffs could have secured jurisdiction under § 1581(b) had they used the section 516 procedure.¹⁵⁴ Thus, plaintiffs' failure to exhaust the administrative remedies of section 516 precluded plaintiffs from securing jurisdiction under § 1581(b), and their failure to use section 516 in the first place precluded them from securing jurisdiction under the residual jurisdiction clause.¹⁵⁵ Implicitly, the court held that a domestic manufacturer seeking to influence Customs' interpretation of section 304 *must* proceed under section 516 to ensure judicial review of Customs' ruling on the issue.

III. ANALYSIS

Norcal/Crosetti represents judicial policy-making in an attempt to

148. *Id.* at 733.

149. *Id.* at 735-36.

150. *Id.* at 742.

151. *Id.*

152. *Norcal/Crosetti Foods*, 963 F.2d 356, 360 (Fed. Cir. 1992).

153. *Id.* at 359. The court stated that a § 516 classification and rate of duty challenge raise the issue of whether Customs failed to impose a 10% ad valorem duty on mismarked goods. *Id.* This argument necessarily requires a determination of whether the goods were in fact mismarked. *Id.* at 359-60. *Diamond Match* evidences the validity of this argument. *Diamond Match Co. v. United States*, 49 C.C.P.A. 52, 59 (1962). *But see supra* note 137 (discussing the timing of the requested relief).

154. *Norcal/Crosetti Foods*, 963 F.2d at 359.

155. *See id.* at 359-60.

balance the statutorily-granted rights of domestic industry with the due process needs of importers. By requiring domestic interested parties to use section 516 for marking issues, the court intended for petitioners to be able to present their case to Customs, while ensuring notice-and-comment opportunities for importers on the issues raised in the petition.¹⁵⁶ While the court's motives were proper, the solution was not. From both a legal and a functional standpoint, the use of section 516 fails to ensure fairness on either side of the balance.

A. In Theory: The Poor Fit of Sections 304 and 516

In terms of legal theory, section 304 and section 516 have dissimilar underlying strategies and are thus poorly paired. Using the section 516 procedure to present section 304 marking issues is similar to using tax evasion to put away Al Capone: While it might do the job, it skirts the real issue. Section 516 procedure deals with fiscal activities and results in a "fiscal" remedy, while section 304 is a substantive provision for which "interpretive" remedies are necessary. Therefore, the two provisions are ill-suited to work together.

1. The Ends and the Means: Regulatory versus Fiscal

Section 516 gives domestic interested parties a method to dispute classification, valuation, and rate of duty, i.e., fiscal activities.¹⁵⁷ The result of these fiscal activities is the imposition and collection of duties.¹⁵⁸ Duties raise revenue for the government while increasing the prices of imports.¹⁵⁹ Increased prices in turn lower the competitiveness of imports in the American market.

On the other hand, section 304 has a regulatory function.¹⁶⁰ It prohibits goods from entering the market if they do not comply with certain requirements, such as being conspicuously and legibly marked with their country of origin.¹⁶¹ When goods bear the proper marks, they, like dutiable goods, enter the market at a competitive disadvantage. However, the disadvantage is not based on price, but rather on more subjective

156. *Id.*

157. *See supra* notes 50, 97-101 and accompanying text.

158. *See supra* note 50 and accompanying text.

159. Again, these were the original goals of United States trade law. For legislative history of the first duty provision, see *supra* note 46 and accompanying text.

160. *See supra* note 77 and accompanying text.

161. *See supra* note 79 and accompanying text.

characteristics, such as perceived quality and nationalist sentiment.¹⁶² For example, an American-made shirt may be less price-competitive than one made in China, but the purchaser's allegiance to domestic products may negate that disadvantage. Thus, while the ends of the two provisions may be the same, the means are quite different.

2. *Relief Sought versus Relief Received*

When domestic manufacturers raise section 304 issues, they are not concerned with price competitiveness, but rather with "subjective" competitiveness.¹⁶³ For this reason, they do not seek an additional ten percent duty as relief, but instead a more conspicuous or legible country of origin mark.¹⁶⁴ Under section 516, a petitioner is allowed to state the "appraised value, classification, or rate of duty it believes proper."¹⁶⁵ Thus, a domestic manufacturer filing a protest under section 516 can only assert that the importer should have been assessed a duty ten percent higher than whatever Customs actually charged.

Under section 177, on the other hand, the domestic manufacturer was able to state what it believed to be the correct interpretation of the conspicuous or legible requirements of section 304 given the facts at hand.¹⁶⁶ As succinctly stated in *Norcal/Crosetti*, domestic producers "could care less about the 'appraised value, classification or rate of duty.'"¹⁶⁷ The real concern is the mark itself.¹⁶⁸ Thus, section 516 fails to address the true issues raised by domestic manufacturers' section 304 disputes.

B. *In Actuality: Negative Implications of Section 516*

In addition to the academic arguments against using the section 516 procedure for marking issues, practical arguments also advise against its use. For the petitioner, section 516 is an exercise in redundancy, resulting in lost time, money, and market share. For the importer, section 516 achieves little in the way of increased meaningful due process. On both sides of the equation, section 516 results in negatives.

162. See *supra* notes 34, 41 and accompanying text.

163. See Letter to Lobred, *supra* note 7, at 4.

164. *Id.*

165. 19 U.S.C. § 1516(a)(1)(B) (1988). For the text of this provision, see *supra* note 101.

166. 19 C.F.R. § 177.2(b)(6) (1994). See *supra* notes 92, 93 and accompanying text.

167. 963 F.2d at 360.

168. See *id.*

1. *Increased Burdens on Petitioning Parties*

As argued in *Norcal/Crosetti II*, “the [section 516] process takes too long, given the economic background, for the meaningless gesture of taking product by product and asking Customs to change views so recently expressed in the [first] ruling.”¹⁶⁹ When a domestic producer files a request for a section 177 letter ruling, Customs immediately begins formulating a response.¹⁷⁰ If the requesting party does not receive the response it desires, it may file suit with the CIT.¹⁷¹

In comparison, when a party files a section 516 protest, the petition is summarized by Customs, the issues are published in the Federal Register, and the status quo is preserved for sixty days while interested parties have the opportunity to comment.¹⁷² After comments have been received, read, and tabulated, Customs makes a determination and notifies the petitioner.¹⁷³ If the determination does not conform to the petitioner’s wishes, the petitioner must compose and file a notice of contest.¹⁷⁴ Again, the notice is summarized by Customs, published, and possibly opened for another sixty day comment period.¹⁷⁵

This red tape imposes an unnecessary burden on domestic producers. It is difficult to imagine that the comments received after the second notice publication differ in substance from those received after the first. Further, it is unlikely that Customs will change its position in the hiatus between the two.¹⁷⁶ Thus, throughout this lengthy and redundant process, no check on imports is effected, costs for petitioners are increased, and access to the courts is restricted.

2. *Lack of Increased Due Process for Affected Importers*

While the redundant section 516 process results in tangible detriment to petitioners, importers likewise receive no meaningful due process benefits

169. *Id.* The first point in this statement, that the process is too lengthy, is only accurate when taken in conjunction with the second statement, that the process is redundant. In other words, while § 516 is not lengthy when compared to a protracted court battle, it remains unnecessarily redundant.

170. *See supra* part II.B.1.

171. *See supra* note 96 and accompanying text.

172. *See supra* note 103 and accompanying text.

173. *See supra* notes 104, 105 and accompanying text.

174. *See supra* note 106 and accompanying text.

175. *See supra* note 107 and accompanying text.

176. While it is unlikely, it is admitted that it is not out of the realm of possibility. For an example see *infra* note 178.

from the additional notice-and-comment opportunity. First, it is questionable that publication in the Federal Register provides actual notice to the majority of importers. Unless a company has counsel or a particular manager or department assigned to the task of perusing the Federal Register on a daily basis for mention of its products, it seems unlikely that it would hear about an issue on a timely basis. Second, and perhaps most importantly, Customs is an executive agency, subject to the policy designs of the current administration.¹⁷⁷ In other words, from a policy standpoint, Customs' views on an issue are not susceptible to change, regardless of input from importers. If the administration favors free trade, importers' comments will be cited with approval. If the administration leans to protectionism, however, comments from importers will make little difference.¹⁷⁸ Thus, while notice-and-comment opportunity for importers is generally desirable,¹⁷⁹ in practice, the redundancy of section 516 results in little meaningful benefit. The interests of importers would be better addressed in the context of an impartial judicial setting, such as the CIT or arbitration.¹⁸⁰

IV. PROPOSAL

Because neither section 177 nor section 516 adequately balance the

177. See generally MATHEW D. MCCUBBINS ET AL., ADMINISTRATIVE PROCEDURES AS INSTRUMENTS OF POLITICAL CONTROL (Center for the Study of American Business Working Paper No. 109, 1987). In this discussion of public notice-and-comment procedures, the authors note that the public process "affords numerous opportunities for political principals to respond when an agency seeks to move in a direction that officials do not like." *Id.* at 27-28.

178. One example of this agency predisposition is found in the *Norcal/Crosetti* saga. After *Norcal/Crosetti* lost the court battle, they resubmitted their marking concerns in the form of a § 516 petition. This second petition resulted in the response that *Norcal/Crosetti* desired—at the White House's suggestion. Apparently, front panel marking on frozen vegetables was granted in exchange for a House representative's affirmative vote on NAFTA. See *American Frozen Food Institute v. United States*, 855 F. Supp. 388, 416-17 (Ct. Int'l Trade 1994).

179. In addition to simply being "desirable," notice-and-comment opportunities are required by GATT in this situation. See *supra* note 24. In fact, this is the downfall of letter rulings: that § 177 affords no notice-and-comment opportunity before Customs makes a decision. See generally, William D. Araiza, *Notice-and-Comment Rights for Administrative Decisions Affecting International Trade: Heightened Need, No Response*, 99 YALE L.J. 669 (1989).

180. See North American Free Trade Agreement Between the Government of the United States of America, the Government of Canada and the Government of the United Mexican States, Dec. 17, 1992, art. 1805 (G.P.O. 1993) [hereinafter NAFTA] ("Each Party shall establish and maintain judicial, quasi-judicial or administrative tribunals . . . [which are] impartial and independent of the office or authority entrusted with administrative enforcement.").

interests of importers and domestic manufacturers,¹⁸¹ Congress should adapt NAFTA dispute resolution procedures to govern marking disputes over goods from all countries.¹⁸² Customs initiated the idea of global application of certain NAFTA provisions in January of 1994, when, in fulfillment of its NAFTA obligations, it changed the manner in which it determined origin for Canadian and Mexican imports.¹⁸³ In the Federal Register announcement immediately following that change, Customs further proposed applying the new method to all imports.¹⁸⁴ While it is beyond the scope of Customs' authority to adapt NAFTA's substantive dispute resolution procedures for marking issues to apply on a multinational basis, it is well within the realm of Congress' power.

Chapters 5 and 18 of NAFTA provide interested parties with a clear and well-balanced framework for resolving Customs issues. Congress could easily adapt this framework to cover goods from all countries.¹⁸⁵ Chapter 5 contains two sections addressing administrative review procedures, sections C and D.¹⁸⁶ Because section C only covers prospective marking questions submitted by importers, domestic manufacturers may not use section C's "Advance Ruling" provisions to raise concerns about the interpretation of the "conspicuous" and "legible" marking requirements.¹⁸⁷ It appears, however, that domestic manufacturers are entitled to inquire

181. For a discussion of § 177's lack of pre-decision notice-and-comment opportunity, see *supra* note 179. For a discussion of the problems of § 516, see *supra* part III.

182. See NAFTA, *supra* note 180, at chs. 5, 18, 19. Chapter 5 covers "Customs Procedures." Chapter 18 covers "Publication, Notification and Administration of Laws." Chapter 19 addresses "Review and Dispute Settlement in Antidumping and Countervailing Duty Matters." *Id.*

183. Rules for Determining the Country of Origin of a Good for Purposes of Annex 311 of the North American Free Trade Agreement, 59 Fed. Reg. 110 (1994) [hereinafter *Annex 311 Marking Rules Annex 311 Marking Rules*]. For a discussion of the rules of origin, substantial transformation, and tariff shift classification tests, see *supra* notes 67 and 68. Note that Annex 311's "Marking Rules" establish a good's origin for purposes of marking when the good is from any country. See *Annex 311 Marking Rules, supra*, at ch. 4. NAFTA's Chapter 4, "Rules of Origin," is in actuality a provision for local content for determining preferential treatment. *Id.*

184. Rules of Origin Applicable to Imported Merchandise, 59 Fed. Reg. 141 (1994) (to be codified at 19 C.F.R. §§ 4, 10, 12, 102, 134, 177).

185. See NAFTA, *supra* note 180, at ch. 5, arts. 509-510.

186. *Id.*

187. See NAFTA, *supra* note 180, at art. 509. Article 509 addresses advance rulings, providing:

1. Each Party shall, through its Customs administration, provide for the expeditious issuance of written advance rulings, prior to importation of a good into its territory, to an importer in its territory or an exporter or a producer in the territory of another Party . . . concerning:
(g) whether the proposed or actual marking of a good satisfies country of origin marking requirements under Article 311 (Country of Origin Marking).

Id. at art. 509(1)(g). This provision corresponds to 19 C.F.R. § 177 (1994).

about the interpretation of marking requirements¹⁸⁸ by using Section D, “Review and Appeal of Origin Determinations and Advance Rulings.” This review provision requires Customs first to provide administrative review and second, to allow access to judicial or quasi-judicial appellate review.¹⁸⁹

A. Level One: Administrative Review

To adapt the framework of Chapter 5 to apply to goods from all countries, Congress must first create a means for the initial administrative review. Congress could easily effect this by amending section 516. First, the amendment would expressly state that the section 516 procedure applies to marking issues.¹⁹⁰ Because marking would be included in section 516 in its own right and not shoe-horned into the rate of duty category, domestic manufacturers would be able to put their preferred interpretations of section 304 before Customs and would not be limited to requesting the imposition of a ten percent ad valorem duty. Second, the amendment would explicitly

188. See NAFTA, *supra* note 180, at art. 510. This section provides:

1. Each Party shall grant substantially the same rights of review and appeal of marking determinations of origin, country of origin determinations and advance rulings by its customs administration as it provides to importers in its territory to any person:

(a) who completes and signs a Certificate of Origin for a good that has been the subject of a determination of origin;

(b) whose good has been the subject of a country of origin marking determination pursuant to Article 311 (Country of Origin Marking); or

(c) who has received an advance ruling pursuant to Article 509(1).

Id. at art. 510(1)(a)-(c).

While subsection (b) does not specifically mention domestic producers, it appears that it was meant to cover them. First, its differentiation from (c), which covers those domestic importers or foreign manufacturers and exporters who received advance rulings, strongly suggests that (b) is meant to include domestic manufacturers. Second, no other NAFTA provision allows for domestic manufacturer input in marking issues. The key to subsection (b)'s construction lies in the term “whose good.” If this means “whose actual good,” domestic manufacturers cannot be covered because their actual goods are not subject to importation examinations. On the other hand, if the words of subsection (b) mean “whose good” as a more abstract, “class or kind” descriptor, domestic manufacturers are included in the review and appeal process. Because discussion in this section involves what Congress should legislate, this Note assumes that subsection (b) includes domestic manufacturers. If in actuality it does not, the deficiency could be remedied should Congress choose to legislate such provisions.

189. *Id.* at arts. 510(2)(a)-(b). This provision operates in conjunction with articles 1804 (Administrative Proceedings) and 1805 (Review and Appeal). *Id.* at art. 510(2). The NAFTA provision provides for a minimum of one administrative review. *Id.* at art. 510(2)(a).

190. Specifically, the last sentence of 19 U.S.C. § 1516(a)(1), which describes the contents of a petition, would be moved to a separate section (a)(3), and the sections currently numbered (a)(2) and (a)(3) would be renumbered (a)(4) and (a)(5). Then, a new section (a)(2) would be inserted containing language stating that, in addition to (a)(1) rate of duty disputes, the procedure also covered disputes arising from Customs' interpretations of the § 304 marking statute.

provide for one Customs' review that includes a notice-and-comment opportunity for affected importers prior to Customs' determination of the issue.¹⁹¹ After the administrative review, the amendment would allow a dissatisfied petitioning party to appeal to the appropriate "judicial or quasi-judicial" body. This would eliminate redundant, time-consuming procedures.

B. Level Two: Independent Appellate Review

1. Option One: Court of International Trade

In keeping with Chapter 18 of NAFTA, which requires a reviewing body to be independent of the agency enforcing the matter at issue,¹⁹² Congress has two choices with which to fulfill the "judicial or quasi-judicial" review aspect of the framework provision. The first option designates the CIT to act as the reviewing tribunal. This is the simpler approach, as the CIT's jurisdictional statute already provides for exclusive jurisdiction over section 516 protest appeals and would require no amendment.¹⁹³ The CIT is the logical choice also because of its history and expertise in Customs matters, including marking, and the fact that it is already established and currently available to litigants.¹⁹⁴ Further, parties could take advantage of additional appellate review by the CAFC.¹⁹⁵ The downside of this approach results from the fact that the CIT is indeed a well-established court. Litigants must endure a potentially congested docket and the expense of a full legal battle. However, these problems inhere in the nature of judicial review and should be expected by those conducting business.

2. Option Two: NAFTA Chapter 19 Arbitral Panels

As a second option, Congress could establish an arbitral panel exclusively for marking disputes, similar to NAFTA's Chapter 19 bilateral panels for antidumping and countervailing duty disputes.¹⁹⁶ This could be offered as an exclusive or an optional forum for parties involved in marking

191. This would require substantial reworking of 19 U.S.C. §§ 1516(b)-(c).

192. As a preliminary requirement, Chapter 18, Article 1805 states that the judicial proceeding must be "independent of the office or authority entrusted with administrative enforcement." NAFTA, *supra* note 180, at art. 1805(1). This requirement eliminates control of the review by the politically-sensitive Customs Service. See *supra* note 178 and accompanying text.

193. See 28 U.S.C. § 1581(b) (1988).

194. For a discussion of the CIT and CAFC and their history, see *supra* notes 87 and 113.

195. *Id.*

196. See NAFTA, *supra* note 180, at ch. 19, Annex 1901.2.

disputes. Following the structure of Annex 1901.2, Congress could provide a roster of potential panelists, chosen on the basis of good character and reputation, objectivity, sound judgment and familiarity with international trade law.¹⁹⁷ Each side in the dispute would choose two of the first four panelists, and together the parties would agree on a fifth.¹⁹⁸ The panelists would be bound by the same code of conduct as NAFTA panelists, thereby ensuring their impartiality.¹⁹⁹ The procedural provisions established for NAFTA panels would likewise apply.²⁰⁰

The benefits of small arbitral panels include the speed and binding nature of the decisions. Involved parties would know the outcome of the case more quickly, thereby avoiding product stockpiling and price fluctuations resulting from speculation on the outcome of the case. On the other hand, one disadvantage of this second option involves the make-up of the roster. Because the panel would hear marking disputes regarding goods from all countries, unlike the NAFTA panels, it could reasonably contain only American panelists. This could lead to perceived unfairness by other countries. However, the unfairness would be more perceived than actual, as parties would fare no differently before an all-American CIT in terms of nationalist favoritism. A second disadvantage to the arbitral panel is that while panel decisions would likely be more equitable, they might tend to be less uniform on the aggregate due to lack of binding case law. The results of increased fairness to involved parties, however, outweigh any superficial lack of predictability.

V. CONCLUSION

The unwavering advancement of technology over the course of the past century has made our proverbially small world even smaller. The once arcane world of international trade has become a fact of life for every individual in the United States, from the manufacturer waiting on a shipment of pig iron from New Guinea to the consumer at a local store purchasing a Japanese television or a shirt made in Guatemala. This

197. *Id.* at annex 1901.2(1).

198. *Id.* at annex 1901.2(2)-(4). Alternatively, these numbers could be lowered to provide a total of 3 panelists—each side choosing 1 panelist apiece and jointly selecting the third.

199. *See id.* at art. 1909.

200. *See id.* at annex 1901.2(2)-(12) (excluding provisions concerning protective orders, which are necessary to shield the confidential business information of parties subject to antidumping and countervailing duty suits, but would be wholly inappropriate for marking disputes). These procedural sections include, for instance, a time period for choosing panelists, *id.* at annex 1901.2(2), (3), and a panelist immunity clause, *id.* at annex 1901.2(12).

globalization of the marketplace has been perceived by some as causing the recent waves of lay-offs and plant-closings in the United States, as imports are seen usurping the market share that American products once enjoyed. American manufacturers seek to use this anti-import sentiment to sell their products. Section 304, as intended by Congress, provides them with a means to do so. However, the section 516 procedure, which the CAFC implicitly mandated in *Norcal/Crosetti*, fails to allow domestic manufacturers to take advantage of section 304.

This Note maintains that it is not the place of the courts to contradict such clearly expressed legislative intent. Thus, Congress should act to “overrule” the decision of the CAFC. By adapting NAFTA dispute resolution procedures to address domestic industry marking protests against goods from any country, Congress would allow both importers and domestic industry to benefit from clear and workable procedures, while preserving the goals of section 304.

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