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Abstract

This Comment argues that the recently decided case of U.S. Shoe should be upheld by the Federal Circuit upon review because allowing the continued imposition of the HMT would adversely affect the U.S. export industry and subject the Government to possible North American Free Trade Agreement ("NAFTA") violations. Part I provides background information regarding Congress' commerce and taxation powers. Part I also analyzes the constitutional restrictions on taxation and presents the judicial interpretations of the Export Clause and Import-Export Clause. Part I then describes the CIT and how it functions. Next, Part I presents a review of NAFTA and U.S.-Canada trade relations. Finally, Part I introduces background information on the HMT and Harbor Maintenance Trust Fund ("Trust Fund"), and examines the problems surrounding this tax and the disputes leading to the U.S. Shoe holding. Part II analyzes the CIT's decision in U.S. Shoe. Part III argues that U.S. Shoe was correctly decided by the CIT, and that the traditional approach to Export Clause analysis should be upheld and applied in the future. This Comment concludes that U.S. Shoe should be upheld in order to preserve the success of maritime trade between U.S. and Canadian ports, the competitiveness of U.S. ports, and the validity of a well-established Supreme Court precedent.

U.S. SHOE CORP. v. UNITED STATES: A VICTORY FOR U.S.-CANADA MARITIME TRADE

*Howard Schragin**

INTRODUCTION

The U.S. Constitution prohibits the U.S. Government from taxing goods exported out of the United States[1] and prevents individual states from levying taxes on goods exported from their territory.[2] As originally adopted, the Export Clause[3] and the Import-Export Clause[4] protected the Southern States[5] from interference by the Federal Government[6] and the Northern States.[7] As far back as 1787,[8] the drafters of the Export Clause recognized the need for unrestricted free trade with other countries.[9] The Export Clause and Import-Export Clause help to in-

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1. U.S. CONST. art. I, § 9, cl. 5 ("[n]o Tax or Duty shall be laid on Articles exported from any State"). With the adoption of Article I, § 9, clause 5 ("Export Clause"), the free trade of exports became a part of the fundamental law of the United States. GEORGE BANCROFT, 2 HISTORY OF THE FORMATION OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA 152 (1882).

2. U.S. CONST. art. I, § 10, cl. 2 ("No State shall, without the Consent of Congress, lay any Imposts or Duties on Imports or Exports").

3. U.S. Const. art. I, § 9, cl. 5. Article I, § 9, clause 5 is known as the Export Clause. International Business Machs. Corp. v. United States, 59 F.3d 1234, 1236 (Fed. Cir. 1995), *cert. granted*, 116 S.Ct. 594 (Dec. 8, 1995) [hereinafter *IBM*].

4. U.S. CONST. art. I, § 10, cl. 2. Article I, § 10, clause 2 is referrred to as the Import-Export Clause. *IBM*, 59 F.3d at 1234, 1236.

5. CHARLES WARREN, THE MAKING OF THE CONSTITUTION 573 (1937). The Southern States, represented at the 1787 Constitutional Convention by Virginia, Maryland, North Carolina, South Carolina, and Georgia, were financially dependant on the exportation of their crops to provide revenues and, therefore supported the adoption of the Export Clause restriction. *Id.*

6. 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, 362 (Max Farrand ed., 1937) [hereinafter RECORDS OF THE FEDERAL CONVENTION]. During the Convention, Elbridge Gerry of Massachusetts stated, "we have given it [general government] more power already than we know how will be exercised, it will enable the [general government] to oppress the States." *Id.*

7. Note, *Constitutionality of Export Controls*, 76 YALE L. J. 200, 204 (1966) [hereinafter *Export Controls*]. According to James Madison's notes, Mr. Langdon, a constitutional delegate, recognized that, "[it] seems to be feared that the Northern States will oppress the trade of the South[er]n." 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 6, at 359.

8. *Id.* at 204. The Constitutional Convention was held in Philadelphia in 1787. WARREN, *supra* note 5, at 99.

9. *Export Controls*, *supra* note 7, at 204-06. Mr. Clymer, a constitutional delegate, noted that as a result of export taxation, "[t]he middle States may apprehend an op-

sure the success of the United States in relation to foreign competitors by not allowing federal or state government to restrict foreign trade.[10]

Nonetheless, the Federal Government taxes cargo exported by vessel out of U.S. ports and harbors.[11] Established in 1986, the Harbor Maintenance Tax[12] ("HMT") places a tax of 0.125 percent on cargo loaded onto a vessel for exportation to a non-U.S. port.[13] The U.S. Congress passed the HMT in order to help support federally funded development and maintenance of U.S. ports[14] and harbors.[15] As a result of the HMT, U.S. exporters and U.S. ports have lost millions of dollars and endured competitive harm with respect to Canada over the last nine years.[16]

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pression of their wheat flour, provisions, & c., and with more reason, as these articles were exposed to a competition in foreign markets not incident to tob[acc]o, rice & c . . . ." 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 6, at 363.

10. *Export Controls*, *supra* note 7, at 204-05.

11. 26 U.S.C. §§ 4461(a), 4462(a) (1994).

12. Harbor Maintenance Revenue Act of 1986, 26 U.S.C. §§ 4461-62 (1994). Congress established the Harbor Maintenance Tax ("HMT") as part of the Water Resources Development Act of 1986. Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082 (Nov. 17, 1986) (codified as amended at 33 U.S.C. § 2201 et seq. (1994) and scattered sections of 26 U.S.C. (1994)) [hereinafter Water Resources Act of 1986].

13. 26 U.S.C. § 4461(b) (1994). The HMT is placed upon "port use," which is defined as the loading or unloading of commercial cargo to or from a vessel at a port. 26 U.S.C. § 4462(a)(1)(A)-(B) (1994).

14. H.R. REP. No. 228, 99th Cong., 2d Sess. 5 (1986); S. REP. No. 126, 99th Cong., 1st Sess. 6 (1985). The term "port" includes any channel or harbor in the customs territory of the United States that is not an inland waterway and is open to public transportation. 19 C.F.R. § 24.24 (b)(1)(1995). Code of Federal Regulations § 24.24 (b)(1) gives an exhaustive list of the approximately 200 ports that are subject to the HMT. *Id.*

15. S. REP. No. 126, 99th Cong., 1st Sess. 6 (1985). A harbor is an area adjoining navigable water used to land, unload, repair, dismantle, or build a vessel. THOMAS J. SCHOENBAUM, 1 ADMIRALTY & MARITIME LAW § 7.2, at 373 (1994). Harbors are included within the term port. 19 C.F.R. § 24.24(b)(1) (1995).

16. *Water Resources Development Act of 1995: Hearings Before the Subcommittee on Water Resources and Environment of the House Committee on Transportation and Infrastructure*, 104th Cong., 1st Sess. 142 (Feb. 7, 1995) [hereinafter *Stromberg Statement*] (prepared statement of Erik Stromberg, President, American Association of Port Authorities) (commenting that HMT puts U.S. ports at competitive disadvantage with Canadian ports for U.S. export business). In 1988, the Port of Tacoma estimated that US$11.4 million in U.S. exports and imports were shipped through Canadian ports. *Cumulative Impact of Taxes and Various Fees Levied on the Maritime Industry: Hearings Before the Subcommittee on Oversights and Investigations, House Merchant Marine and Fisheries Committee*, 102d Cong., 1st Sess. 157 (May 23, 1991) [hereinafter *Valenti Statement*] (prepared statement of Joseph L. Valenti, Port Director, Tampa Port Authority). This diversion of cargo to Canada represents an increase of nearly 60% over the last two years. *Id.* This cargo diversion accounts for 1250 lost vessel calls, 325,000 full containers of diverted cargo and the loss

Consequently, approximately one hundred major U.S. exporters challenged the constitutionality of the HMT.[17] On October 25, 1995, the U.S. Court of International Trade[18]("CIT") in *United States Shoe Corp. v. United States*,[19] held the HMT to be unconstitutional.[20] The court ruled that the HMT constituted a tax upon exports prohibited by the Export Clause of the Constitution.[21] Following the decision, the Government filed for appeal to the

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of port labor and maritime related revenue. *Cumulative Impact of Taxes and Various Fees Levied on the Maritime Industry: Hearings Before the Subcommittee on Oversights and Investigations, House Merchant Marine and Fisheries Committee*, 102d Cong., 1st Sess. 75 (May 23, 1991) [hereinafter *Aylward Statement*] (testimony of Anne Aylward, Maritime Director, Massachusetts Port Authority).

More specifically, Andersons Management Corporation, the owner of a major grain elevator complex in Ohio, complains that during 1989-91, the U.S. Great Lakes ports have lost 5250 million bushels of grain to railway transportation travelling to Canadian ports. *Cumulative Impact of Taxes and Various Fees Levied on the Maritime Industry: Hearings Before the Subcommittee on Oversights and Investigations, House Merchant Marine and Fisheries Committee*, 102d Cong., 1st Sess. 132 (May 23, 1991) [hereinafter *Mock Letter*] (letter of Sharon Mock, Grain Transporter Coordinator, The Andersons Management Corp. to John Loftus, Seaport Director, Toledo-Lucas Port Authority). In addition, the Port of Boston has seen the 19.8 million short tons of cargo shipped in 1984 decline to 17.8 million tons in 1994. *Tax Drives Firms to Canadian Ports, Exporters Trucking Goods North*, PATRIOT LEDGER, May 2, 1995, at 5.

According to Steven McCoy, President of the North American Export Grain Association, "[t]he cumulative impact on U.S. agricultural exports of the various taxes which are the subject of today's hearing could be to increase the cost of exporting U.S. agricultural products by some US$45 million this year, discouraging such exports and lowering farm income." *Cumulative Impact of Taxes and Various Fees Levied on the Maritime Industry: Hearings Before the Subcommittee on Oversights and Investigations, House Merchant Marine and Fisheries Committee*, 102d Cong., 1st Sess. 153 (May 23, 1991) [hereinafter *McCoy Statement*] (prepared statement of Steven A. McCoy, President, North American Export Grain Association). Likewise, Eastman Kodak, a Rochester, New York based corporation, will face HMT charges of approximately US$1.5 million on its cargo shipments. Nicky Robertshaw, *Shippers Exit N.Y. Port to Avoid Higher Taxes*, CRAIN'S N.Y. BUS., Oct. 14, 1991, at 1.

17. United States Shoe Corp. v. United States, 17 I.T.R.D. (BNA) 1281 (Ct. Int'l Trade Feb. 15. 1995) (establishing *U.S. Shoe Corp. v. U.S.* as lead case in HMT litigation and granting permission to numerous other exporters to act as amici curiae and file briefs in support of plaintiff's motion). The amici curiae include some of the largest corporations in the United States, including: Baxter Healthcare Corp. (No. 94-10-00650), Chevron Chemical Co. (No. 95-01-00116), Ford Motor Co. (No. 95-01-00092), Microsoft Corp. (No. 95-01-00120), Pillsbury Co. (No. 95-01-00121), and Xerox Corp. (No. 94-10-00654). *Id.* at 1282-84.

18. 28 U.S.C. §§ 251-57 (1994) (defining Court of International Trade ("CIT")). As an Article III court, the CIT maintains exclusive jurisdiction over civil actions dealing with international trade law. 28 U.S.C. §§ 1581-85 (1994).

19. 907 F. Supp. 408 (Ct. Int'l Trade 1995).

20. *U.S. Shoe*, 907 F. Supp. at 408.

21. *Id.* at 418.

U.S. Court of Appeals for the Federal Circuit ("Federal Circuit").[22]

This Comment argues that the recently decided case of *U.S. Shoe* should be upheld by the Federal Circuit upon review because allowing the continued imposition of the HMT would adversely affect the U.S. export industry and subject the Government to possible North American Free Trade Agreement ("NAFTA") violations. Part I provides background information regarding Congress' commerce and taxation powers. Part I also analyzes the constitutional restrictions on taxation and presents the judicial interpretations of the Export Clause and Import-Export Clause. Part I then describes the CIT and how it functions. Next, Part I presents a review of NAFTA and U.S.-Canada trade relations. Finally, Part I introduces background information on the HMT and Harbor Maintenance Trust Fund[23] ("Trust Fund"), and examines the problems surrounding this tax and the disputes leading to the *U.S. Shoe* holding. Part II analyzes the CIT's decision in *U.S. Shoe*. Part III argues that *U.S. Shoe* was correctly decided by the CIT, and that the traditional approach to Export Clause analysis should be upheld and applied in the future. This Comment concludes that *U.S. Shoe* should be upheld in order to preserve the success of maritime trade between U.S. and Canadian ports, the competitiveness of U.S. ports, and the validity of a well-established Supreme Court precedent.

I. *BACKGROUND TO* U.S. SHOE v. UNITED STATES

The Constitution grants the Federal Government the right to govern commerce[24] and to tax in order to raise revenue for

22. *U.S. Shoe*, 907 F. Supp. 408, *appeal filed*, (No. 94-11-00668) (Fed. Cir. Jan. 31, 1996).

23. 26 U.S.C § 9505 (1994). The Trust Fund acts as a fund to support and organize the Federal financing of the operations and maintenance of U.S. ports and harbors. H.R. REP. NO. 228, 99th Cong., 2d Sess. 11 (1985). The Trust Fund collects money from the HMT, tolls collected from the Saint Lawrence Seaway Development Corporation and from interest earned on the proceeds of the Trust Fund. 26 U.S.C. § 9505(a)(1), (2), (3) (1994). Expenditures from the Trust Fund are appropriated according to U.S.C § 9505(c) (1994). 26 U.S.C. § 9602(b)(3) (1994). The U.S. Secretary of the Treasury operates the Trust Fund, along with all other trust funds, and reports to Congress each year on the financial condition and results of operation of the Trust Fund for the past fiscal year and for the next five fiscal years. 26 U.S.C. § 9602(a) (1994).

24. U.S. CONST. art. I, § 8, cl. 3.

the support of the Government.[25] To protect and encourage foreign trade,[26] the adopters of the Constitution placed restrictions on these two powers, namely the Export Clause which prohibits taxation upon exports.[27] Similarly, in 1993, the U.S. Government entered into the North American Free Trade Agreement[28] ("NAFTA") to further ensure the success of the United States in the foreign marketplace.[29] Despite this, Congress enacted the HMT which damages export trade[30] by placing a tax upon loading or unloading of commercial cargo to be exported out of U.S. ports.[31] The CIT will determine if the HMT, as enacted, does violate the Export Clause and in turn undermine the policies aimed toward successful foreign trade.[32]

A. *Constitutional Powers of Commerce and Taxation*

Section 8, Article I of the U.S. Constitution specifies the powers granted exclusively to Congress.[33] Among these are the power of taxation[34] and the power to regulate commerce.[35] Section 9 addresses the limitations on these powers,[36] and includes the Export Clause prohibition against export taxes.[37] Section 10 establishes both inherent limitations on state powers and restric-

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25. U.S. CONST. art. I, § 8, cl. 1.

26. *See supra* notes 9-10 and accompanying text (discussing role of Export Clause in foreign trade relations)

27. U.S. CONST. art. I, § 9, cl. 5.

28. Canada-Mexico-United States: North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 289 (1993) (entered into force Jan. 1, 1994) [hereinafter NAFTA].

29. Dean C. Alexander, *The North American Free Trade Agreement: An Overview*, 11 INT'L TAX & BUS. LAW. 48, 48-49 (1993).

30. *See supra* note 16 (illuminating economic problems created by HMT).

31. 26 U.S.C. § 4461(a) (1994).

32. *U.S. Shoe*, 907 F. Supp. at 410.

33. U.S. CONST. art. I, § 8. Article I, § 8 declares that "Congress shall have the power to . . . ." *Id.*; EDWARD S. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 38 (Harold W. Chase & Craig R. Ducat eds., 14th ed. 1978) ("This is one of the most important sections of the Constitution since it describes, for the most part, the field within which Congress may exercise its legislative power.").

34. U.S. CONST. art. I, § 8, cl. 1. ("The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .").

35. *Id.* art. I, § 8, cl. 3 ("To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . . .").

36. J.W. PELTASON, CORWIN & PELTASON'S UNDERSTANDING THE CONSTITUTION 80 (10th ed. 1985) ("Whereas Section 8 enumerates the legislative powers of the national government, Section 9 limits them.").

37. U.S. CONST. art. I, § 9, cl. 5.

tions imposed by the extent of the Federal Government's powers set out in Section 8. According to the Import-Export Clause, states are also prohibited from placing taxes on exported goods.[38]

1. The Power of Commerce and Its Restrictions

The Commerce Clause[39] of the Constitution provides Congress with the power to regulate commerce within the United States and with foreign countries.[40] This commerce power allows Congress to regulate interstate transactions that cannot be regulated by the individual states, who possess limited jurisdiction and power.[41] Congress' power extends to state functions if they involve foreign nations or if they affect more than one state.[42] The Supreme Court has defined commerce to include all forms of commercial intercourse, transportation, and communication carried on between nations and states within nations.[43]

The Constitution grants Congress the power to regulate commerce through prescription of the rules used to govern this commerce.[44] This power entails employing any procedures or methods Congress considers necessary and appropriate to carry out and implement the governing rules that it seeks to establish.[45] This commerce power is unlimited as long as the adopted rules do not infringe on any prohibitions set forth in the Constitution,[46] such as the provision that no money shall be drawn from the Treasury unless properly appropriated[47] or that no preferences shall be given to the ports of one state over an-

38. *Id.* art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports . . . .").

39. *Id.* art. I, § 8, cl. 3.

40. *Id.*

41. CORWIN, *supra* note 33, at 47.

42. PELTASON, *supra* note 36, at 63.

43. Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 189-95 (1824); Brown v. State of Maryland, 25 U.S. (12 Wheat.) 419 (1827).

44. Rodgers v. United States, 138 F.2d 992, 994 (6th Cir. 1943).

45. *Rodgers*, 138 F.2d at 994.

46. *Gibbons*, 22 U.S. at 196; *Rodgers*, 138 F.2d at 994. According to the Court in *Gibbons*, the commerce power is "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution." *Gibbons*, 22 U.S. at 196.

47. U.S. CONST. art. I, § 9, cl. 7.

other.[48]

The Export Clause signifies another constitutional prohibition that restricts Congress' commerce power.[49] The Export Clause does not limit Congress' commerce power in a general sense,[50] but restricts the taxing power of Congress to raise revenue within its commerce function.[51] The restriction applies to revenue-raising measures only and does not affect measures taken in the normal regulation of commerce.[52] The Export Clause restricts the application of the Commerce Clause in a limited manner by prohibiting Congress from adopting methods of regulation incorporating export taxes.[53]

2. The Power of Taxation

Government taxation raises revenue for certain governmental purposes[54] by appropriating portions of money from the public.[55] Taxation represents a function essential to the survival of government and may, therefore, be exercised legitimately upon all property and persons under the authority of the Government.[56] A government needs revenue to support its functions,

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48. *Id.* art. I, § 9, cl. 6. ("No Preference shall be given by any Regulation of Commerce or Revenue to the Ports of one State over those of another.").

49. *Id.* art. I, § 9, cl. 5.

50. Moon v. Freeman, 379 F.2d 382, 390 (9th Cir. 1967).

51. *Moon*, 379 F.2d at 390.

52. *Rodgers*, 138 F.2d at 994. A minimal charge imposed by Congress strictly as part of a plan of regulation does not violate the Export Clause. *Id.* A charge established to raise revenue above and beyond its regulatory purpose does violate the Export Clause. *Id.* In *Rodgers*, the Court held a charge imposed by Congress for production of cotton above set marketing quotas constitutionally valid. *Id.* at 994-95. The Court noted that "imposition with which we are here concerned has for its object the fostering, protecting and conserving of interstate commerce and the prevention of harm to the people from its flow . . . . It is not a charge on property for the purpose of raising revenue." *Id.* at 995. Similarly, in *Moon*, the Court ruled that the required purchase of export certificates for wheat production as part of a wheat allocation program did not constitute a tax in violation of the Export Clause. *Moon*, 379 F.2d at 383. The purpose of the wheat allocation program was to "induce producers to comply with crop controls, and to regulate the price of wheat reaching both domestic and foreign markets." *Id.* at 392. In addition, the Court noted that the wheat allocation program by not generating substantial amounts of revenue did not implicate any constitutional taxation restrictions. *Id.*

53. *Brown*, 425 U.S. at 412-23; *accord Rodgers*, 138 F.2d at 994 (stating that Congress may impose monetary sanctions under Commerce Clause as long as they do not levy taxes to raise revenue).

54. *Gibbons*, 22 U.S. at 199.

55. 1 THOMAS M. COOLEY, TREATISE ON THE LAW OF TAXATION 2 n.1 (1903).

56. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 428 (1819); 1 COOLEY, *supra* note 55, at 9.

and taxation provides the mechanism to produce these revenues.[57] A government possesses the power of taxation as a necessary result of its sovereign authority and may impose taxes upon all subjects over which the government's control extends,[58] but only to support public purposes.[59]

The U.S. Constitution grants Congress the authority to impose and collect taxes for the U.S. Government.[60] These taxes provide for the common defense and general welfare of the country.[61] The power of taxation extends over all persons and real property subject to the control of the legislative branch of the Government.[62] The Federal Government in the nineteenth century derived most of its revenue from levying indirect taxes,[63] such as duties on imports and excise and stamp taxes on manufacturers.[64] Today, a large portion of government revenue comes from the national income tax.[65]

Congress' power of taxation can be exercised in its own right without reference to Congress' other powers.[66] The power of taxation acts as an addition to the other enumerated congressional powers and not as a supplement to them.[67] The Government may impose taxes for the purpose of raising revenue to

57. THE FEDERALIST NO. 30, at 132 (Alexander Hamilton) (New ed. 1857). Hamilton stated that a general power of taxation must be included in the framework of the U.S. Government and this power is requisite to any written constitution. *Id.* As Hamilton notes, "money is . . . considered as the vital principle of the body politic, as that which sustains its life and motion and enables it to perform its most essential functions." *Id.*

58. *McCulloch*, 17 U.S. at 429.

59. 1 COOLEY, *supra* note 55, at 181.

60. U.S. CONST. art. I, § 8, cl. 1. The power of taxation was considered "vital" and "essential" to the new form of government being established at the Constitutional Convention, without this power, "[a]ny Government of any description is helpless." WARREN, *supra* note 5, at 465.

61. U.S. CONST. art. I, § 8, cl. 1; *Gibbons*, 22 U.S. at 199.

62. 1 COOLEY, *supra* note 55, at 9.

63. *Id.* at 10-11. Indirect taxes refer to duties, impost, and excises placed upon goods in commerce before they reach the consumer and are paid as part of market price of the good and not as a tax. *Id.*

64. *Id.* at 11.

65. U.S. CONST. amend. XVI. Individual income taxes account for 39% of total receipts by the U.S. Government. OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT OF THE UNITED STATES, FISCAL YEAR 1996-BUDGET OF THE UNITED STATES GOVERNMENT 2 (1996). This accounted for approximately US$525.1 billion and US$551.9 billion towards the U.S. Government's budget in 1995 and 1996, respectively. *Id.*

66. PELTASON, *supra* note 36, at 59.

67. *Id.*

support the Government generally or a particular branch of the Government.[68] The power of taxation also allows Congress to tax in order to support the programs it undertakes to regulate under the Commerce Clause.[69]

Notwithstanding this power, the power to lay taxes to raise revenue remains distinct and separate from the power to adopt legislative programs that raise money to regulate commerce.[70] In 1964, for example, Congress as part of the Agricultural Act of 1964,[71] required the purchase of export certificates for wheat produced for exportation.[72] The Court in *Moon v. Freeman*[73] upheld the export certificate requirement, concluding that the price paid for these certificates was a legitimate charge under Congress' commerce power because the purpose of the agricultural program was not to raise revenue but to encourage wheat producers to comply with industry quotas and to regulate the price of wheat to both domestic and foreign markets.[74] Similarly, in *Augusta Towing Co., Inc. v. United States*,[75] the United States Claims Court upheld a tax upon vessels engaged in commercial transportation on any of twenty-six enumerated inland or intracoastal waterways.[76] The Claims Court found the tax to be a fee imposed for the purpose of compensating the Government for the benefits supplied for improving the inland waterway system, and not a tax imposed to raise revenue.[77]

The power granted to Congress to levy taxes does not abridge the rights of the States to levy taxes.[78] States, like the Federal Government, need revenue in order to support their government.[79] The power of taxation in the hands of the individual States is also essential to their existence.[80] By prohibiting the States from imposing taxes on imports and exports, the Con-

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68. *Rodgers*, 138 F.2d at 995.
69. PELTASON, *supra* note 36, at 59.
70. *Gibbons*, 22 U.S. at 198-202; *Rodgers*, 138 F.2d at 995.
71. Agricultural Act of 1964, Pub. L. No. 88-297, § 101, 78 Stat. 173, 178-79 (codified at 7 U.S.C. § 1349 (1994)).
72. *Id.*
73. 379 F.2d 382 (9th Cir. 1967).
74. *Moon*, 379 F.2d at 392.
75. 5 Cl. Ct. 160 (1984).
76. 26 U.S.C. § 4042(a) (1994); 33 U.S.C. §§ 1802, 1804 (1994).
77. *Augusta Towing*, 5 Cl. Ct. at 167.
78. *McCulloch*, 17 U.S. at 428; *Gibbons*, 22 U.S. at 198.
79. *Gibbons*, 22 U.S. at 199.
80. *Id.*

stitution impliedly grants the States the power to tax everything else.[81] The power to tax all articles other than imports and exports exists in both the Federal Government and the state governments.[82] Following from this, a state can tax those persons or property over which its authority extends for the purpose[83] of raising revenue to support state functions.[84]

B. *Constitutional Restrictions on Power of Taxation*

The congressional power to lay taxes is very broad, limited by one restriction and two qualifications contained in the Constitution.[85] The first qualification instructs the Government to levy indirect taxes uniformly[86] throughout the United States.[87] The Government must also levy direct taxes[88] in proportion to the census or any other numerical system established by Congress.[89] Lastly, Congress cannot impose taxes upon exports.[90] The limitations on Congress' taxation power relate specifically to revenue raising and not to incidental revenue gains obtained while performing other congressional duties such as commercial regulation.[91] Aside from these limitations, the power of Congress is extensive and may be exercised at will within the discretion of Congress.[92]

1. The Export Clause

The Export Clause of the U.S. Constitution prohibits the Federal Government from placing a tax or duty upon articles exported from any state.[93] Although originally sanctioned as a

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81. THE FEDERALIST No. 32, at 141 (Alexander Hamilton) (New ed. 1857).

82. *Id.*

83. *McCulloch*, 17 U.S. at 429.

84. *Gibbons*, 22 U.S. at 199.

85. License Tax Cases (United States v. Vassar), 72 U.S. (5 Wall.) 462, 471 (1866).

86. Knowlton v. Moore, 178 U.S. 41 (1900). The uniformity requirement refers to geographical uniformity and means to "[o]perate generally throughout the United States." *Knowlton*, 178 U.S. at 769.

87. U.S. CONST. art. I, § 8, cl. 1.

88. 1 COOLEY, *supra* note 55, at 10. Direct taxes are imposed directly on the person, property, business, or income of the individual responsible for paying them. *Id.*

89. U.S. CONST. art. I, § 9, cl. 4.

90. *Id.* art. I., § 9, cl. 5.

91. *Rodgers*, 138 F.2d at 995.

92. *License Tax Cases*, 72 U.S. at 462.

93. *Id.* art. I, § 9, cl. 5. ("No Tax or Duty shall be laid on articles exported from any State.").

protection for interstate commerce,[94] the use of the word "exported" in the Constitution is now interpreted as referring to shipment of goods between the United States and foreign countries.[95] The Export Clause, therefore, prevents federal taxation on exports from any state in the United States to a non-U.S. country.[96]

a. The General Export Clause Restriction

The Supreme Court in *Fairbanks* set the standard for a broad interpretation of the Export Clause.[97] The Court stated that the Export Clause protects all exportation from the burdens of national taxation.[98] It followed, therefore, that this freedom extended not only to exported articles themselves, but to the ex-

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94. Fairbank v. United States, 181 U.S. 282, 292-94 (1901). The drafters of the Constitution initially adopted the Export Clause to prevent taxation from creating burdens upon the exportation of goods from Southern states. SAMUEL FREEMAN MILLER, LECTURES ON THE CONSTITUTION OF THE UNITED STATES 592 (1983) [hereinafter MILLER ON THE CONSTITUTION]. The drafters adopted the provision in response to the fears of the Southern states that the Northern states would unduly burden exports out of the South. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 6, at 359 (highlighting debate between delegates regarding taxation and export clause). The South felt that protection against undue tax burdens was not something they could entrust to the North. *Id.* at 305, 359. Mr. Mason of Virginia, in fact, "urged the necessity of connecting with the power of levying taxes duties &c, that no tax should be laid on exports . . . . He was unwilling to trust to its being done in a future article. He hoped the Northn. States did not mean to deny the Southern this security." *Id.* at 305. Protecting the Southern states from abusive taxation by the Government or the Northern states constituted one of the key reasons for adopting export tax restrictions in the Constitution. 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 6, at 305, 359; *See supra* note 85 (depicting debate over export taxes at Constitutional Convention).

95. Woodruff v. Parham, 75 U.S. (8 Wall.) 123 (1868).

96. *Fairbank*, 181 U.S. at 283. Even though the Export Clause is a restriction on congressional powers, courts should construe it to the full extent expressed in its language. *Id.* at 300. The Supreme Court in *Fairbank* concluded that:

> Constitutional provisions, whether operating by way of grant or limitation, are to be enforced according to their letter and spirit, and cannot be evaded by legislation which, though not in terms trespassing on the letter, yet in substance and effect destroy the grant or limitation.

Id. The Court drew a comparison between constitutional grants of powers and constitutional restrictions. *Id.* at 289. The Court indicated that granted powers are to be taken very broadly and Congress is to be given the room necessary to utilize and put those poweres into effect. *Id.* The Court concluded, it is only logical to derive from constitutional interpretation that restrictions on Congress' powers should be given this same broad approach. *Id.* As Justice Brewer recognized, "[i]t would be a strange rule of construction that language granting powers be liberally construed and that language of restriction is to be narrowly and technically construed." *Id.*

97. *Id.* at 283.

98. *Id.* at 292-93.

portation process[99] as well.[100]

A tax violates the Export Clause if Congress places the tax upon exported goods.[101] For analysis under the Export Clause, a court needs to determine whether or not the tax is levied upon exported goods.[102] If Congress imposes a tax upon exported goods, then the goods are immune from taxation.[103] The Supreme Court seeks to determine whether an item is exported as the term is used in the Export Clause, and should be free from taxation.[104]

b. Tax Levied Upon Exported Goods

The first test examines whether the goods are in the actual process of being exported and have begun their journey to a non-U.S. destination.[105] In *Turpin v. Burgess*,[106] the Supreme Court ruled on the constitutionality of a tobacco exportation stamp used to distinguish tobacco intended for exportation in order to protect the government from exporters looking to avoid the tax.[107] In *Turpin*,[108] Congress imposed this stamp tax on tobacco before the tobacco had left the factory and did not take into account that the tobacco may not have been exported.[109] The tax fell upon tobacco intended for exportation

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99. A.G. Spalding v. Edwards, 285 F. 784, 785 (S.D.N.Y. 1922). The term "process of exportation" represents the steps involved in export trade. *A.G. Spalding*, 285 F. at 785. Export trade involves the process of carrying or sending goods abroad. Thompson v. United States, 141 U.S. 471, 477 (1892).

100. *Fairbank*, 181 U.S. at 292-93. As the Court stated, "if all exports must be free from national tax or duty, such freedom requires not simply an omission of a tax upon the article exported, but also a freedom from any tax which directly burdens the exportation." *Id.* at 293.

101. U.S. CONST. art. I, § 9, cl. 5.

102. *See* Turpin v. Burgess, 117 U.S. 504, 507 (1886) (noting that imposing tax upon goods by reason of their exportation or while they are being exported is laying tax on exported goods); *Fairbank*, 181 U.S. at 283 (answering question of whether tax on foreign bill of lading is tax imposed upon exports).

103. *See* Cornell v. Coyne, 192 U.S. 418, 427 (1904) (holding that goods manufactured for exportation are not exported goods while still in warehouse); A.G. Spalding v. Edwards, 262 U.S. 66 (1923) (holding that goods delivered to carrier are exported goods because exporter has taken first step to transport goods across sea).

104. *U.S. Shoe*, 907 F. Supp. at 417.

105. *Cornell*, 192 U.S. at 428.

106. 117 U.S. 504 (1886).

107. *Turpin*, 117 U.S. at 504.

108. *Id.*

109. *Id.* at 507. The Court reasoned that these goods were still in the factory and

and not tobacco presently being exported.[110] The Court concluded that the Export Clause prohibited taxes on goods being exported, and not ones intended for export.[111] The Court, therefore, found the stamp tax to be outside the constitutional prohibition against export taxes.[112]

Following *Turpin*,[113] the Supreme Court adopted the same reasoning in *Cornell v. Coyne*,[114] and found a nondiscriminatory tax[115] placed on manufactured cheese to be constitutionally valid.[116] Even though some of the manufactured cheese would be exported, the Court held that the tax exemption attaches to exported goods and not to articles prior to exportation.[117] The Court upheld the validity of this tax because it taxed the pre-exportation manufacturing of the cheese and not the exportation itself.[118]

Finally, in *A.G. Spalding & Bros. v. Edwards*,[119] the Supreme Court distinguished the line between goods intended for export and those already undergoing the process of exportation.[120] In

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may have never been exported anywhere. *Id.* It cannot be a tax on exports before the goods leave the factory and become exports. *Id.*

110. *Id.*

111. *Id.* The Court concluded that a general tax laid on all tobacco, whether or not the tobacco was in the process of exportation, or intended for exportation could not violate the Constitution. *Id.* The Export Clause was meant to apply to taxes upon exported goods directly, not by virtue of applying a general tax that happened to cover some exported goods. *Id.* It is this rationale that laid the groundwork for the Supreme Court decisions to follow in *Coyne*, *Hvoslef*, and *Thames & Mersey*. *Coyne*, 192 U.S. at 418 (holding tax on all manufactured cheese for export valid because it taxed the manufacturing of cheese and not exportation of cheese); United States v. Hvoslef, 237 U.S. 1 (1915) (declaring tax on charter parties negotiated for exportation of goods by vessel invalid because it targeted and taxed goods while they were being exported); Thames & Mersey Marine Ins. Co. v. United States, 237 U.S. 19 (1915) (invalidating tax on marine risk insurance policies because tax essentially fell upon policies covering goods being exported).

112. *Turpin*, 117 U.S. at 506.

113. *Id.* at 504.

114. *Cornell*, 192 U.S. at 418.

115. *Id.* at 428. The Government assesses a nondiscriminatory tax by placing it on all property and not on specific types of goods. *Id.*

116. *Id.* at 418. The tax in question was placed upon all filled cheese manufactured in the United States. *Id.* at 426. By subjecting all filled cheese that was manufactured to taxation, Congress did not single out exports and, in effect, was only taxing the manufacturing of the cheese and not its export. *Id.* at 427-28.

117. *Id.* at 427.

118. *Cornell*, 192 U.S. at 427-28.

119. 262 U.S. 66 (1923).

120. *Spalding*, 262 U.S. at 66. At the point when goods are no longer intended for

Spalding,[121] Congress levied a tax upon all baseball bats and balls sold by the manufacturer, producer, or importer.[122] A.G. Spalding, a baseball bat manufacturer, sold and delivered baseball bats to Scholtz & Co., a shipping merchant, who in turn would ship the bats to Venezuela to complete a sale to a Venezuelan company.[123] The Supreme Court ruled that once the goods were delivered to the carrier, Scholtz, and title passed to that carrier, the goods were in the process of exportation and subject to the Export Clause prohibitions.[124] The delivery of goods in *Spalding* committed the goods to the carrier for the set purpose of exporting them across the sea[125] and was the first step in the process of moving the bats to a port for shipment to Venezuela.[126] The time of delivery represents the point of distinction from the pre-exportation activities at issue in *Cornell* and *Turpin*, and signifies the point when the Export Clause prohibitions apply to the tax at issue.[127]

c. Tax Levied Close to Value of Exported Goods

The second test seeks to determine if the statute assesses the tax upon an article or document closely related to the value of the exported goods.[128] The Supreme Court in *Thames & Mersey Marine Insurance Co. v. U.S.*,[129] held that a tax upon an article or

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export but begin the process of exportation, they are immune from taxation. *Id.* at 69. Before this, the goods are in the process of manufacture and subject to taxation. *Id.*; *see Cornell*, 192 U.S. at 418 (holding that manufactured cheese was not exported good while it remains in warehouse). After this point, the process of exportation has begun and the goods are immune from taxation. *Spalding*, 262 U.S. at 69.

121. *Spalding*, 262 U.S. at 66.

122. *Id.* at 68. The tax was passed under the War Revenue Act of October 3, 1917 and provided that a tax was to be placed "upon all . . . baseball bats, . . . balls of all kinds . . . sold by the manufacturer, producer, or importer." War Revenue Act of 1917, Pub. L. No. 65-50, § 600(f), 40 Stat. 300, 316 (Oct. 3, 1917).

123. *Spalding*, 262 U.S. at 68.

124. *Id.* at 69. The Court stated that to put the distinguishing point when the goods were committed to exportation any later in time would deprive the exports of their constitutional protection. *Id.* at 70.

125. *Id.* at 69.

126. *Id.* The Court further recognized that, even though "further acts were to be done before the goods would get to sea does not matter so long as they were only the regular steps to the contemplated result." *Id.* at 69-70.

127. *Spalding*, 262 U.S. at 69.

128. *U.S. Shoe*, 907 F. Supp. at 418.

129. *Thames & Mersey*, 237 U.S. at 19.

good so directly and closely related[130] to the process of exportation is a tax on the exported goods themselves.[131] In other words, the Export Clause protects the goods and any related items essential to the exportation process from the burden of taxation.[132] This view follows from the principle articulated by the Supreme Court in *Pace v. Burgess*[133] and *Fairbank*:[134] that legislation cannot attempt to indirectly accomplish what the Constitution explicitly prohibits.[135]

The Supreme Court used this theory to expand the reach of the Export Clause beyond the goods themselves and held that taxes imposed upon bills of lading are in violation of the Constitution.[136] In 1860, the State of California passed a law that placed a stamp tax upon the bill of lading of any gold or silver leaving the state.[137] In *Almy v. California*,[138] the Supreme Court reasoned that a bill of lading[139] is so closely associated with every item of cargo exported that a tax upon this bill was in effect a tax upon the item of cargo itself.[140] The Court, therefore held that a tax upon a bill of lading was in substance the same as a tax upon the article being shipped.[141]

Following *Almy*,[142] the Supreme Court in *Fairbank*[143] relied

130. *Id.* at 26. Directly and closely related could be defined as an item that by "virtue of the demands of commerce, [is] an integral part of the exportation." *Id.*

131. *Id.* at 25.

132. *Id.*

133. 92 U.S. 372 (1875).

134. *Fairbank*, 181 U.S. at 282.

135. *Id.* The Supreme Court in *Pace* warned that we need to guard against the danger of imposing duties under the pretext of a fee and need to regard "things rather than names." *Pace*, 92 U.S. at 376. The Supreme Court in *Fairbank* noted that, "what cannot be done directly because of constitutional restriction cannot be accomplished indirectly by legislation which accomplishes the same result." *Fairbank*, 181 U.S. at 294.

136. *See* Almy v. California, 65 U.S. 169 (1860) (holding that tax on bill of lading is tax on exports); *Fairbank*, 181 U.S. at 283 (concluding that tax on foreign bill of lading effectively taxes exports).

137. *Almy*, 65 U.S. at 169.

138. *Id.*

139. *Hvoslef*, 237 U.S. at 17. A bill of lading is a contract for the carriage of a particular set of goods occupying a limited area of cargo space aboard a vessel. *Id.*

140. *Almy*, 65 U.S. at 174. "A bill of lading therefore, or some equivalent instrument of writing, is invariably associated with every cargo of merchandise exported to a foreign country, and consequently a duty upon that is, in substance and effect, a duty on the article exported." *Id.*

141. *Id.* The Court stated that "although differing in form from duty on the article shipped, [a tax or duty on a bill of lading] is in substance the same thing." *Id.*

142. *Almy*, 65 U.S. at 169.

143. *Fairbank*, 181 U.S. at 283.

heavily on the rationale of *Almy*[144] to strike down as unconstitutional a federal stamp tax on foreign bills of lading.[145] The Court reiterated the proposition that a tax on a bill of lading confirming the exported articles burdens the exportation process just as a tax placed directly on the exported articles themselves.[146] The Court chracterized the tax upon the foreign bill of lading as revenue raising[147] and equivalent to a tax upon the articles included in the bill of lading.[148] The Court further observed that Congress taxed export bills of lading ten times as much as ordinary bills of lading and this demonstrated an attempt to burden exports with a discriminatory and excessive tax.[149] The Court therefore held that the stamp tax burdened the exportation of the articles and violated the Export Clause prohibition against taxation.[150]

In *United States v. Hvoslef*,[151] the Supreme Court continued to redefine the broad reach of the Export Clause by holding a tax on charter parties[152] for the carriage of cargo to non-U.S. ports unconstitutional.[153] The charter party in this case covered the complete cargo of a vessel as opposed to a bill of lading, which covered specific goods on the vessel.[154] According to the Court, this distinction should not, and does not, matter constitutionally.[155] The charter parties were negotiated solely for the purpose of exportation.[156] The charter parties were also related

144. *Almy*, 65 U.S. at 169.

145. *Fairbank*, 181 U.S. at 283.

146. *Id.* at 293.

147. *Id.* at 305.

148. *Id.* at 312.

149. *Fairbank*, 181 U.S. at 290.

150. *Id.* at 312.

151. *Hvoslef*, 237 U.S. at 1.

152. *Id.* at 16-17. A charter party is a contract for the lease of a vessel or for special services rendered by the owner of the vessel. *Id.* at 16. When the owner of the ship arranges to carry cargo for the charterer to a designated destination, the charter party acts as a contract for the shipment of that cargo. *Id.* In *Hvoslef*, the U.S. Government attempted to impose a tax upon certain charter parties under the War Revenue Act of June 13, 1898. *Id.* at 7. The Court held that this tax violated the Export Clause because a tax on charter parties was so closely associated to the process of exportation that it essentially taxed the exported goods and acted as a prohibited burden on exportation. *Id.* at 17.

153. *Id.* at 17-18.

154. *Id.* at 16-17.

155. *Hvoslef*, 237 U.S. at 17.

156. *Id.*

exclusively to the negotiated service of exporting goods.[157] A nondiscriminatory tax applied to export charter parties is so closely related to the process of exportation and the exported goods, and therefore it constitutes a tax upon exportation and exported goods.[158]

Two weeks after *Hvoslef*,[159] the Supreme Court in *Thames and Mersey Marine Insurance Co. v. United States*,[160] determined the constitutionality of a tax applied to marine insurance policies covering exported goods against marine voyage risks.[161] As in *Hvoslef*,[162] the question remained whether the marine insurance policies covering marine risks during voyage were so vitally connected[163] with the export process that a tax upon them was in essence a tax on the exported goods.[164] The Court answered in the affirmative.[165] By analyzing the business of exportation, the Court concluded that virtually every shipping contract required marine insurance[166] as necessary to protect one's property when exporting cargo.[167] Marine insurance is so essential to the exportation process that a tax upon the policy may properly be considered a tax upon the exported goods themselves.[168]

In 1995, the Federal Circuit, in *International Business Machines Corp ("IBM") v. United States*,[169] assured the continuing validity of the broad view of the Export Clause[170] by invalidating a

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157. *Id.*

158. *Id.*

159. *Hvoslef*, 237 U.S. at 1.

160. *Thames & Mersey*, 237 U.S. at 19.

161. *Id.* at 22.

162. *Hvoslef*, 237 U.S. at 1.

163. *Thames & Mersey*, 237 U.S. at 25-26. As used by the Supreme Court, "so vitally connected" refers to how essential and close to the process of exportation the insurance policies were. *Id.*

164. *Id.* The Court pointed out that it was not dealing with activities in anticipation of exportation, in which case the tax would be valid, but, rather with activities directly relating to the exportation itself. *Id.*

165. *Id.* at 26.

166. *Id.* The Court illustrated this by referring to a "C.I.F." contract to ship cargo. *Id.* A C.I.F. contract includes a price negotiated according to cost, insurance, and freight. *Id.* The C.I.F. requires the shipper to forward to the exporter, or shippee, a bill of lading and an insurance policy. *Id.*

167. *Thames & Mersey*, 237 U.S. at 26.

168. *Id.*

169. International Business Machines Corp. v. United States, 59 F.3d 1234 (Fed. Cir. 1995), *cert. granted*, 116 S.Ct. 594 (Dec. 8, 1995) [hereinafter *IBM*].

170. *Id.* at 1239. The Federal Circuit admitted that the Supreme Court may overrule *Thames & Mersey* and the traditional approach to the Export Clause. *Id.* The court

tax upon non-U.S. issued insurance policies relating to goods in export.[171] In *IBM v. U.S.*,[172] Section 4371 of the Internal Revenue Code[173] authorized a tax upon each policy of casualty insurance issued to a domestic company by a non-U.S. insurer to cover risks or liabilities arising in the United States.[174] The tax attempted to minimize the advantage that non-U.S. insurers had over their tax-liable domestic counterparts.[175] In *IBM v. U.S.*, non-U.S. IBM subsidiaries purchased insurance policies from non-U.S. insurers to cover the risk of damage during the overseas exportation of their goods.[176] Because the goods were being exported and the insurance policies were based upon the value of these goods, the circuit court concluded that the tax upon the policies functioned as a tax on goods in the process of exportation.[177] The circuit court, therefore, held the tax on marine insurance policies to be a tax upon exported goods and unconstitutional as a violation of the Export Clause.[178]

The Constitution also limits state taxation.[179] These limitations help to establish a viable federal system[180] and prevent states from imposing independent policies that destroy federal harmony.[181] Additionally, some of the constitutional restrictions on state taxation help foster succesful commercial relations with

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reasoned, however, that "we do not feel free in this case to take the extraordinary step of disregarding a higher court decision that all agree is binding precedent if still valid." *Id.* The circuit court invited the Supreme Court to reconsider the *Thames & Mersey* holding and with it the traditional analysis of the Export Clause. *Id.* On December 8, 1995, the Supreme Court granted certiorari to hear this case. *IBM*, 59 F.3d at 1234.

171. *IBM*, 59 F.3d at 1239.

172. *Id.* at 1235.

173. 26 U.S.C. § 4371 (1994). The Internal Revenue Code "provid[es] the statutory mechanisms to raise revenues for the fulfillment of Federal, State, and local policies and programs . . . [and] also establish[es] priorities for the achievement of public and private goals . . . . The result is a tax code determining not only the health, welfare, and security of the entire nation but the standard of living of every person." 26 U.S.C.A. §§ 1-100, at V (1988 & West. Supp. 1995).

174. *Id.*

175. *IBM*, 59 F.3d at 1235; H.R. REP. NO. 2333, 77th Cong., 2d Sess. 61 (1942).

176. *IBM*, 59 F.3d at 1235.

177. *Id.*

178. *Id.* at 1237-39. The circuit court in *IBM* upheld the *Thames & Mersey* decision and relied wholly on it in making their determination. *Id.*; *see supra* notes 160-68 and accompanying text (reviewing *Thames & Mersey* holding).

179. PAUL J. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION § 1:1, at 5 (1981).

180. *Id.*

181. *Id.* at 2.

non-U.S. countries.[182] One of these limitations, the Import-Export Clause,[183] prohibits states from levying taxes on imports and exports.[184]

2. The Import-Export Clause

The Import-Export Clause of the Constitution prohibits states from imposing taxes upon imported or exported goods.[185] The drafters of the Constitution adopted the Import-Export Clause in order to grant the Federal Government exclusive power over import taxation and to prevent abuses of the taxation privilege by certain states situated against seaboards.[186] The traditional Import-Export Clause interpretation mirrored the Export Clause approach.[187] The Supreme Court in *Michelin Tire Corp. v. Wages*[188] limited the breadth of the Import-Export Clause by adopting a new approach based on the underlying policies of the clause.[189]

a. Traditional Analysis

Traditionally, in determining whether the prohibition applied in a particular case, the Supreme Court examined whether the tax fell upon goods that were imports or exports in the stream of foreign commerce.[190] The Supreme Court considered a good an import if it still resembled an import and had not yet become incorporated into the mass of property[191] in the state.[192]

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182. *Id.* at 7.

183. U.S. CONST. art. 1, § 10, cl. 2.

184. *Id.*

185. *Id.*

186. 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 6, at 518-19; 2 RECORDS OF THE FEDERAL CONVENTION, *supra* note 6, at 441-42.

187. Department of Revenue v. Association of Washington Stevedoring Cos., 435 U.S. 734, 752 (1978). If Congress placed a tax upon goods in the process of exportation, then the tax violated the Export Clause. *Spalding*, 262 U.S. at 69. Similarly, if Congress placed a tax upon goods in foreign commerce, then the tax violates the Import-Export Clause. *Almy*, 65 U.S. at 169. The Court, in *Washington Stevedoring*, recognized that the two tests were essentially the same and used *Spalding* as precedent for early Import-Export Clause analysis. *Washington Stevedoring*, 435 U.S. at 752.

188. 423 U.S. 276 (1976).

189. *Michelin*, 423 U.S. at 276.

190. *Low*, 80 U.S. at 29; *Almy*, 65 U.S. at 169. The stream of foreign commerce involves the shipment of articles of commerce from the ports of one country to those of another. *Almy*, 65 U.S. at 174.

191. *Brown*, 25 U.S. at 440-45. The mass of property includes the property subject

Courts employed the "original package"[193] test to make this determination.[194] If the importer left the good in its original packaging and did not use it or offer it for sale outside of this packaging, the ruling court considered these goods imports and free from taxation.[195] The analysis applied by the courts for taxes upon exports was the same as that applied in the Export Clause cases.[196] Thus, a tax fell upon exports if the goods had already entered the stream of commerce and had begun their journey out of the country.[197]

b. *Michelin* Approach

In *Michelin*,[198] the Supreme Court established a new, narrower approach[199] to the Import-Export Clause.[200] In holding a nondiscriminatory *ad valorem* tax upon all tires and tubes constitutionally valid, the Supreme Court in *Michelin* overruled *Low v. Austin*[201] and adopted a new approach to Import-Export Clause

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to state taxation and does not include property belonging to the individual importer. *Id.*

192. *Low*, 80 U.S. at 30-31.

193. *Brown*, 25 U.S. at 441-42. The Court in Brown laid out the "orginal package" test as follows:

> It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported, that it has become incorporated and mixed up with the mass of proerty in the country, it has perhaps, lost its distinctive character as an import and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form of package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition of the constitution.

Id.

194. *Brown*, 25 U.S. at 441-42.

195. *Id.*; MILLER ON THE CONSTITUTION, *supra* note 94, at 591.

196. *Turpin*, 117 U.S. at 506; *see supra* notes 93-178 and accompanying text (discussing traditional export clause analysis).

197. *See Turpin*, 117 U.S. at 506 ("The prohibition . . . has reference to the imposition of duties on goods by reason or because of their exportation or intended exportation . . . ."); *Cornell*, 192 U.S. at 427 ("The exemption attaches to the export and not the article before its exportation.").

198. *Michelin*, 423 U.S. at 276.

199. *Id.* at 290-91. The Import-Export Clause does not act as broad restriction on all taxation of imports and exports. *Id.* at 290. Rather, the Import-Export Clause narrowly prohibits only imposts or duties, both of which have the characteristics of taxes targeted towards imports or exports specifically. *Id.* at 290-91.

200. *Id.* at 276.

201. *Low*, 80 U.S. at 29. The *Michelin* Court overruled *Low* because it felt that the court in *Low* had misread the words of *Brown v. Maryland*. *Michelin*, 423 U.S. at 282; *see supra* note 193 and accompanying text (discussing use of *Brown* decision by Court in *Low*). The Court noted that it did not believe that the ruling in *Brown* was meant to

analysis.[202] The Court in *Michelin* departed from the traditional analysis of whether an article was an import and thus subject to taxation,[203] focusing instead on the underlying nature of the tax.[204] The *Michelin* Court sought to determine, based upon the

include a nondiscriminatory *ad valorem* tax among the prohibited imposts or duties. *Michelin*, 423 U.S. at 282. First, this was not the type of exaction that the Framers of the Constitution were concerned about when they adopted this provision. *Id.* at 283. A nondiscriminatory *ad valorem* tax would not hamper commerce or be used by seaboard states to take advantage of the inland states that needed their ports for exportation or importation. *Id.* at 286. It was also obvious to the Court that this type of tax would not affect the most important goal of this provision: granting the Federal Government exclusive control over non-domestic commerce. *Id.* An important characteristic of this type of tax is that it cannot be "selectively imposed or increased" in order to damage foreign importation. *Id.* at 288. Finally, a nondiscriminatory *ad valorem* property tax would not impede or interfere with the free flow of goods between the States. *Id.*

The wording of the clause should be read to prohibit specifically imposts or duties as opposed to general taxes. *Id.* at 290. Duties encompassed taxes imposed on the goods themselves as well as the excise taxes laid on the importation process and the documents associated with it. 1 COOLEY, *supra* note 55, at 6; 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 6, at 203-04. Imposts were duties, usually in the form of stamps, laid on articles imported into the country. 1 COOLEY, *supra* note 55, at 6 n.6; 3 RECORDS OF FEDERAL CONVENTION, *supra* note 6, at 203-04. Taxes were general exactions on persons, land, and property. 1 COOLEY, *supra* note 55, at 6 n. 4; 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 6, at 203-04. The Court in *Michelin* recognized that imposts or duties have the common characteristic of being directed to imported goods and employed by the seaboard states to discriminate against the inland states. *Michelin*, 423 U.S. at 292. The use of the words imposts or duties, therefore, suggests a prohibition of exactions more specific than general taxes. *Id.* at 291.

The *Michelin* Court stated that the Court in *Low* compounded its mistake by misreading Judge Taney's opinion in the *License Cases*. *Id.* at 299. Judge Taney used language similar to that in *Brown* to uphold the proposition that an imported good is immune from taxation if it is still in the hands of the importer, in its original packaging, and not yet a part of the mass of property of the state. License Cases (Thurlow v. Massachussetts), 46 U.S. (5 How.) 504, 575 (1847) ("goods imported, while they remain in the hands of the importer, in the form and shape in which they were brought into the country, can in no just sense be regarded as a part of that mass of property in the State usually taxed for the support of the State government"). The Court in *Low* took this language to support its holding that the prohibition covered any tax upon imports. *Id.* at 300. The problem, as the *Michelin* Court pointed out, was that Judge Taney continued his analysis and made it "crystal clear" that the prohibition applied only to taxes upon imports still characterized as imports and not nondiscriminatory *ad valorem* property taxes. *Id.* Given the above reasoning, the *Michelin* Court held that *Low* was wrongly decided and overruled it. *Id.* at 301.

202. *Michelin*, 423 U.S. at 278.

203. *Washington Stevedoring*, 435 U.S. at 752. The Court noted that the *Michelin* Court adopted a new approach to Import-Export Clause analysis by ignoring the question of whether the tax was placed upon imports and focusing instead on the nature of the tax as an impost or duty. *Id.*

204. *Id.* The Court in *Michelin* evaluated the tax to determine if it acted as an impost or duty as used in the Import-Export Clause. *Michelin*, 423 U.S. at 290-91. The words imposts or duties do not mean all taxation. *Id.* at 293. Only charges that create

policies and purposes underlying the Import-Export Clause, whether the charge was an impost or duty within the meaning of the Import-Export Clause and not whether the charged was placed upon an imported or exported good.[205]

The Import-Export Clause first seeks to ensure that the Federal Government speaks with one voice when regulating commerce with non-U.S. governments.[206] Second, the Import-Export Clause assures that import revenues become a major source of revenue to the Federal Government and prevents diversion of this revenue to the States.[207] Finally, the Import-Export Clause maintains harmony among the States and protects against abuse by seaboard states.[208] According to the Court, an exaction that offends any one of these three policies exemplifies a forbidden impost or duty.[209]

The *Michelin* Court held that the tax in question had no effect on the Federal Government's ability to regulate international commerce.[210] The Court noted that Congress could not use a nondiscriminatory tax to selectively encourage or discourage importation or international trade.[211] In addition, the tax did not deprive the Government of any revenue to which it was entitled.[212] The tax in question covered the costs of state serv-

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the evils that the Import-Export Clause intended to eliminate are considered imposts or duties. *Id.* The Court evaluated the tax in question to determine if it created any of the evils that the clause intended to protect against. *Id.* at 286-90.

205. *Michelin*, 423 U.S. at 286-90.

206. *Id.* at 285. James Madison in the Federalist No. 42 stated,

> [T]he second class of powers, lodged in the general government, consists of those which regulate the intercourse with foreign nations, to wit . . . to regulate foreign commerce . . . . This class of powers forms an obvious and essential branch of the federal administration. If we are to be one nation in any respect, it clearly ought to be in respect to other nations.

THE FEDERALIST No. 42, at 193 (James Madison) (New ed. 1857).

207. *Michelin*, 423 U.S. at 285. According to Alexander Hamilton, "the greatest part of the national revenue is derived from taxes of the indirect kind; from importers, and from excises. Duties on imported articles form a large branch of this latter description." THE FEDERALIST No. 12, at 55 (Alexander Hamilton) (1857).

208. *Michelin*, 423 U.S. at 285-86; 3 RECORDS OF THE FEDERAL CONVENTION, *supra* note 6, at 519 (setting forth letter of James Madison to Professor Davis) (writing that inland states should not be taxed for goods coming in or going out to foreign commerce through coastal states).

209. *Michelin*, 423 U.S. at 285-87.

210. *Id.* at 286.

211. *Id.*

212. *Id.* at 286-87.

ices and was not available to the Federal Government.[213] Finally, the nondiscriminatory *ad valorem* property tax did not hinder or affect trade between the States.[214] The *Michelin* Court held that the Import-Export Clause protects against taxes levied upon imported goods as they traveled from state to state and not against a tax on property destined for and remaining in one state.[215] Consequently, the *Michelin* Court held that the nondiscriminatory *ad valorem* property tax did not offend any of these policies.[216] The tax, therefore, did not violate the Import-Export Clause of the Constitution, and could be considered a valid tax.[217]

Two years later in *Department of Revenue v. Assoc. of Washington Stevedoring Cos.*,[218] the Supreme Court upheld the narrower *Michelin* approach and applied it to exports under the Import-Export Clause.[219] In *Washington Stevedoring*,[220] the State of Washington applied a business and occupation tax upon stevedoring activities.[221] The Supreme Court adapted the *Michelin* approach to exports because the prohibitions of the Import-Export Clause included restrictions on both export and import taxes.[222] The Court further reasoned that exports related directly to the first and third policies identified in *Michelin*.[223] First, the Federal Government's control over foreign commerce involves the regulation of export trade.[224] Second, exports also affect the harmonization of interstate trade.[225] The *Washington Stevedoring* Court reasoned that the second prong did not apply to exports because the Federal Government cannot tax exports either, so a ban on state export taxes would not be protecting the Government from loss of any potential revenue.[226]

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213. *Id.*
214. *Michelin*, 423 U.S. at 288.
215. *Id.* at 290.
216. *Id.* at 293-94.
217. *Id.*
218. *Washington Stevedoring*, 435 U.S. at 734.
219. *Id.*
220. *Id.*
221. *Id.* at 736. Stevedoring is the business of loading and unloading cargo from ships. *Id.* at 737.
222. *Washington Stevedoring*, 435 U.S. at 758.
223. *Id.*
224. *Id.*
225. *Id.*
226. *Washington Stevedoring*, 435 U.S. at 758.

The Court reasoned that because the business tax was placed on Washington state-based stevedoring companies and non-U.S. businesses or vessels were not implicated,[227] the tax did not affect the Government's ability to conduct and regulate foreign business.[228] Additionally, the tax avoided interstate friction because it was nondiscriminatory, properly apportioned, reasonably related to a state activity, and only levied upon Washington state residents.[229] Because the business and occupation tax did not violate any of the constitutional policies laid out in *Michelin*, the tax did not represent a prohibited impost or duty under the Import-Export Clause.[230]

These two decisions hold that the restrictions set forth in the Import-Export Clause apply to specific imposts or duties and not to general taxation.[231] Under this view, the Supreme Court, in *Michelin*[232] and *Washington Stevedoring*,[233] found broad nondiscriminatory taxes to fall outside of the constitutional prohibition.[234] A key element to this approach involves the recognition that nondiscriminatory taxes are permissible under the Constitution because they do not discriminate against imports or exports and cannot be manipulated so as to inhibit either one.[235]

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227. *Id.*

228. *Id.* at 754.

229. *Id.* at 755. In order for a state business tax to withstand challenge as an infringement upon Congress' commerce power, it must pass the test set forth by the Court in *Washington Stevedoring*. *Id.* at 750. The state tax must be fairly apportioned, nondiscriminatory against interstate commerce, applied to an activity with a substantial connection to the state, and fairly related to the services provided by the state. *Id.* In this case, the Washington State business tax on stevedoring activities was all of the above. *Id.* The entire stevedoring activity of the taxed parties took place within the State of Washington. *Id.* The tax was levied solely on unloading and loading that took place in Washington and does not appear to discriminate against interstate commerce in any way. *Id.* The tax is fairly related to the service and protection provided by the state. *Id.* The Court, therefore, upheld the tax and concluded that it did not violate the constitutional restrictions placed on states by the Commerce Clause. *Id.* The Court then adopted this same reasoning to hold that the tax also did not create any interstate friction. *Id.* at 755. The Court concluded that the tax did not implicate the third policy of the Import-Export Clause as to create an unconstitutional impost or duty. *Id.*

230. *Washington Stevedoring*, 435 U.S. at 761.

231. *Id.* at 751-754; *see supra* notes 198-235 and accompanying text (discussing *Michelin* and *Washington Stevedoring* decisions).

232. *Michelin*, 423 U.S. at 276.

233. *Washington Stevedoring*, 435 U.S. at 734.

234. *Michelin*, 423 U.S. at 293; *Washington Stevedoring*, 435 U.S. at 761.

235. *Michelin*, 423 U.S. at 287.

C. *Court of International Trade*

In 1980, Congress enacted the Customs Court Act of 1980 and established the CIT[236] to replace the U.S. Customs Court ("Customs Court").[237] Established pursuant to Article III of the U.S. Constitution, the CIT maintains national jurisdiction.[238] Generally, the CIT's jurisdiction encompasses civil suits arising out of adverse actions taken by government agencies involved with import transactions.[239]

1. History

The limited role of the original Customs Court included reviewing and either agreeing or disagreeing with a decision of the U.S. Customs Service regarding classification and valuation of goods for tariff and customs purposes.[240] In these classification and valuation cases, the Customs Court could not issue money judgements and until 1980 could not provide equitable relief.[241] As classification and valuation became less important,[242] and international trade, antidumping,[243] and countervailing duty[244] is-

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236. Customs Court Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (1980) (codified as amended at 28 U.S.C. §§ 251, 1581-85, 2631-47 (1994) and scattered sections of 18 U.S.C. and 19 U.S.C. (1994)).

237. H.R. REP. No. 1235, 96th Cong., 2d Sess. 20 (1980). In 1926, Congress established the U.S. Customs Court as an Article I court. *Id.* at 18. In 1956, as the Customs Court began to play a more important role in the federal judiciary system, Congress amended the statute and proclaimed the court to be established under Article III of the Constitution. 28 U.S.C. § 251 (1994); H.R. REP. No. 1235, 96th Cong., 2d Sess. 20 (1980).

238. Edward D. Re, *Litigation Before U.S. Court of International Trade*, 19 U.S.C.A. §§ 1-1300, at XIV (West. Supp. 1995). Article III, § 1 of the U.S. Constitution provides that "[t]he judicial power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. III, § 1.

239. 28 U.S.C. §§ 1581-85 (1994); Re, *supra* note 238, at XVI.

240. *Id.* at 18-19. The majority of cases before the Customs Court typically concerned the classification and valuation of goods and merchandise. *Id.* at 18.

241. *Id.*

242. H.R. REP. No. 1235, 96th Cong., 2d Sess. 19 (1980). Because multilateral trade negotiations have reduced or eliminated existing tariffs between countries, classification and valuation issues have assumed a less important role in international trade litigation. *Id.*

243. Gerald K. McKim, *United States-Canadian Free Trade: Economic Repercussions of the CFTA and NAFTA on the United States, Canada and the Great Lakes Region*, 25 U. Tol. L. Rev. 485, 490 n.30 (1994). Antidumping laws place fees upon imported goods that the importing country believes are being sold below cost in order to drive out competition. *Id.*

sues became more prevalent,[245] much confusion arose surrounding the jurisdiction of the Customs Court.[246] Due to this confusion and the Customs Court's limited powers to grant sufficient relief, many international trade disputes were brought before district courts and not the Customs Court.[247] Many district courts, however, refused to take on these international trade cases, stating the desire to preserve the grant of exclusive jurisdiction given to the Customs Court over international trade matters.[248]

In response to these problems,[249] the Customs Court Act of 1980 sought to improve judicial review of international trade matters by revising and clarifying the statutory provisions of the Customs Court.[250] In establishing the CIT, Congress hoped to eliminate much of the jurisdictional confusion that had plagued international trade disputes and to ensure the uniformity of U.S. international trade law interpretation.[251] Congress changed the name of the Customs Court to the CIT because it believed the new name reflected the clarified and expanded role of this court over international trade matters.[252]

2. Composition

The President, with the consent of the Senate, appoints nine judges to sit on the CIT.[253] The chief judge of the CIT

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244. *Id.* Countervailing duty statutes establish tariffs upon an imported good that is being unfairly subsidized by the exporter's country. *Id.*

245. H.R. REP. No. 1235, 96th Cong., 2d Sess. 19 (1980). As tariffs became less prevalent, countries adopted other measures such as antidumping and countervailing duties statutes, resulting in increased litigation challenging government decisions made under these statutes. *Id.* In 1979, Congress passed the Trade Agreements Act of 1979 and gave the Customs Court new responsibilities to hear cases dealing with antidumping and countervailing duties issues. Pub. L. No. 96-39, 93 Stat. 144 (1979); H.R. REP. No. 1235, 96th Cong., 2d Sess. 18 (1980).

246. *Id.* at 19. The House of Representatives noted that "the primary statutes governing the U.S. Customs Court have not kept pace with the increasing complexities of modern day international trade litigation." *Id.* at 18.

247. *Id.* at 19.

248. H.R. REP. No. 1235, 96th Cong., 2d Sess. 19 (1980).

249. *Id.* "Congress is greatly concerned that numerous individuals and firms, who believe they possess real grievance, are expanding significant amounts of time and money in a futile effort to obtain judicial review of the merits of their case." *Id.*

250. Customs Court Act of 1980, Pub. L. No. 96-417, 94 Stat. at 1727 (1980).

251. H.R. REP. No. 1235, 96th Cong., 2d Sess. 20 (1980).

252. *Id.*

253. Re, *supra* note 238, at XIV.

assigns actions before the court to a single judge.[254] If the chief judge finds that the action involves, among other things, the constitutionality of an act of Congress, the chief judge may assign the action to a three-judge panel.[255] Final decisions of the CIT must be supported by a statement containing findings of fact and conclusions of law, or an opinion stating the reasons and facts upon which the opinion is based.[256] Decisions of the court are binding on all parties to the lawsuit[257] and may be appealed to the Federal Circuit.[258]

3. Jurisdiction

The traditional areas of the CIT's exclusive jurisdiction under Title 28, United States Code, Section 1581[259] include civil actions pertaining to classification and valuation of imported merchandise,[260] charges and exactions made by the Secretary of the Treasury,[261] the exclusion of merchandise from entry provisions of the customs laws,[262] and challenges to administrative decisions under the antidumping and countervailing duty laws.[263] In order to obtain jurisdiction under Section 1581, litigants must fit into one of the categories, including those mentioned above, listed in subsections (a) through (h) of Title 28, United States Code, Section 1581.[264]

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254. 28 U.S.C. §§ 253(c), 245 (1994); Re, *supra* note 238, at XIV.

255. 28 U.S.C. § 255 (1994); Re, *supra* note 238, at XIV. Assignment of a three-judge panel is not automatic. Re, *supra* note 238, at XV. The underlying purpose of § 255 is to limit the use of three judge panels to special matters that raise important issues requiring a more thorough judicial decision. *Id.*

256. 28 U.S.C. § 2645(a) (1994); Re, *supra* note 238, at XVII.

257. 28 U.S.C. § 2645(c) (1994); Re, *supra* note 238, at XVII.

258. 28 U.S.C. § 1295(a)(5) (1994); Re, *supra* note 238, at XVII.

259. 28 U.S.C. § 1581 (1994).

260. 28 U.S.C. § 1581(a), (b) (1994).

261. 28 U.S.C. § 1581(e), (h) (1994).

262. 28 U.S.C. § 1581(a) (1994).

263. 28 U.S.C. § 1581(c) (1994).

264. Gregory W. Carman, *Remarks Before the Conference on International Business Practice on Practice Before the United States Court of International Trade*, 2 FED. CIR. B. J. 123, 128 (1992). Judge Carman comments that litigants "must slide exactly into a glove of eight jurisdictional fingers, known as 28 U.S.C. § 1581(a)-(h) or . . . . [t]hey are out of court." *Id.* U.S.C. § 1581(a)-(h) provides in pertinent part that the CIT shall have exclusive jurisdiction of any civil action commenced:

(a) . . . to contest the denial of a protest, in whole or in part, under section 515 [19 U.S.C. § 1515] of the Tariff Act of 1930.

(b) . . . under section 516 [19 U.S.C. § 1516] of the Tariff Act of 1930.

(c) . . . under section 516A [19 U.S.C. § 1516a] of the Tariff Act of 1930.

The CIT also possesses a statutory grant of residual jurisdiction which authorizes the court to hear any civil action arising out of certain laws relating to international trade or the administration and enforcement of these laws.[265] Section 1581(i)[266] acts as a supplement to the exclusive jurisdiction authorized under Section 1581(a)-(h).[267] Before plaintiffs can file for residual jurisdiction under Section 1581(i), they must pursue all available remedies found in subsections (a)-(h).[268] Consequently, Section 1581(i) may be invoked only when these other available

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(d) . . . to review—

(1) any final determination of the Secretary of Commerce under section 223 [19 U.S.C. § 2273] of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act;

(2) any final determination of the Secretary of Commerce under section 251 [19 U.S.C. § 2341] of the Trade Act of 1974 with respect to eligibility of a firm for adjustment assistance under such Act;

(3) any final determination of the Secretary of Commerce under section 271 [19 U.S.C. § 2371] of the Trade Act of 1974 with respect to the eligibility of a community for adjustment assistance under such Act.

(e) . . . to review any final determination of the Secretary of the Treasury under section 305(b)(1) [19 U.S.C. § 2515] of the Trade Agreements Act of 1979.

(f) . . . involving an application for an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c) (2) [19 U.S.C. § 1677f] of the Tariff Act of 1930.

(g) . . . to review—

(1) any decision of the Secretary of the Treasury to deny a customs broker's license under section 641(b)(2) or (3) [19 U.S.C. § 1641(b), (c)] of the Tariff Act of 1930, or to deny a customs broker's permit under section 641(c)(1) of such Act, or to revoke a license or permit under section 641(b)(5) or (c)(2) of such Act;

(2) any decision of the Secretary of the Treasury to revoke or suspend a custom broker's license or permit, or impose a monetary penalty in lieu thereof, under section 641(d)(2)(B) of the Tariff Act of 1930; and

(3) any decision or order of the Customs Service to deny, suspend, or revoke accreditation of a private laboratory under section 499(b) [19 U.S.C. § 1499] of the Tariff Act of 1930. (h) . . . to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportuntiy to obtain judicial review prior to such importation.

28 U.S.C. § 1581(a)-(h) (1994).

265. 28 U.S.C. § 1581(i) (1994).

266. *Id.*

267. Re, *supra* note 238, at XXXIX.

268. *Id.* at XL; Carman, *supra* note 264, at 128-29.

means for jurisdiction are manifestly inadequate,[269] or it is necessary to eliminate unjustified delays resulting from pursuit of these other remedies.[270]

The CIT possesses all the legal and equitable powers of a U.S. district court.[271] Section 2643 of Title 28 of the United States Code spells out the remedies available through the CIT.[272] These remedies include money judgements for or against the United States, retrials, rehearings or remands for further proceedings, and any other appropriate remedy the CIT deems necessary.[273]

D. *NAFTA & U.S. Trade Relationship with Canada*

The United States and Canada form the World's largest two-way trade partnership.[274] In 1995, the two countries accounted for US$242 billion in trade.[275] They represent each other's largest recipient of exports and largest beneficiary of imports.[276] Despite the economic importance of this trade relationship, the United States and Canada historically had adopted policies of protectionism rather than of cooperation.[277]

1. U.S.-Canada Trade Before the Canada-United States Free-Trade Agreement & NAFTA

In 1854, British North American Governor General Lord Elgin and U.S. Secretary of State William Marcy signed an agreement[278] ("Elgin-Marcy Agreement") intended to generate lim-

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269. Re, *supra* note 238, at XL; Miller & Co. v. United States, 824 F.2d 961, 963 (Fed. Cir. 1987), *cert denied*, 484 U.S. 1041 (1988). An example of a manifestly inadequate means of jurisdiction occurs when a plaintiff is required to protest a decision or action by Customs over which Customs has no authority. Lynn S. Baker & Michael E. Roll, *Securing Judicial Review in the United States Court of International Trade: Has Conoco, Inc. v. United States Broadened the Jurisdictional Boundaries?*, 18 FORDHAM INT'L L.J. 726, 734 (1995).

270. *Miller*, 824 F.2d at 963; Re, *supra* note 238, at XL.

271. 28 U.S.C. § 1585 (1994).

272. 28 U.S.C. § 2643 (1994).

273. 28 U.S.C. § 2643 (1994); Re, *supra* note 238, at XVIII.

274. McKim, *supra* note 243, at 485.

275. U.S. DEPARTMENT OF COMMERCE, INTERNATIONAL TRADE ADMINISTRATION, OFFICE OF TRADE AND ECONOMIC ANALYSIS, U.S. FOREIGN TRADE HIGHLIGHTS 1994, at 18, 22 (1995) [hereinafter TRADE HIGHLIGHTS].

276. *Id.* at 11, 18, 22.

277. McKim, *supra* note 243, at 485-86.

278. 1 U.S.-CANADA FREE TRADE AGREEMENT: THE COMPLETE RESOURCE GUIDE 6

ited free trade between the United States and Canada.[279] The Elgin-Marcy Agreement granted Canadian and U.S. fishermen access to the other country's Atlantic coastal waters.[280] The Elgin-Marcy Agreement also reduced tariffs on commodities such as grain, meat, lumber, and coal.[281] Although the Agreement was successful,[282] it was dissolved a few years later by the United States because of economic and political dissension.[283]

Protectionism[284] and failed attempts at free trade[285] characterized the next century of U.S.-Canada trade.[286] In one instance, Canada adopted the National Policy of 1879.[287] The National Policy of 1879 aimed to protect Canadian manufacturing by raising tariffs and to pressure the United States to enter into a new trade agreement.[288] Similarly, the United States, believing that its trading partners were using unfair trade practices, utilized U.S. trade law remedies such as antidumping laws[289] and

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(Bureau of National Affairs Special Report 1988) [hereinafter FTA RESOURCE GUIDE]; McKim, *supra* note 243, at 487-88.

279. McKim, *supra* note 243, at 488.

280. FTA RESOURCE GUIDE, *supra* note 278, at 6.

281. *Id.*

282. *Id.* Overall trade between the United States and Canada increased to approximately US$73 million by 1866, but most of the growth was on Canada's side. *Id.* Canada's exports to the United States increased from US$9 million in 1854 to US$49 million in 1866. *Id.*

283. *Id.* Due to the lack of economic benefit and Canada's support for the South in the Civil War, the United States pulled out of the Elgin-Marcy Agreement in 1866. *Id.*

284. EDWARD JOHN RAY, U.S. PROTECTIONISM AND THE WORLD DEBT CRISIS 22-23 (1989). Protectionism is the process of protecting a country's import-sensitive industries by using tariffs to restrict the number of imports. *Id.* The term refers to a range of import restrictions, other than tariffs and quotas, used to protect a country from unfairness in international trade. Philip H. Trezise, *U.S.-Canadian Free Trade: An Idea Whose Time Has Come?*, *in* PERSPECTIVES ON A U.S.-CANADIAN FREE TRADE AGREEMENT 1, 2 (Robert M. Stern et al. eds., 1987).

285. FTA RESOURCE GUIDE, *supra* note 278, at 7. In 1911, the United States and Canada came close to signing a new trade agreement. *Id.* President William Howard Taft and Prime Minister Wilfrid Laurier signed an agreement on January 26, 1911, to lower tariffs and allow for reciprocal free entry of certain goods. *Id.* Canadian farmers and businessmen, fueled by anti-American sentiment and the fear of adverse economic results, opposed the agreement. *Id.* On September 11, 1911, the Conservative party candidate defeated both Laurier and the chance of completing the agreement. *Id.*

286. McKim, *supra* note 243, at 490.

287. *Id.* at 488.

288. *Id.*

289. McKim, *supra* note 243, at 490 n.30. Antidumping laws place fees upon imported goods that the importing country believes are being sold below cost in order to drive out competition. *Id.*

countervailing duty laws[290] to protect U.S. industry.[291] Additionally, in 1930 the U.S. Congress passed the Tariff Act of 1930[292] ("Hawley-Smoot Tariff") and created some of the highest tariffs in the history of the United States.[293] The Hawley-Smoot Tariff placed duties of fifty-three percent[294] on imports to the United States to protect U.S. industry and labor.[295]

In 1965, the United States and Canada took the first step toward a broad free trade agreement[296] by adopting the Automotive Products Trade Act of 1965 ("Automotive Trade Act").[297] The Automotive Trade Act granted Canada free access by abolishing duties on Canadian autos, trucks, buses, parts, and accessories entering the United States.[298] On the other hand, this agreement contained restrictions which required the United States to meet certain standards before it received duty-free entry to Canada.[299] Canada undertook the next step when it issued the Trade Policy Review of 1983[300] and reversed its traditional anti-free trade philosophy.[301] The Trade Policy Review of 1983 reported that Canada's future prosperity depended on gaining access to the U.S. marketplace.[302] Then, in 1984, Conservative Brian Mulroney took over as Prime Minister of Canada,[303] advocating a plan to create a laissez-faire economic environment in Canada to encourage investment and expansion of the Canadian economy.[304] A key component of Mulroney's plan included

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290. *Id.* Countervailing duty laws establish tariffs upon an imported good that is being unfairly subsidized by the exporter's country. *Id.*

291. Trezise, *supra* note 284, at 7.

292. Pub. L. No. 361, 46 Stat. 590 (1930) [hereinafter Hawley-Smoot Tariff].

293. Lowell D. Hill, *Effects of Regulation on Efficiency of Grain Marketing*, 17 CASE W. RES. J. INT'L L. 389, 398 (1985).

294. Thomas D. Grant, *Foreign Takeovers of United States Airlines: Free Trade Process, Problems, and Progress*, 31 HARV. J. ON LEGIS. 63, 139 (1994).

295. Hawley-Smoot Tariff, Pub. L. No. 361, 46 Stat. at 590 (1930).

296. FTA RESOURCE GUIDE, *supra* note 278, at 10.

297. Pub. L. No. 89-283, 79 Stat. 1016 (1965) (codified as amended at 19 U.S.C. §§ 2001-33 (1994)).

298. FTA RESOURCE GUIDE, *supra* note 278, at 7.

299. *Id.*

300. Sperry Lea, *A Historical Perspective*, *in* PERSPECTIVES ON A U.S.-CANADIAN FREE TRADE AGREEMENT 11, 26-27 (Robert M. Stern et al. eds., 1987).

301. *Id.*

302. *Id.*

303. McKim, *supra* note 243, at 491.

304. *Id.*

gaining free access to the U.S. marketplace.[305]

2. The Canada-United States Free-Trade Agreement

On January 1, 1988 President Ronald Reagan and Prime Minister Mulroney signed the Canada-United States Free-Trade Agreement ("CFTA").[306] The CFTA created one of the largest free trade areas in the world, affecting approximately US$125 billion in trade at the time.[307] The CFTA generally aimed to eliminate barriers of trade in goods and services,[308] facilitate free trade between the United States and Canada,[309] encourage investment in the two countries,[310] establish effective dispute resolutions,[311] and lay a foundation for future free trade agreements.[312]

Chapter Four of the CFTA establishes border measures aimed at eliminating tariffs and other trade restrictions.[313] Article 401,[314] the main component of Chapter Four, creates a schedule of tariff reduction between the United States and Canada.[315] The CFTA will effectively eliminate all bilateral tariffs between the United States and Canada by January 1, 1998.[316] The Agreement provides for three stages of tariff removal.[317] Stage I eliminated tariffs on specific enumerated goods immediately upon effectiveness of the agreement.[318] Stage II eliminated tariffs in five annual reductions by January 1, 1993.[319] Finally, stage

305. *Id.*

306. Canada-United States: Free-Trade Agreement, Jan. 2, 1988, U.S.-Can., 27 I.L.M. 281 (1988) [hereinafter CFTA].

307. *Id.*, 27 I.L.M. at 281.

308. *Id.* art. 102(a), 27 I.L.M. at 293.

309. *Id.* art. 102(b), 27 I.L.M. at 293.

310. *Id.* art. 102(c), 27 I.L.M. at 293.

311. *Id.* art. 102(d), 27 I.L.M. at 293.

312. *Id.* art. 102(e), 27 I.L.M. at 293.

313. FTA RESOURCE GUIDE, *supra* note 278, at 35.

314. CFTA, *supra* note 306, art. 401, 27 I.L.M. at 306.

315. *Id.* art. 401(2), 27 I.L.M. at 306.

316. FTA RESOURCE GUIDE, *supra* note 278, at 35.

317. *Id.*

318. CFTA, *supra* note 306, art. 401(2)(a), 27 I.L.M. at 306. Products in Stage I include computer equipment, motorcycles, leather goods, and whiskey. JUDITH H. BELLO & ALAN F. HOLMER, GUIDE TO THE U.S.-CANADA FREE-TRADE AGREEMENT 397 (1992). These goods were believed to be able to exist in a duty-free environment without any adjustment period. *Id.*

319. CFTA, *supra* note 306, art. 401(2)(b), 27 I.L.M. at 306. Stage II includes paper products, subway cars, furniture, and most machinery. BELLO & HOLMER, *supra* note 318, at 398.

III eliminates tariffs in ten annual reductions to be completed by January 1, 1998.[320]

Article 407[321] of Chapter Four prohibits the adoption of import or export restrictions, other than tariffs, such as quotas and other quantitative restrictions.[322] Article 407 seeks to prevent parties to the Agreement from establishing trade restrictions using methods other than tariffs.[323] Furthermore, Article 408 bans either country from adopting or maintaining export taxes on goods to the other party.[324]

3. NAFTA

On December 17, 1992, President George Bush, President Salinas, and Prime Minister Mulroney signed NAFTA.[325] In 1988, Mexican President Carlos Salinas de Gortari initiated a plan for long-term growth and development of Mexico into a respected international economic entity.[326] Mexico, similar to Canada, realized that in order to develop and grow economically it would need free access to the U.S. marketplace.[327] President Clinton submitted NAFTA to Congress on November 4, 1993[328] and Congress approved the Act on December 8, 1993.[329]

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320. CFTA, *supra* note 306, art. 401(2)(c), 27 I.L.M. at 306. Included in Stage III are most agricultural products, textiles, steel, appliances, rail cars, and rubber. BELLO & HOLMER, *supra* note 318, at 398. These goods are most susceptible to import competition problems and need a long period of adjustment before duty-free trade can begin. *Id.*

321. CFTA, *supra* note 306, art. 407, 27 I.L.M. at 310.

322. BELLO & HOLMER, *supra* note 318, at 411-12 (1992). Article 407 does not prohibit import and export restrictions that are permitted under GATT for certain conditions dealing with national security, health and safety, conservation, and short supply. CFTA, *supra* note 306, art. 407, 27 I.L.M. at 310.

323. BELLO & HOLMER, *supra* note 318, at 411-12.

324. CFTA, *supra* note 306, art. 408, 27 I.L.M. at 310.

325. NAFTA, *supra* note 28, 32 I.L.M. at 289.

326. *America Builds a Trade Block*, ECONOMIST, Aug. 15, 1992, at 53.

327. McKim, *supra* note 243, at 495; Katherine Barnhart, *A Canadian Thumbs Up for the NAFTA*, BUS. MEX., Oct. 1992, at 40. Unlike the enthusiastic Mexican Government, Canada entered the agreement mostly to protect its pre-existing trade agreement with the United States, and not to establish a new trading partner in Mexico. Dierdre McMurdy & John Daly, *Clearing the Final Hurdles: Trade Ministers Agonize Over the Final Touches to a Continental Trade Pact*, MACLEAN'S, Aug. 17, 1992, at 24.

328. Donald J. Musch, *Summary of NAFTA Legislative History*, *in* 1 NORTH AMERICAN FREE TRADE AGREEMENTS, TREATIES 4 (James R. Holbien & Donald J. Musch eds. 1995) [hereinafter TRADE AGREEMENTS].

329. North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, § 101, 107 Stat. 2061 (Dec. 8, 1993) (codified at 19 U.S.C. §§ 3311 (1994)).

a. Free Trade of Goods under NAFTA

The contracting parties to NAFTA represent the World's largest trade area, consisting of 360 million people and a combined gross national product of approximately US$6.3 trillion.[330] Following NAFTA, trade between the United States and Canada continued to prosper as Canada retained its place as the premier trading partner of the United States.[331] In 1994, the United States exported approximately US$114.3 billion worth of merchandise and goods to Canada, up fourteen percent from 1993.[332] Additionally, the United States received approximately US$128.9 billion worth of Canadian goods, sixteen percent higher than in 1993.[333]

In general terms, NAFTA creates a free trade area between the United States, Canada, and Mexico in which tariffs and non-tariff barriers to trade are reduced between the parties.[334] The contracting parties designed NAFTA to stimulate trade and investment in North America through a more efficient use of capital, land, labor, and technology.[335] NAFTA is subdivided into six principle areas corresponding to its stated objectives.[336] NAFTA proposes to eliminate barriers to trade between the United States, Mexico, and Canada,[337] promote fair competition among the parties,[338] increase investment opportunities,[339] secure adequate and effective intellectual property protection,[340] create effective dispute resolution mechanisms,[341] and establish a framework for future agreements.[342]

Chapter Three of NAFTA[343] provides the central framework

330. Alexander, *supra* note 29, at 48.

331. UNITED STATES TRADE REPRESENTATIVE, 1995 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 33 (1995) [hereinafter TRADE BARRIERS REPORT].

332. *Id.*

333. *Id.*

334. Charles R. Johnston, Jr. et al., *Summary of the North American Free Trade Agreement, in* 1 NORTH AMERICAN FREE TRADE AGREEMENTS, COMMENTARIES 1 (James R. Holbien & Donald J. Musch eds., 1995) [hereinafter TRADE COMMENTARIES].

335. Alexander, *supra* note 29, at 48-49.

336. McKim, *supra* note 243, at 497-98.

337. NAFTA, *supra* note 28, art. 102(1)(a), 32 I.L.M. at 297.

338. *Id.* art. 102(1)(b), 32 I.L.M. at 297.

339. *Id.* art. 102(1)(c), 32 I.L.M. at 297.

340. *Id.* art. 102(1)(d), 32 I.L.M. at 297.

341. *Id.* art. 102(1)(e), 32 I.L.M. at 297.

342. *Id.* art. 102(1)(f), 32 I.L.M. at 297.

343. *Id.* Ch. 3, 32 I.L.M. at 299.

for free trade of goods between the United States and Mexico by eliminating tariffs and non-tariff restrictions to market access.[344] Article 302[345] prevents any party from increasing or adopting new tariffs according to the schedule set up in Annex 302.2.[346] Stage I provides that upon January 1, 1994, duties will be removed on certain categories of goods including computers and automobiles.[347] Stage II phases out tariffs over a five-year period in annual reductions ending by January 1, 1998.[348] Stage III eliminates tariffs in ten yearly cuts, to be completed by January 1, 2003.[349] Finally, Stage IV tariffs will be eliminated by January 1, 2008 through fifteen annual reductions.[350] The CFTA tariff reduction plan will remain in effect until its completion in 1998.[351]

In addition, Article 309 imposes import and export restriction upon the parties to the Agreement.[352] Article 309 forbids any party to the Agreement from maintaining or adopting export restrictions on goods destined to another country within the Agreement.[353] This rule is accompanied by a long list of exempted industries such as timber, automotive, textiles, and energy.[354] In addition, Article 314 prohibits the parties from adopting or maintaining any tax on goods exported to another country within the Agreement.[355] An exception to Article 314 permits a party to impose an export tax on goods to a particular country, if the party imposes the same tax on goods exported to

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344. *Id.* 32 I.L.M. at 299-349; PAUL ET AL., NORTH AMERICAN FREE TRADE AGREEMENT, SUMMARY AND ANALYSIS 5 (1993) [hereinafter NAFTA SUMMARY];

345. NAFTA, *supra* note 28, art. 302, 32 I.L.M. at 300.

346. *Id.* art. 302(4), 32 I.L.M. at 300.

347. *Id.* annex 302.2(1)(a), 32 I.L.M. at 310; NAFTA SUMMARY, *supra* note 344, at 5.

348. NAFTA, *supra* note 28, annex 302.2(1)(b), 32 I.L.M. at 310.

349. *Id.* annex 302.2(1)(c), 32 I.L.M. at 310.

350. *Id.* annex 302.2(1)(d), 32 I.L.M. at 310.

351. *Id.*; *see supra* notes 314-20 and accompanying text (describing tariff reduction under CFTA).

352. NAFTA, *supra* note 28, art. 309(1), 32 I.L.M. at 303.

353. *Id.*

354. *Id.* annex 301.3, 32 I.L.M. at 305; NAFTA SUMMARY, *supra* note 344, at 6.

355. *Id.* art. 314, 32 I.L.M. at 303. NAFTA Article 314 provides that:

> No Party may adopt or maintain any duty, tax, or other charge on the export of any good to the territory of another Party, unless such duty, tax or charge is adopted or maintained on: (a) exports of any such good to the territory of all other Parties; and (b) any such good when destined for domestic consumption.

Id.

all other countries and goods destined for domestic consumption.[356] Article 314, however, permits Mexico to tax exports of certain food items such as beans, wheat flour, corn tortillas, and eggs.[357]

b. Dispute Resolution under NAFTA

Chapter Twenty of NAFTA[358] establishes two institutions to administer the Agreement and settle its disputes.[359] Cabinet-level trade representatives from each of the parties will comprise the Free Trade Commission ("Commission").[360] The Commission will supervise the implementation and further elaboration of the Agreement as well as resolve disputes that may arise regarding interpretation of the Agreement.[361] The Secretariat shall be established to assist the Commission and any other committees the Commission establishes.[362] The Secretariat includes national sections that are established, staffed, and operated by the individual parties.[363]

NAFTA creates a three-step process for dispute resolution arising under the Agreement.[364] One party requests consultations from another in order to attempt to arrive at a mutually beneficial settlement to the dispute.[365] If the consulting parties fail to arrive at a resolution within thirty to forty days,[366] either of the parties may request a meeting of the Commission.[367] The Commission convenes within ten days[368] of the request and may utilize technical advisors, expert groups, and dispute resolution mechanisms such as mediation to reach a prompt resolution.[369] If the Commission does not resolve the matter within thirty days, either party may request the establishment of an arbitral

356. *Id.* art. 314(a),(b), 32 I.L.M. at 303.
357. *Id.* annex 314, 32 I.L.M. at 319.
358. NAFTA SUMMARY, *supra* note 344, at 100.
359. *Id.*
360. *Id.*
361. NAFTA, *supra* note 28, art. 2001(2), 32 I.L.M. at 693.
362. *Id.* art. 2001(3)(a), (b), 32 I.L.M. at 693.
363. NAFTA SUMMARY, *supra* note 344, at 100.
364. *Id.* at 101.
365. NAFTA, *supra* note 28, art. 2006(1),(5), 32 I.L.M. at 694.
366. *Id.* art. 2007(1), 32 I.L.M. at 695. For perishable agricultural goods, the time frame is reduced to fifteen days. *Id.* art. 2007(1)(c), 32 I.L.M. at 695.
367. *Id.* art. 2007(1), 32 I.L.M. at 695.
368. *Id.* art. 2007(4), 32 I.L.M. at 695.
369. *Id.* art. 2007(5), 32 I.L.M. at 695.

panel.[370] Five members, chosen by the disputing parties, constitute the arbital panel who evaluate the issue and provide an initial report within ninety days and a final report thirty days later.[371]

The parties will agree to accept and be bound to the determinations of the Commission or panel.[372] The resolution usually will involve an order to remove or not to execute the offending trade measure but may require compensation for damages.[373] If a party does not comply with or accept this determination, the opposing party may suspend the benefits given to the other party under the Agreement and execute retaliatory trade measures of its own.[374]

D. *Harbor Maintenance Tax and Trust Fund*

In 1986, Congress passed the Water Resources Development Act[375] to improve and repair the United States' navigable water system.[376] As part of this Act, Congress established the HMT.[377] Congress enacted the HMT to compel commercial shippers, the major beneficiaries of U.S. port and harbor repair and maintenance, to pay for such repair and maintenance.[378]

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370. *Id.* art. 2008(1), 32 I.L.M. at 695.

371. McKim, *supra* note 243, at 516.

372. *Id.*

373. NAFTA SUMMARY, *supra* note 344, at 102.

374. McKim, *supra* note 243, at 516

375. Water Resources Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082 (1986).

376. *Id.* The Act provided for the conservation and development of water and related resources and the improvement and rehabilitation of the nation's water resources infrastructure. *Id.* This infrastructure is made up of the nation's inland waterway system in connection with coastal harbors and ports. S. REP. No. 126, 99th Cong., 1st Sess. 7 (1985) (discussing effect of tax on commercial inland waterways along with coastal harbors and ports). The inland waterway system of the United States includes 25,000 miles of waterways, connected by 160 dams and 240 locks. *Id.* at 7. Additionally, there are approximately 300 ports, including harbors, in the United States that are subject to Harbor Maintenance fees. 19 C.F.R. § 24.24 (b)(1).

377. Harbor Maintenance Revenue Act of 1986, 26 U.S.C. §§ 4461-62 (1994).

378. *See* H.R. REP. No. 228, 99th Cong., 2d Sess. 5 (1985). Historically, general government revenues were used to finance the full costs of developing, operating, and maintaining U.S. harbors and ports. S. REP. No. 126, 99th Cong., 1st Sess. 6 (1985); H.R. REP. No. 228, 99th Cong., 2d Sess. 5 (1985). The Senate and the House both believed that this change in funding was needed in order to successfully meet the growing needs of the U.S. water transportation system and allow the United States to grow and develop economically. S. REP. No 126, 99th Cong., 1st Sess. 6 (1985); H.R. REP. No. 228, 99th Cong., 2d Sess. 5 (1985).

1. Operation of the HMT

Congress structured the HMT as an *ad valorem* tax[379] imposed upon any port use,[380] defined as the loading and unloading of commercial cargo[381] from a commercial vessel[382] at a port.[383] As originally enacted, the tax was assessed at 0.04% of the value of the cargo involved.[384] In 1990, Congress increased the HMT[385] to 0.125% of the value of the commercial cargo being exported.[386] This *ad valorem* amount does not account for the size of the vessel, the manner and extent of its port use, or the conditions of the port itself.[387] Parties responsible for the tax include the importer of commercial cargo into the United States, the exporter of cargo out of the United States, or the shipper in any other case.[388]

Exporters are liable for the HMT at the time they load their cargo for exportation out of the United States[389] and they pay the tax on a quarterly basis.[390] The statute imposes the tax upon the value of commercial cargo and not the amount of port use.[391] Bunker fuel and other items of equipment necessary for

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379. RUTH F. STURM, A MANUAL OF CUSTOMS LAW 39 (1974). *Ad valorem* is a method of taxing in which the amount of the tax is determined by a percentage of the value of the taxed cargo. *Id.*

380. 26 U.S.C. § 4461(a) (1994). The term "any port use" does not include every port within the United States and the statute designates those ports which are not subject to this tax. 26 U.S.C. § 4462(2)(B) (1994). This category of excluded ports includes those that have not utilized federal funds since 1977 and those that, prior to 1985, have been deauthorized to receive federal funds. 26 U.S.C § 4462(2)(B) (1994).

381. 26 U.S.C. § 4462(a)(3) (1994). Commercial cargo is defined for use in this statute as any cargo transported on a commercial vessel, including passengers transported for compensation or hire. 26 U.S.C. § 4462(a)(3)(A) (1994).

382. 26 U.S.C. § 4462(a)(4) (1994). Commercial vessel is defined for the purposes of this statute as any vessel used in transporting cargo by water for compensation or hire or in the business of the owner, lessee, or operator of the vessel. 26 U.S.C. § 4462(a)(4)(A)(i), (ii) (1994).

383. 26 U.S.C. § 4462(a)(1)(A), (B) (1994).

384. Water Resources Act of 1986, Pub. L. No. 99-662, 100 Stat. at 4266 (1986).

385. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11214, 104 Stat. 1388, 1436 (Nov. 5 1990) (codified at 26 U.S.C. § 4461 (1994)).

386. 26 U.S.C. § 4461(b) (1994).

387. *U.S. Shoe*, 907 F. Supp. at 411.

388. 26 U.S.C. § 4461(c)(1)(A)-(C) (1994).

389. 26 U.S.C. § 4461(2)(A) (1994). For cases involving importers or other shippers, the tax is imposed at the time of unloading. 26 U.S.C. § 4461(2)(B) (1994).

390. 19 C.F.R. § 24.24(e)(2)(ii) (1995).

391. 26 U.S.C. § 4461(b) (1994); Brief of Amici Curiae Aris-Isotoner et al. at 24-5, *U.S. Shoe*, 907 F. Supp. 408 (No. 94-11-00668) [hereinafter Aris-Isotoner Brief].

the operation of the vessel are excluded.[392] The statute also exempts many other items of cargo from tax liability, such as fish or other aquatic animal life caught during the voyage of a fishing vessel,[393] passengers on ferry boats,[394] and bonded commercial cargo[395] entering the United States for transportation and direct exportation to a non-U.S. port.[396] The tax also exempts shipments of cargo between the continental United States and Alaska, Hawaii, or any other non-continental territory of the United States, such as Puerto Rico.[397]

In conjunction with the HMT, Congress established the Trust Fund[398] to implement the purposes of the tax.[399] The U.S. Customs Service collects the money from the tax and transfers[400] it to the Trust Fund to be allocated according to the terms of the statute.[401] Congress authorizes the Trust Fund to cover up to

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392. 26 U.S.C. § 4462(a)(3)(B)(i) (1994); Aris-Isotoner Brief, at 24-5, *U.S. Shoe*, 907 F. Supp. 408 (No. 94-11-00668).

393. 26 U.S.C. § 4462(a)(3)(B)(ii) (1994). Senator Mitchell first suggested the exemption to protect the small fisherman of Maine. ADDITIONAL COMMENTS BY SENATOR MITCHELL, S. REP. NO. 126, 99th Cong., 1st Sess. 133 (1985). The exemption further protected the emerging national fishing industry. ADDITIONAL COMMENTS BY SENATOR LAUTENBERG, S. REP. NO. 126, 99th Cong., 1st Sess. 135 (1985). Lautenberg realized that "[i]t would be unwise to burden an emerging industry with additional costs in contravention of efforts to make that industry competitive with foreign fishing fleets." S. REP. NO. 126, 99th Cong., 1st Sess. 135 (1985).

394. 26 U.S.C. § 4462(a)(4)(B) (1994). The statute does not consider passengers on ferry boats engaged in transportation within the United States to be commercial cargo. 26 U.S.C. § 4462(a)(4)(B)(1) (1994).

395. RUTH F. STURM, 2 CUSTOMS LAW AND ADMINISTRATION, § 3.3, at 51. (3d ed. 1994). Bonds to Customs are issued to persons, firms or corporations to ensure that they pay the necessary amounts due to the U.S. Government from their compliance with the Customs Laws. *Id.* The bond is filed with the Customs Service in order to guarantee that proper entry summaries are filed, tax and duty payments will be made, and merchandise will be redelivered if found not to comply with the applicable laws and regulations. *Id.* Bonded commercial cargo is cargo that has a properly filed bond attached to it. *Id.*

396. 26 U.S.C. § 4462(d)(1) (1994). In addition, the statute exempts the U.S. Government, nonprofit organizations and cooperatives and any intraport use from tax liability. 26 U.S.C. § 4462(e), (g)(2), (h) (1994). These exemptions fit within the plan of Congress to have commercial shippers pay for the benefit of using these harbors and ports. H.R. REP. 228, 99th Cong., 2d Sess. 5 (1985).

397. 26 U.S.C. § 4462(b)(1)(A) (1994).

398. Water Resources Act of 1986, Pub. L. No. 99-662, § 1403, 100 Stat. at 4269; *see supra* note 22 (describing Trust Fund and its basic functions).

399. 26 U.S.C. § 9505(a) (1994).

400. 26 U.S.C. § 9505(b) (1994).

401. 26 U.S.C. § 9505(c) (1994). U.S.C. § 9505 authorizes the allocation of money out of the Trust Fund to make expenditures to pay 100% of eligible operations and

one hundred percent of the funds needed for the operation and maintenance of U.S. harbors and ports.[402] The U.S. Army Corps of Engineers,[403] responsible for the maintenance duties relating to the water infrastructure of the United States,[404] receives the largest proportion of Trust Fund monies.[405]

2. The Impact of the HMT

U.S. exporters and port management[406] criticize the HMT

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maintenance of the St. Lawrence Seaway handled by the St. Lawrence Seaway Development Corporation ("SLSDC"). 26 U.S.C. § 9505(c)(1) (1994); 33 U.S.C. § 2238(a)(1) (1994). U.S.C. § 9505 also authorizes payment of sums necessary to cover cost of operations and maintenance provided to commercial navigation of all harbors and inland harbors within the United States. 26 U.S.C. § 9505(c)(1) (1994). In addition, the Trust Fund is authorized to pay for all expenses, up to US$5,000,000 within one fiscal year, incurred by the Treasury Department, Army Corps of Engineers, and Department of Commerce while administrating the HMT. 26 U.S.C. § 9505(c)(3) (1994).

402. Water Resources Development Act of 1990, Pub. L. No. 101-640, § 316, 104 Stat. 4604, 4641 (Nov. 28, 1990) (codified as amended at 33 U.S.C. § 2322). Prior to the 1990 amendment, the Harbor Maintenance Trust Fund was responsible for up to 40% of these repair and maintenance costs. Water Resources Development Act of 1986, Pub. L. No. 99-662, § 210, 100 Stat. at 4106.

403. OFFICE OF THE FEDERAL REGISTER, UNITED STATES GOVERNMENT MANUAL 209 (1995/96) [hereinafter GOVERNMENT MANUAL]. The U.S. Army Corps of Engineers manages and executes the Civil Works programs of the Department of the Army, including research and development, and operation and maintenance related to rivers, harbors, and waterways in the United States. *Id.*

404. S. REP. No. 126, 99th Cong., 1st Sess. 7-8 (1985). The Army Corps of Engineers is responsible for harbor improvement and development because of the high costs and the engineering expertise that harbor maintenance entails. *Id.*

405. OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1996-APPENDIX, at 376 (1996) [hereinafter BUDGET APPENDIX]. According to the Army Civil Works Division, in 1996, appropriations from the Trust Fund were given out as follows:

SLSDC	1995, US$10,410,000 1996, US$10,412,000
Army Corps of Engineers	1995, US$462,000,000 1996, US$500,000,000
Department of the Treasury	1996, US$3,000,000
Nat. Oceanic & Atmospheric Assoc. (proposed)	1996, US$45,000,000

Id.

406. Anne Thompson, *Firms Sue To Sink Harbor-Upkeep Tax*, SEATTLE TIMES, May 4, 1995, at D3. Port Management is represented by the American Association of Port Authorities ("AAPA") who lobby on their behalf before Congress. *Id.* The AAPA represents U.S. public port agencies who by mandate of law facilitate waterborne commerce and generate local and regional economic growth. *Stromberg Statement*, *supra* note 16, at 143. These port agencies are private port management firms with an interest in port development, water transportation, and accessorial services. 1 ENCYCLOPEDIA OF ASSOCIATIONS 613 (Carolyn A. Fisher & Carol A. Schwartz eds., 30th ed. 1996).

for placing U.S. ports at a competitive disadvantage with respect to Canadian ports for U.S. export business.[407] Furthermore, they claim that many Canadian ports encourage U.S. exporters to take advantage of tax free Canadian ports and avoid the tax liabilities imposed by the HMT.[408] Exporters who ship through U.S. ports face high tax liabilities[409] on their cargo that they would not incur at Canadian ports.[410] A ship coming to a U.S. port faces HMT charges of approximately US$75,000 while the same ship in Canada would only face charges between US$432 and US$8640.[411] This has led to considerable diversion[412] of cargo to Canada and away from U.S. ports.[413] In 1988, the Department of Transportation's Maritime Administration reported

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407. *The Water Resources Development Act of 1994 and Issues Related to the Reauthorization of the Civil Works Program of the U.S. Army Corps of Engineers: Hearings Before the Subcommittee on Water Resources and Environment of the House Committee on Public Works and Transportation*, 103rd Cong., 2d Sess., 478 (July 26, 1994) [hereinafter *Stromberg Statement*] (prepared statement of Erik Stromberg, President, American Association of Port Authorities). *See* Anne D. Aylward, *Harbor Tax Costly to U.S. Ports*, CONTAINER NEWS, Apr. 1992, at 86 ("Many companies are experienceing moderate to sharp increases in their per-container box cost, leading some of them to route their cargo through Canadian ports rather than U.S. container ports."); Robertshaw, *supra* note 16, at 1 (discussing U.S. diversion of cargo to Montreal, Canada to avoid the added costs created by HMT). Stromberg, in his testimony before Congress, warned that:

> [U.S.] ports, particularly on the northern tier, are at a significant competitive disadvantage in attracting cargo because shippers can avoid the [Harbor Maintenance] [T]ax by sending cargo through non-U.S. ports . . . . We must find a way to protect U.S. ports against diversion of cargo as the result of the Harbor Maintenance Tax . . . .

Stromberg Statement 94, *supra*, at 485.

408. Aylward, *supra* note 407, at 86. According to the author, "[w]e have seen examples of direct marketing by Canadian carriers to take advantage of the tax." *Id.* Robertshaw adds that "[s]hipping experts say Montreal has been especially aggressive in touting how companies can avoid U.S. taxes and fees." Robertshaw, *supra* note 16, at 1.

409. *Aylward Statement*, *supra* note 16, at 73. The HMT levy on an average cargo container ship loading or unloading at a U.S. port is approximately US$75,000. *Id.* at 75. Currently, Canada has no national harbor charge except that some local ports do impose a charge on an individual basis. *Valenti Statement*, *supra* note 16, at 157.

410. *Valenti Statement*, *supra* note 16, at 158.

411. *Id.*

412. *Id.*; *see supra* note 16 (illustrating problem of cargo diversion to Canada).

413. Aylward, *supra* note 407, at 86. The story of one shipper exemplifies the dilemma faced by the shippers and the ports. Thompson, *supra* note 406. Steve Farris, traffic manager for Ionics, a manufacturer of water-purification systems, ships his equipment 309 miles to Montreal, even though Boston Harbor is just six miles away, in order to save US$160,000 in potential taxes to his company. *Id.* Diversion of cargo to Canada has historically been a problem facing the U.S. trade business. Bruce Vail, *Canada Cargo Diversion Cuts Both Ways*, AM. SHIPPER, Oct. 1994, at 78. In the 1970's and early 1980's, there was a lot of diversion to Canada as a result of labor unrest in U.S. East Coast ports.

that approximately 4.8 million tons of cargo moved through Canadian ports at the expense of the United States.[414] The ports of Seattle, Tacoma, and Boston[415] have lost the most export volume, while the Canadian ports of Vancouver and Montreal have received the greatest increase in business.[416]

The HMT places the United States at a competitive disadvantage with respect to U.S. exports in the world market.[417] The decline in U.S. competitiveness results from increased U.S. export prices, reduced prices paid to U.S. producers, and increased costs of using U.S. ports caused by the HMT.[418] Freight cost is an integral part of a U.S. product's price, and this increased cost adversely affects closely competitive goods such as grain and coal, in which tiny differences in cost can mean lost business.[419] In the precious metal industry, increased cost due to the HMT and intense price competition have lead to lost business for many companies who cannot get companies to purchase at the increased price.[420] The HMT also affects U.S. agricultural exports, for which a small difference in price can cause a U.S. exporter to lose business to a competitor nation.[421] In addition,

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Id. The diversion has not declined with the passing of these labor troubles and has, in fact, risen, which can be directly attributed to the HMT. *Id.*

414. *Aylward Statement, supra* note 16, at 75.

415. *Introduction of a Bill to Roll Back the Harbor Maintenance Tax*, 141 Cong. Rec. E519 (Mar. 6, 1995) [hereinafter *McDermott Bill*] (statement by Rep. Jim McDermott); *see supra* note 16 (discussing affects of HMT on Seattle, Tacoma, and Boston harbors).

416. Leigh Stoner, *Harbor Tax Rollback Proposed in Bill Introduced in House*, INSIDE DOT & TRANSP. WEEK, Mar. 24, 1995, *available in* LEXIS, Nexis Library, CURNWS File. As stated by Stoner, more than 50% of the trans-Atlantic traffic passing through Montreal is either coming from or bound to the United States. *Id.* Montreal is also at an advantage because of good railroad connections into and out of the United States. Robertshaw, *supra* note 16, at 1.

417. *Aylward Statement, supra* note 16, at 77; *see* Daniel B. Moskowitz, *Trade Burdens*, INT'L BUS., May 1993, at 72 (noting that this trend is especially troublesome because it comes at time when exports are beginning to play more important role in U.S. commerce).

418. *Aylward Statement, supra* note 16, at 77.

419. *Id.* Trade taxes have resulted in cost increases amounting to 30 cents for a ton of wheat and 47 cents for a ton of coal. *Id.*

420. *Cumulative Impact of Taxes and Various Fees Levied on the Maritime Industry: Hearings Before the Subcommittee on Oversights and Investigations, House Merchant Marine and Fisheries Committee*, 102d Cong., 1st Sess. 142 (May 23, 1991) [hereinafter *Christiano Statement*) (prepared statement of John J. Christiano, Degussa Corporation).

421. *McCoy Statement, supra* note 16, at 153-55; Paul Cohan, *Maritime Taxes Face Opposition*, CONTAINER NEWS, July 1991, at 6. Steven McCoy, President of the North American Export Grain Association, estimates that taxes cost U.S. agricultural exporters an additional US$45 million a year; in one year, the tax on a US$5 million corn ship-

the economies of export-dependent states such as Washington particularly suffer as a result of the competitive handicap the HMT creates.[422] Washington State, for example, could lose export sales and export-related jobs as increased costs give Canadian and Australian timber and agriculture companies a competitive advantage over Washington for overseas sales.[423]

The Trust Fund is also encountering problems.[424] Presently there exists a surplus of approximately US$650 million in the fund.[425] The Government placed the surplus "on budget,"[426] helping to foster the belief held by U.S. exporters that the HMT

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ment increased from US$2000 to US$6500. *McCoy Statement*, *supra* note 16, at 153. Sharon Mock, Grain Transportation Coordinator for The Andersons Management Corp., explains that "[t]he grain industry is extremely price sensitive. A price differential as slight as one cent a bushel can swing business away from Great Lakes ports to other shipping points. User fees add one more cost to Great Lakes shipping — threatening our price competitiveness in world markets." *Mock Letter*, *supra* note 16, at 132.

422. David Schaeffer, *Port Officials Fighting Harbor-Tax Increase*, SEATTLE TIMES, Sept. 15, 1990, at A12. In a letter to the Congress budget negotiators, Washington State delegates complained that "[a]s the most trade-dependent state in the United States, Washington would be hurt the most by depressed exports and lower overall trade volumes. Washington State exports of wheat, apples, aircraft and other goods would become less competitive in the international marketplace." *Id.*

423. *Cumulative Impact of Taxes and Various Fees Levied on the Maritime Industry: Hearings Before the Subcommittee on Oversights and Investigations, House Merchant Marine and Fisheries Committee*, 102d Cong., 1st Sess. 166-67 (May 23, 1991) [hereinafter *Ports Statement*] (Statement by Port of Seattle and Port of Tacoma).

424. *McDermott Bill*, *supra* note 415, at E519.

425. *Id.* The surplus in the trust fund has continued to grow from US$120.6 million for the fiscal year ("FY") 1992 to US$302.3 million for FY 1993 and up to US$451.4 million at the end of FY 1994. *Id.* In FY 1994, the Trust Fund collected US$646.2 million or 130% of the US$497.1 million distributed for harbor maintenance costs. *Id.* The surplus is expected to grow to US$644.3 million by the end of FY 1995 and reach US$802.9 million by the end of FY 1996. *Id.* This surplus is also in danger of violating Articles II and VIII of The General Agreement on Tariffs and Trade. *General Agreement on Tariffs and Trade*, opened for signature Oct. 30, 1947, 61 Stat. A3, 55 U.N.T.S. 187 (1950) [hereinafter *GATT*]; *McDermott Bill*, *supra* note 415. A surplus in the Trust Fund would violate Article II of GATT because it is evidence that the HMT is a fee beyond compensation for services rendered. *GATT*, art. II 2(c), 55 U.N.T.S. at 202. Article II 2(c) provides, in pertinent part, that "nothing shall prevent any contracting party from imposing at any time on the importation of any product: fees or other charges commensurate with the cost of services rendered." *Id.* Accordingly, if the Trust Fund runs at a surplus, it is raising more money than is needed for its intended purpose and the HMT is, therefore, not "commensurate with the cost of the services rendered." *McDermott Bill*, *supra* note 415, at E519. Additionally, the surplus could violate Article VIII if Congress took funds out of the surplus in order to offset the budget deficit. *GATT*, art. VIII, 55 U.N.T.S. at 218-19. Article VIII provides, in pertinent part, that:

> All fees and charges of whatever character imposed by contracting parties on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indi-

does not represent a user fee but rather a revenue raising tax.[427]

II. U.S. SHOE V. UNITED STATES

Because the HMT unfairly burdens U.S. exporters, the American Association of Exporters & Importers[428] filed suit in federal district court, claiming the HMT violated the Export Clause of the U.S. Constitution.[429] Believing that the CIT and not the district court had proper jurisdiction, approximately one hundred[430] U.S. exporters filed similar actions in the CIT challenging the constitutionality of the HMT.[431] The CIT stayed all

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rect protection of domestic products or a taxation of imports or exports for fiscal purpose.

Id. The HMT would, therefore, violate GATT if Congress chose to take money from the Trust Fund in order to help pay for other domestic programs such as reducing the federal budget deficit. *Id.*

426. OFFICE OF MANAGEMENT AND BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, BUDGET OF THE UNITED STATES GOVERNMENT, FISCAL YEAR 1996-ANALYTICAL PERSPECTIVES 325 (1996) [hereinafter BUDGET PERSPECTIVES]. "On budget" reflects the transactions of all government entities that are included in budget calculations except those that are excluded by law such as Social Security Trust Funds and the Postal Service Fund. *Id.* The budget specifically notes that "[a]ny net cash inflow from the public to the trust funds decreases the Treasury's need to borrow from the public in order to finance the Federal funds deficit." *Id.* at 251. In 1994, income from trust funds, the Trust Fund included, exceeded expenditures by nearly US$95 billion. *Id.* at 252. This surplus helps to offset the Government's need to borrow from the public to fully finance the US$298 billion federal debt. *Id.*

427. Aris-Isotoner Brief, at 33-34, *U.S. Shoe*, 408 F. Supp. 408 (No. 94-11-00668) (arguing that excess of funds demonstrates revenue raising purpose rather than regulatory purpose). According to the General Accounting Office, "as the unified budget is presently structured, the surpluses in the trust funds are merged with the rest of the budget, effectively masking the magnitude of those surpluses and the size of the deficit in the rest of the government." GENERAL ACCOUNTING OFFICE, MANAGING THE COST OF THE GOVERNMENT 9 (Oct. 1989).

428. ENCYCLOPEDIA OF ASSOCIATIONS, *supra* note 406, at 262. Founded in 1921, the American Association of Exporters and Importers ("AAEI") seeks to maintain fair world trade, provides legal advice to its members regarding laws and regulations, and testifies for exporters and importers before government and other official bodies. *Id.* The AAEI consists of those engaged directly or indirectly with export and import trade. *Id.*

429. American Ass'n of Exporters & Importers v. Bentsen, No. L94-1839 (D. Md. filed July 1, 1994). The Government moved to dismiss this case arguing that the CIT, not the district court, had proper jurisdiction. Government's Motion to Dismiss, filed Sept. 20, 1994, American Ass'n of Exporters & Importers v. Bentson, No. L94-1839, (D. Md. July 1, 1994).

430. Telephone Interview with Michael E. Roll, Attorney at Law, Katten Muchin & Zavis, Chicago, Ill. (Feb. 5, 1996). The number of lawsuits pending is currently approximately 1000. *Id.*

431. Baker & Roll, *supra* note 269, at 749-50 n.145.

these proceedings[432] and designated *U.S. Shoe* as the lead case to determine the constitutional and jurisdictional issues involving the HMT.[433]

A. *Jurisdictional Analysis*

U.S. Shoe Corp., the plaintiff, amici curiae, and the U.S. Government agreed that the CIT had subject matter jurisdiction over this dispute.[434] Title 28, Section 1581 of United States Code[435] grants the CIT exclusive jurisdiction over any civil action involving federal regulation of import transactions brought against the United States.[436] The authority of the CIT over import transactions and international trade also includes the duty to review challenges to the constitutionality of a law within these areas of expertise.[437]

1. CIT Had Proper Jurisdiction Over HMT Dispute Under Section 1581

Section 4462(f)(2) of the HMT statute directs courts of the United States to treat the HMT as a customs duty for determining jurisdiction.[438] Customs duties,[439] generally referred to as import transactions,[440] are imposed by the U.S. Government in the form of taxes upon the importation or exportation of commodities, merchandise, or other goods.[441] Accordingly, the HMT is an import transaction and the CIT had jurisdiction under Section 1581 to rule on its constitutionality.[442] The ques-

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432. *U.S. Shoe*, 17 I.T.R.D.(BNA) at 1281.

433. *Id.*

434. *U.S. Shoe*, 907 F. Supp. at 410.

435. 28 U.S.C. § 1581 (1994).

436. Conoco, Inc. v. United States Foreign-Trade Zones Board, 18 F.3d 1581, 1586 (Fed. Cir. 1994).

437. *U.S. Shoe*, 907 F. Supp. at 410-11; 28 U.S.C. §§ 251, 1331, 1581 (1994).

438. 26 U.S.C. § 4462(f)(2) (1994). U.S.C. § 4462(f)(2) provides that "[f]or purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty." *Id.*

439. Faber, Coe & Gregg (Inc.) v. United States, 19 C.C.P.A. 8, 12-13 (1931), *cert. denied*, 284 U.S. 634 (1931).

440. *U.S. Shoe*, 907 F. Supp. at 410.

441. *Faber*, 19 C.C.P.A. at 12-13. Customs duties embody all taxes imposed upon imports while in the custody of the customs service. *Id.*

442. *U.S. Shoe*, 907 F. Supp. at 410-11. Previously, in *Carnival Cruise Lines*, the CIT assumed jurisdiction over a matter dealing with the HMT. Carnival Cruise Lines v. United States, 866 F. Supp. 1437 (Ct. Int'l Trade 1994).

tion still remains as to which subsection controls in this case, Section 1581(a) or 1581(i).[443]

2. Jurisdiction Under Section 1581(a)?

The Government contended that jurisdiction was only proper under 1581(a).[444] Section 1581(a) grants the CIT exclusive jurisdiction over actions challenging the denial of a protest[445] filed with the Customs under Title 19, Section 1515 of the United States Code.[446] Under section 1515, a party must file a protest regarding certain issues enumerated in 19 U.S.C. § 1514.[447] Customs may grant or deny this protest in whole or in

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443. *U.S. Shoe*, 907 F. Supp. at 418. The jurisdiction of the CIT under U.S.C. § 1581 has been the subject of much discussion. *See* Carman, *supra* note 264, at 123 (discussing the confusion and difficulties of obtaining jurisdiction under U.S.C. § 1581); Baker & Roll, *supra* note 269, at 726 (examining the scope of residual jurisdiction under U.S.C. § 1581(i)). As CIT Judge Carman noted, "[t]he primary jurisdictional statute of the court, 28 U.S.C. § 1581, as it has been interpreted by the courts, presents a confusing and costly juridictional maze which is seemingly designed to deny litigants easy access to the CIT." Carman, *supra* note 264, at 128.

444. Memorandum of the United States in Opposition to Briefs of Amici Curiae at 25, *U.S. Shoe*, 907 F. Supp. 408 (No. 94-11-00668) [hereinafter Government Brief].

445. Daniel Waltz, *The Harbor Maintenance Fee: A Straightforward Constitutional Question Buried in A Jurisdictional Quagmire*, 5 FED. CIR. B.J. 181, 186 (1995). A protest is an administrative tool in which an exporter seeks review of a Customs decision. *Id.*

446. 28 U.S.C. § 1581(a) (1994); 19 U.S.C. § 1515 (1994). U.S.C. § 1581(a) provides that "[t]he Court of International Trade shall exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." 28 U.S.C. § 1581(a) (1994).

447. 19 U.S.C § 1515 (1994); Mitsubishi Elecs. Am., Inc. v. United States, 44 F.3d 973, 976 (Fed. Cir. 1994). U.S.C. § 1514(a) establishes that:

> [D]ecisions of the Customs Service, including the legality of all orders and findings entered into by the same, as to -
> (1) the appraised value of merchandise;
> (2) the classification and rate and amount of duties chargeable;
> (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury;
> (4) the exclusion of merchandise from entry or delivery or a demand for redelivery to customs custody under any provision of the customs laws, except a determination under section 1337 of this title;
> (5) the liquidation or reliquidation of an entry, or reconciliation as to the issues contained therein, or any modification thereof;
> (6) the refusal to pay a claim for drawback; or
> (7) the refusal to reliquidate an entry under section 1520(c) of this title;
> shall be final and conclusive upon all persons . . .unless a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Court of International Trade . . . .

19 U.S.C. § 1514(a) (1994).

part.[448] Before a protest can be filed, Customs first must make a decision under section 1514.[449] Absent a decision, a party cannot initiate a protest and, therefore, the CIT lacks jurisdiction under section 1581(a).[450] Section 1581(a) provides for jurisdiction solely over denials of protests based upon a Customs decision involving the exclusive issues designated in section 1514 .[451] The government argued that the CIT could review the plaintiff's complaints only after: (1) the plaintiff has protested the tax payments to Customs; (2) Customs denied this protest; and (3) the plaintiff sought review of that denial.[452]

The CIT in *U.S. Shoe* ruled that it did not exercise jurisdiction pursuant to 1581(a) because Customs did not make a protestable decision regarding the constitutionality of the tax.[453] As noted, a prerequisite for filing a protest and subsequent jurisdiction under Section 1581(a) is a decision by Customs.[454] The procedures undertaken by Customs in accordance with the HMT are ministerial in nature and do not require any decision on their part.[455] Customs merely administers and executes the provisions of the HMT as adopted by the U.S. Congress.[456] U.S. Shoe Corp. was not protesting payment of the tax, but rather the constitutionality of the tax.[457] Because Customs only performs administrative duties relating to the HMT and Customs made no

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448. *Id.*

449. *U.S. Shoe*, 907 F. Supp. at 419; 19 U.S.C. § 1514(c)(1) (1994). U.S.C. § 1514(c) requires that "[a] protest of a decision under [section 1514(a)] shall be filed in writing . . . set[ting] forth distinctly and specifically - (A) each decision described in subsection (a) of this section as to which protest is made . . . ." 19 U.S.C. § 1514(c)(1)(A) (1994).

450. *Mitsubishi*, 44 F.3d at 977.

451. *Id.* at 976.

452. Government Brief at 25, *U.S. Shoe*, 907 F. Supp. 408 (No. 94-11-00668); *U.S. Shoe*, 907 F. Supp. at 418.

453. *U.S. Shoe*, 907 F. Supp. at 420-21. The CIT notes that the plaintiffs are not protesting the payment of the tax, but rather the constitutionality of the tax. *Id.* at 420. Given that "there was no decision of Customs which the companies could protest," the CIT concluded that jurisdiction under U.S.C. § 1581(a) was improper. *Id.*; *Carnival Cruise Lines*, 866 F. Supp. at 1441 . Similarly, in *Carnival Cruise Lines*, the CIT found jurisdiction improper under U.S.C. § 1581(a) because all Customs did was collect payments filed with quarterly summary reports as required by regulation. *Carnival Cruise Lines*, 866 F. Supp. at 1441.

454. *Mitsubishi*, 44 F.3d at 977.

455. *U.S. Shoe*, 907 F. Supp. at 420.

456. *Id.*

457. *Id.*

constitutional evaluations,[458] jurisdiction was not proper under Section 1581(a).[459]

3. Jurisdiction Under Section 1581(i)?

The CIT held that subsection 1581(i) would provide jurisdiction over the HMT dispute.[460] Section 1581(i) confers exclusive jurisdiction to the CIT over matters dealing with any law of the United States providing for revenue from imports and the administration and enforcement of that law.[461] The HMT is classified as a customs duty for jurisdictional purposes and such duties by their nature raise revenue,[462] therefore situating the HMT within Section 1581(i)(1) jurisdiction.[463] Furthermore, Section 4462(f)(1) of the HMT Act[464] indicates that all administrative and enforcement provisions shall apply to the tax as if it were a customs duty.[465] This places the HMT within the jurisdiction of the CIT, as conferred by Section 1581(i)(4).[466] Because the HMT statute provides for revenue from imports and for the administration and enforcement of the tax, the CIT concluded that proper jurisdiction over this issue fell under subsection 1581(i).[467]

B. *Application of the Commerce Clause*

The Government initially argued that Congress legitimately

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458. *Id.*

459. *U.S. Shoe*, 907 F. Supp. at 419-21.

460. *Id.* at 420-21.

461. 28 U.S.C. § 1581(i) (1994). U.S.C. § 1581(i) provides, in pertinent part, that:

> In addition to the jurisdiction conferred upon the Court of International Trade in subsections (a)-(h) 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 -
>
> (1) revenue from imports or tonnage;
>
> (2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue; . . .
>
> (4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

28 U.S.C. § 1581(i) (1994).

462. *U.S. Shoe*, 907 F. Supp. at 421.

463. 28 U.S.C. § 1581(i)(1) (1994); *U.S. Shoe*, 907 F. Supp. at 421.

464. 26 U.S.C. § 4462(f)(1) (1994).

465. *Id.*

466. 28 U.S.C. § 1581(i)(4) (1994); *U.S. Shoe*, 907 F. Supp. at 421.

467. *U.S. Shoe*, 907 F. Supp. at 421.

applied its commerce power in levying the HMT and that the HMT did not implicate its taxation powers.[468] The Government claimed the export clause applies only to taxation and not to regulation of commerce.[469] Because the HMT was enacted pursuant to Congress' commercial power and because the HMT was a valid user fee meant to recover the costs of maintenance, the Government concluded that the export clause was inapplicable to this case.[470]

The CIT concluded that the commerce power of Congress cannot eclipse the prohibition set forth in the Export Clause.[471] Congress holds a broad authority to regulate commerce without any restrictions not otherwise delineated by the Constitution.[472] When Congress imposes a revenue raising tax upon exports, however, the Export Clause restricts the Commerce Power.[473] Accordingly, the CIT held that even if the HMT was a proper exercise of Congress' commerce power, the Export Clause restrictions still would apply if the HMT was found to serve as a revenue raising tax or duty.[474] If Congress levies a charge under its commerce power and it taxes exported goods in order to raise revenue, the charge violates the Export Clause.[475]

C. *HMT: Tax or User Fee?*

U.S. Shoe Corp. argued that the HMT was a tax.[476] U.S. Shoe asserted that the language of the statute as well as the legislative history made it apparent that the HMT represented a tax.[477] According to U.S. Shoe Corp., continual references to the imposition of a tax throughout the HMT statute and Water Resources Development Act of 1986 supported its position.[478]

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468. Government Brief at 51-52, *U.S. Shoe*, 907 F. Supp. 408 (No. 94-11-00668).

469. *Id.* at 52.

470. *Id.*

471. *Id.*

472. *Gibbons*, 22 U.S. at 196.

473. *U.S. Shoe*, 907 F. Supp. at 413.

474. *Id.*

475. *Id.*

476. Plaintiff's Brief in Support of Its Motion For Summary Judgement at 22, *U.S. Shoe*, 907 F. Supp. 408 (No. 94-11-00668) [hereinafter U.S. Shoe Brief].

477. *Id.* at 22.

478. *Id.* For example, 26 U.S.C. § 4461 is labeled "Imposition of Tax." 26 U.S.C. § 4461 (1994). Additionally, subsection (a) of U.S.C. § 4461 states that "there is hereby imposed a tax." 26 U.S.C. § 4461(a) (1994). Furthermore, § 1402 of the Water Resources Development Act of 1986 is entitled, "Imposition of a Harbor Maintenance

Moreover, U.S. Shoe Corp. claimed that the HMT represents a tax upon exports and not a fee for port use.[479] Because Congress assessed the tax upon loading of certain cargo and not all port use, U.S. Shoe Corp. claimed it was not a fee, but rather an *ad valorem* tax imposed upon the exported goods themselves.[480] To further support its belief that the HMT taxed exports, U.S. Shoe Corp. noted that liability for the tax on exported goods lies solely on the exporter.[481]

In response, the Government asserted that Congress established the HMT as a valid user fee pursuant to its commerce power.[482] The Government averred that the HMT comprised only one component of a comprehensive legislative plan to provide for the conservation, development, maintenance, and improvement of the nation's water resources infrastructure.[483] According to the Government, the HMT primarily recovered costs of harbor maintenance from those who benefit from the use of the harbors[484] and did not raise revenue for general purposes.[485] The Government also noted that commercial shippers did benefit from services provided for by the HMT by receiving safe, navigable ports and harbors through which to export their merchandise.[486]

The CIT examined whether the HMT was a prohibited tax or a permitted user fee imposed by Congress pursuant to the regulation of commerce.[487] Under the Commerce Clause or the Export Clause, if the charge is not a tax, then it is not prohibited by the Constitution.[488] To determine this issue, the CIT applied

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Tax." Water Resources Act of 1986, § 1402, Pub. L. No. 99-662, 100 Stat. at 4266 (1986).

479. U.S. Shoe Brief at 23, *U.S. Shoe*, 907 F. Supp. 408 (No. 94-11-00668).

480. *Id.* at 23-26.

481. *Id.* at 24.

482. Government Brief at 51, *U.S. Shoe*, 907 F. Supp. 408 (No. 94-11-00668).

483. *Id.* at 54.

484. *Id.* at 52, 56.

485. *Id.* at 54.

486. Government Brief at 66, *U.S. Shoe*, 907 F. Supp. 408 (No. 94-11-00668).

487. *U.S. Shoe*, 907 F. Supp. at 413-15.

488. *Moon*, 379 F.2d at 390-92. The Court stated, "the test for determining when a monetary imposition nominally imposed under the commerce power should be considered an exercise of the power to raise revenue and therefore barred by the export clause, i.e., when is it a tax and not a regulation." *Id.* Previously, the Court, in *Armour Packing Co. v. United States*, held that "unless the alleged interference amounts to such taxation or duty, it does not come within the constitutional prohibition." 209 U.S. 56, 79 (1908).

the standard established by the Court of Appeals for the Sixth Circuit in *Rodgers v. United States*,[489] which held that courts should look to the statute as a whole and ascertain whether the primary purpose was revenue or regulation.[490] If Congress' primary purpose in adopting the statute in question is to raise revenue, and regulation incidentally results therefrom, the charge is a tax.[491] If Congress' primary purpose in enacting the statute in question is regulation, then the charge is a user fee imposed to facilitate the regulatory goals of the statute.[492]

1. Did the HMT Regulate Commerce?

The CIT first determined whether Congress imposed the HMT to regulate a valid commerce function.[493] In *South Carolina ex rel. Tindal v. Block*,[494] the Court of Appeals for the Fourth Circuit held that a 1982 amendment[495] to section 201 of the Agricultural Act of 1949[496] was a valid exercise of Congress' commerce function.[497] The amendment's primary purpose was to regulate overproduction of milk and offset a portion of the milk price support program.[498] Congress' exercised its commerce power to properly regulate the milk industry and did not implicate any constitutional restrictions on its taxation power.[499]

Similarly, in *Moon v. Freeman*,[500] the Ninth Circuit upheld a

489. *Rodgers*, 138 F.2d at 992 (holding that primary purpose of cotton marketing quota provisions established under Agricultural Adjustment Act of 1938 was regulation and incidental revenue gained therefrom did not result from taxation).

490. *Id.* at 994; *see supra* notes 70-77 and accompanying text (discussing distinction between programs that charge fee as part of regulation and those that charge fee to raise revenue).

491. *Id.*

492. *Id.*

493. *U.S. Shoe*, 907 F. Supp. at 413. The Federal Government's commerce power involves the establishment of rules to regulate commerce. *Rodgers*, 138 F.2d at 994. A charge imposed by the Federal Government for the purpose of regulation is a valid exercise of this power. *Moon*, 379 F.2d at 393.

494. 717 F.2d 874 (4th Cir. 1983).

495. Omnibus Budget Reconciliation Act of 1982, Pub. L. No. 97-253, § 101, 96 Stat. 763 (Sept. 8, 1982) (codified as amended at 7 U.S.C. § 1446 (1994)).

496. 7 U.S.C. § 1446 (1994).

497. *Block*, 717 F.2d at 887. The court stated that, "[t]he clear language and structure of the 1982 amendment indicates that its primary purpose is regulation . . . . Accordingly, the dairy amendment bears the indelible imprimatur of the commerce power and is not an unconstitutional exercise of the taxing power." *Id.*

498. *Id.*

499. *Id.*

500. *Moon*, 379 F.2d at 382.

wheat marketing allocation program under the Agricultural Act of 1964.[501] Congress' commerce power includes the right to regulate crop production and prices.[502] The Agricultural Act generally sought to regulate the price of domestic and foreign wheat, insure that farmers were complying with crop production controls, and raise the income of the wheat farmers.[503] Because the Act only intended to regulate crop production and prices and not to raise revenue,[504] the Act was not an unconstitutional exercise of Congress' taxing power.[505]

In light of such precedent, the CIT in *U.S. Shoe* determined that Congress did not intend to regulate commerce with the HMT.[506] The CIT concluded that the HMT did not seek to control the use of harbors or ports.[507] In addition, the HMT did not attempt to control commercial practices as did the programs upheld in *Block* and *Moon*.[508] Rather, the court determined that Congress imposed the HMT for the purpose of garnering funds for the maintenance costs of U.S. harbors and ports,[509] thereby raising revenue.[510] Contrary to the HMT, the programs in *Rodgers*, *Block*, and *Moon* all raised revenue as an incidental consequence of their execution.[511]

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501. Agricultural Act of 1964, Pub. L. No. 88-297, § 101, 78 Stat. 173, 178-79 (codified at 7 U.S.C. §§ 1348-49 (1994)).

502. Wickard v. Filburn, 317 U.S. 111, 127-28 (1942).

503. *Moon*, 379 F.2d at 391. The court noted:

> We have set out earlier the general announced purposes of the wheat marketing allocation program for the 1964-65 marketing year. These are consistent with the exercise of the commerce power. Nothing in the legislative history of the Act indicates that the purpose of the legislation was in any way related to the raising of revenue.

Id. at 391-92.

504. *Id.* The Court in *Moon* conceded that if the program had generated large amounts of revenue, they would not consider it an exercise of the commerce power. *Id.* at 392.

505. *Id.* at 391.

506. *U.S. Shoe*, 907 F. Supp. at 413-14.

507. *Id.*

508. *Id.*

509. S. REP. No. 126, 99th Cong., 1st Sess. 7 (1985). The HMT was characterized as a "new tax to cover a portion of Federal spending." *Id.* In fact, the court properly recognized that the tax was actually an alternative mode of fund-raising by the federal government to cover the costs of improvement and maintenance of the country's water systems. *U.S Shoe*, 907 F. Supp. at 414; H.R. REP. No. 228, 99th Cong., 2d Sess. 5 (1985).

510. *U.S. Shoe*, 907 F. Supp. at 414.

511. *Rodgers*, 138 F.2d at 995. The court acknowledged that revenue may be an incidental result of the charge levied against farmers for the right to produce cotton at an amount over their statutory allotment, but this fact does not strip the regulation of

2. Was the HMT a User Fee?

The CIT in *U.S. Shoe* also recognized that if Congress intended to establish a user fee and not a tax, then the HMT would be a valid exercise of its commerce power.[512] Congress establishes user fees in order to compensate the government for the cost of services rendered in furtherance of its regulatory goals.[513] In the *Head Money Cases*,[514] the Supreme Court found a head charge[515] upon incoming immigrants paid for by the owners of the shipping vessels to be a constitutionally proper exercise of Congress' commerce power.[516] The Supreme Court reasoned that Congress imposed the fee in order to raise money to pay for the temporary care of distressed passengers brought to the United States and not to support the Federal Government.[517] Likewise, in *Pace v. Burgess*,[518] the Supreme Court held that a tobacco export stamp, used to distinguish tobacco intended for

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its commercial character. *Id.* In *Block*, the court stated that, "the mere fact a statute raises revenue does not imprint upon it the characteristics of a law by which the taxing power is exercised." 717 F.2d at 887; *see Moon*, 379 F.2d at 392 (noting that funds raised by sale of export marketing certificates by Commodity Credit Corporation ("CCC") were used to defray costs of implementing this program and not to raise revenue). It appeared from an affadavit by John W. Vaughan, acting controller of the CCC, the issuer of the wheat exporting certificates, that the CCC received a US$30 million balance from the charge but that this was eventually used to cover costs assumed by the CCC. *Id.* at 392 n.30. The court, in *U.S. Shoe*, apparently took heed in the *Moon* Court's warning that "if the record in any way indicated that substantial amounts of revenue had been generated by the sale of export certificates, we would hesitate before deeming the program an exercise of the commerce power." *U.S. Shoe*, 907 F. Supp. at 414 (quoting *Moon*, 379 F.2d at 392). This fact is evidenced by the huge surplus that has accumulated in the Trust Fund to date and will continue to grow in the future. *See McDermott Bill*, *supra* note 415, at E519 (illustrating large surplus in Trust Fund). Further evidence of revenue generation exists because the HMT is on budget and is used to help offset the large federal budget deficit, thereby appearing to be a source of revenue. *See* BUDGET PERSPECTIVE, *supra* note 426, at 251, 325 and accompanying text (discussing how HMT is on budget and illustrating affects of this).

512. *U.S. Shoe*, 907 F. Supp. at 413-14; Pace v. Burgess, 92 U.S. 372, 375 (1875). The HMT needs to be looked at for its substance rather than just its moniker as a "tax." *Pace*, 92 U.S. at 376. In the words of Justice Bradley, "we must regard things rather than names," and if the HMT in fact acts like a user fee than it should be evaluated as a user fee. *Id.*

513. *Pace*, 92 U.S. at 375. The Court warned that the danger to guard against is the "imposition of a duty under the pretext of fixing a fee." *Id.* at 376.

514. Head Money Cases (Edye v. Robertson), 112 U.S. 580 (1884).

515. PELTASON, *supra* note 36, at 40. A state imposes a head tax upon every person of that state. *Id.*

516. *Head Money Cases*, 112 U.S. at 599-600.

517. *Id.* at 596.

518. *Pace*, 92 U.S. at 372.

exportation, was a fee.[519] The Court found the charge for the stamp was a fee meant to cover the costs of services properly rendered in implementing the stamp exemption program, including the cost of paper, ink, and printing.[520] Also, the price of the stamps never exceeded the amount necessary to cover the costs required to implement the program, which benefitted the exporters by distinguishing which goods would be exempt from taxes.[521]

In the present case, the CIT, relying on the legislative history of the HMT statute, the *Head Money Cases*,[522] and *Pace*,[523] declared that Congress did not intend to create a user fee when it adopted the HMT.[524] The CIT noted that the tax was established to help pay for the costs of developing, operating, and maintaining U.S. ports for all uses, commercial as well as recreational.[525] Moreover, Congress based the tax on the value of the cargo, and did not guarantee that the Trust Fund would be used only for harbor maintenance.[526] In fact, money from the Trust Fund went to support the work of the Department of the Treasury and could go potentially to the National Oceanic & Atmospheric Association.[527] Furthermore, Customs collected the tax to support future projects rather than to pay for recently completed projects.[528]

The CIT also evaluated the HMT under the test established by the Supreme Court in *Massachusetts v. United States*[529] to discern whether the HMT was a user fee or an impermissible tax on exports.[530] According to the Court in *Massachusetts*, a user fee

519. *Id.* at 375.

520. *Id.*

521. *Id.*

522. *Head Money Cases*, 112 U.S. at 580.

523. *Pace*, 92 U.S. at 372.

524. *U.S. Shoe*, 907 F. Supp. at 414-15.

525. *See* S. REP. No. 126, 99th Cong., 1st Sess. 9 (1985) (stating that tax was adopted in order to help fund maintenance of U.S. harbors and ports).

526. *Id.*; *U.S. Shoe*, 907 F. Supp. at 414-15.

527. BUDGET APPENDIX, *supra* note 405, at 376.

528. *See* S. REP. No. 126, 99th Cong., 1st Sess. 9 (1985) (noting that HMT is collected to fund future maintenance and development projects).

529. 435 U.S. 444 (1978).

530. *Massachusetts*, 435 U.S. at 460-70. The Supreme Court, in *Massachusetts*, confronted the issue of whether a state should be immune from a federal aircraft registration tax. *Id.* at 446. The State of Massachusetts was assessed the registration tax for a helicopter it used primarily for police functions. *Id.* at 452. The Court held that the registration tax was actually a user fee and did not violate the implied immunity of a

does not constitute a tax if the charge: (1) does not discriminate against a constitutionally protected state function;[531] (2) was based upon a fair approximation of the use of the implemented system; and (3) was structured to produce revenues that will not exceed the total cost to the Federal Government of the benefits supplied.[532] In *U.S. Shoe*, the CIT did not address the issue of discrimination but proceeded to apply the second two prongs of the test to the HMT.[533] Under the second prong of the *Massachusetts* test, the CIT found that the HMT was not based on a fair approximation of the cost of the benefits supplied by the government to port users.[534] The CIT noted that although low-value bulk cargo exporters[535] use port facilities more often than high-value non-bulk exporters,[536] they pay less taxes.[537] Furthermore,

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state government from federal taxation. *Id.* at 460-70. No constitutional doctrines, therefore, were implicated by this tax. *Id.* at 467-70. Although this case dealt with the implied constitutional doctrine of state immunity from federal taxation, the test employed by the Court has been adopted and applied to many different constitutional situations, including the present case. *See* Brief of Certain Amici Curiae in Support of Plaintiff's Motion for Summary Judgement at 26, *U.S. Shoe*, 907 F. Supp. 408 (No. 94-11-00668) [hereinafter Brown-Forman Brief] (arguing that CIT should apply the Massachusetts test to Export Clause issue).

531. *Massachusetts*, 435 U.S. at 466-67. The Court first considered whether the tax disciminated against the constitutionally protected state function of operating a police force. *Id.* at 466-67. In *Massachusetts*, Congress placed a tax on all civil aircraft that fly in the navigable airspace of the United States. *Id.* at 449-50. The tax fell upon certain aircraft used by the State of Massachusetts to execute the essential and traditional state function of operating a police force, including patrolling its highways and performing other police functions. *Id.* The State of Massachusetts claimed that its implied constitutional immunity from federal taxation on essential state activities protected it from the tax imposed by Congress. *Id.* at 452.

532. *Id.* at 466-67.

533. *U.S. Shoe*, 907 F. Supp. at 415. The CIT recognized that the Export Clause clearly functions to protect the constitutionally valued activity of exportation from the burdens of taxation and the HMT could, therefore, be discriminatory. *Id.* The CIT did not delve into this issue and instead proceeded, under the assumption of nondiscrimination, to invalidate the HMT under prongs two and three of the *Massachussetts* test. *Id.*

534. *Id.* at 411.

535. Robertshaw, *supra* note 16, at 1. Routine shipments of items such as food additives would be considered low value exports. *Id.* A typical container of the above item would be worth US$50,000 and pay taxes of approximately US$62. *Id.*; *Christiano Statement*, *supra* note 420, at 142.

536. *Christiano Statement*, *supra* note 420, at 142. Precious metals are high value exports. *Id.* One cargo container of precious metals would face taxes of approximately US$3750. *Id.* Another example of a high value exporter is Eastman Kodak who ships 5000 containers of cargo yearly and faces taxes of approximately US$1.5 million on their shipments. Robertshaw, *supra* note 16, at 1.

537. *Christiano Statement*, *supra* note 420, at 142. According to Christiano, it would take 60 containers of a low value commodity to equal the taxes paid on one container

ports such as Seattle and Tacoma pay much higher taxes than other less frequented ports but require and receive in return less fund money than these other ports.[538] These facts illustrated that the HMT was unfairly approximated to the costs of servicing U.S. harbors and ports.[539]

Applying the third prong, the CIT found that the HMT revenue exceeded the cost incurred by the Government in providing these services.[540] In support of this conclusion, the CIT noted that the tax had produced a large and growing surplus,[541] above and beyond the costs incurred by the Government.[542] Additionally, the court recognized that the tax was used to fund projects slated for the future and not to repay the Government for past or current services rendered.[543] If the fund was used to support future projects, then the money raised did not correlate to the costs of present day maintenance.[544]

D. *Export Clause Analysis*

Having concluded that the Commerce Clause cannot override the Export Clause and that the HMT was a tax and not a

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of precious metals. *Id.* A good example of this situation is illustrated by the following scenario:

> Two vessels are docked at a port to receive cargo for export. The first ship is a medium-capacity, shallow-draft vessel that is to be loaded with five computer systems with a value of $30 million. To load this merchandise requires a single crane to place the five computers into the cargo hold. At the current rate of .125 percent, the HMT on this "port use" would amount to $37,500. The second ship, a large-capacity, deep-draft vessel, is to carry a load of automobiles with an average value of $15,000. To incur the same HMT liability, it would be necessary to load 2,000 cars onto this ship. This would entail 2,000 separate loading operations, considerable time and significant dock space.

Aris-Isotoner Brief at 25 n.25, *U.S. Shoe*, 907 F. Supp. 408 (No. 94-11-00668).

538. *McDermott Bill, supra* note 415, at E519. The ports of Seattle and Tacoma, estimate that their shippers pay over US$50 million in taxes. *Id.* In return, the ports receive less than US$1 million in harbor maintenance funds, mainly because they are naturally deep-dredged harbors and require less maintenance. *Id.* A further example of this disproportionate allocation of HMT funds is demonstrated by the Port of Los Angeles. *U.S. Shoe*, 907 F. Supp. at 415. In 1992, the Army Corps of Engineers estimated that the Port of Los Angeles paid US$78.7 million in taxes and received only US$162,000 in return for maintenance and operations. *Id.*

539. *Massachusetts*, 435 U.S. at 466.

540. *U.S. Shoe*, 907 F. Supp. at 415.

541. *Id.*; *see supra* notes 424-27 and accompanying text (discussing development of Trust Fund surplus).

542. *U.S. Shoe*, 907 F. Supp. at 415.

543. *Id.*; S. REP. No. 126, 99th Cong., 1st Sess. 9 (1985).

544. *U.S. Shoe*, 907 F. Supp. at 415.

user fee, the CIT then addressed the question of whether the HMT violated the prohibitions of the Export Clause of the Constitution.[545] U.S. Shoe Corp. argued that the charge imposed by the HMT was a tax upon exports and therefore in violation of the Export Clause of the Constitution.[546] The Government counterargued that the HMT did not fall upon exported articles within the meaning of the Export Clause.[547]

1. Should CIT Apply Traditional or Narrow Export Clause Analysis?

Relying on the traditional Supreme Court export analysis,[548] U.S. Shoe Corp. argued that the HMT burdened the exportation process and was directly connected to the value of the exported goods.[549] According to U.S. Shoe Corp., the HMT attached to goods being loaded onto a vessel for exportation, which placed it well within the process of exportation.[550] U.S. Shoe Corp. further alleged that the loading of cargo represented an essential part of the exportation process and a tax upon loading acts as a tax upon the goods themselves.[551]

The Government argued that, as a result of recent Supreme Court decisions, the traditional export stream test had been overruled.[552] The Government's argument relied on two cases, *Michelin*[553] and *Washington Stevedoring Companies*,[554] both of which established a narrow approach to Import-Export Clause analysis.[555] The Government urged the CIT not to read the Export Clause as broadly as the traditional export stream test applied by the plaintiff and the Supreme Court.[556] The Government argued that the CIT should determine whether Congress

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545. *Id.* at 416.

546. U.S. Shoe Brief at 27, *U.S. Shoe*, 907 F. Supp. 408 (No. 94-11-00668).

547. Government Brief at 92, *U.S. Shoe*, 907 F. Supp. 408 (No. 94-11-00668); *U.S. Shoe*, 907 F. Supp. at 416.

548. *See supra* notes 93-178 and accompanying text (describing traditional Supreme Court Export Clause analysis).

549. U.S. Shoe Brief at 36, *U.S. Shoe*, 907 F. Supp. 408 (No. 94-11-00668).

550. *Id.* at 31.

551. *Id.* at 32-34.

552. *Id.*

553. *Michelin*, 423 U.S. at 276.

554. *Washington Stevedoring*, 435 U.S. at 734.

555. U.S. CONST. art. I, § 10, cl. 2.

556. Government Brief at 97, *U.S. Shoe*, 907 F. Supp. 408 (No. 94-11-00668); *U.S. Shoe*, 907 F. Supp. at 415-16.

placed the HMT upon exported articles under the Export Clause by taking a narrow approach similar to the approach used in recent Supreme Court decisions interpreting the Import-Export Clause of the Constitution.[557] Applying this narrow *Michelin*,[558] *Washington Stevedoring*[559] approach, the Government contended that the HMT represented a nondiscriminatory tax that did not target exports and only applied to services that facilitate[560] exportation.[561] The Government argued, therefore, that the HMT did not violate the Export Clause because it did not tax exports.[562]

The CIT disagreed with the Government and refused to apply this analysis to the Export Clause.[563] The CIT limited its inquiry to that of the Export Clause.[564] First, the CIT stated that a difference exists between the language of the two clauses.[565] The language of the Export Clause prohibits any tax or duty, while the Import-Export Clause limits itself to only imposts or duties.[566] The entire rationale of *Michelin*[567] and *Washington Stevedoring*[568] relied on this distinction, differentiating between the narrowly construed terms imposts or duties and the broadly construed term general tax.[569]

In addition to this language, the CIT recognized that different policies underlie these clauses.[570] As illustrated by the *IBM* Court, the Import-Export Clause prohibited states from impos-

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557. *U.S. Shoe*, 907 F. Supp. at 418-19; *IBM*, 59 F.3d at 1237.

558. *Michelin*, 423 U.S. at 276.

559. *Washington Stevedoring*, 435 U.S. at 734.

560. Government Brief at 97, *U.S. Shoe*, 907 F. Supp. 408 (No. 94-11-00668). Services necessary to the import-export process such as unloading or loading of cargo are services that facilitate exportation. *Washington Stevedoring*, 423 U.S. at 757; Government Brief at 97, *U.S. Shoe*, 907 F. Supp. 408 (No. 94-11-00668).

561. Government Brief at 97, *U.S. Shoe*, 907 F. Supp. 408 (No. 94-11-00668); *U.S. Shoe*, 907 F. Supp. at 416.

562. Government Brief at 97, *U.S. Shoe*, 907 F. Supp. 408 (No. 94-11-00668).

563. *U.S. Shoe*, 907 F. Supp. at 416.

564. *Id.* at 416. The court in *U.S. Shoe* followed the reasoning applied by the court in *IBM* to disapprove of the Government's desired analysis. *See IBM*, 59 F.3d at 1238-39 (noting differences between Export and Import-Export Clauses).

565. *U.S. Shoe*, 907 F. Supp. at 416; *IBM*, 59 F.3d at 1239.

566. *Michelin*, 423 U.S. at 290-91.

567. *Id.* at 276.

568. *Washington Stevedoring*, 435 U.S. at 734.

569. *See Michelin*, 423 U.S. at 290-91 (illustrating difference in language between Export and Import-Export Clauses).

570. *U.S. Shoe*, 907 F. Supp. at 417-18.

ing taxes upon imported or exported goods moving through their state.[571] The Export Clause, however, served the broader purpose of prohibiting taxation on exports by the Federal Government.[572] The Court in *IBM* held that the Export Clause need not be construed in a manner similar to the Import-Export Clause.[573] The CIT agreed with the Court in *IBM* and held that the defendant's use of *Michelin*[574] and *Washington Stevedoring*[575] in this case was inapplicable.[576]

2. The Traditional Export Clause Analysis Applied

The CIT in *U.S. Shoe* applied the traditional approach to Export Clause analysis to determine whether the HMT was a tax upon exported goods.[577] The CIT first determined whether Congress had imposed the HMT upon goods in the export process.[578] The CIT then determined how closely related Congress' tax was to the value of the exported goods.[579]

a. Did the HMT Tax Exported Goods?

The Supreme Court holdings in *Turpin*,[580] *Cornell*,[581] and *Spalding*[582] indicated that the Court considers a good an export under the Export Clause if it has passed beyond the manufactur-

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571. *IBM*, 59 F.3d at 1239. The court noted that the "[I]mport-Export Clause was intended to prohibit States from imposing a 'transit fee' on goods moving in foreign commerce . . . ." *Id.*

572. *Id.* The court stated that the "[E]xport Clause served the broader purpose of 'forbidding federal taxation of exports.' " *Washington Stevedoring*, 435 U.S. at 758.

573. *IBM*, 59 F.3d at 1239. The court reasoned that "the Supreme Court's current narrower view of the prohibition in the Import-Export Clause thus does not dictate that the Export Clause be given a similarly narrow construction." *Id.*

574. *Michelin*, 423 U.S. at 276.

575. *Washington Stevedoring*, 435 U.S. at 734.

576. *U.S. Shoe*, 907 F. Supp. at 416-17.

577. *Turpin*, 117 U.S. at 507; *Fairbank*, 181 U.S. at 292.

578. *U.S. Shoe*, 907 F. Supp. at 417.

579. *Id.* at 417-18.

580. *Turpin*, 117 U.S. at 504; *see supra* notes 106-12 and accompanying text (discussing *Turpin* decision which held tax upon tobacco manufactured for exportation constitutionally valid because it only taxed goods intended for exportation).

581. *Cornell*, 192 U.S. at 418; *see supra* notes 114-18 and accompanying text (evaluating *Cornell* holding which concluded that nondiscriminatory tax placed on all manufactured cheese did not violate Export Clause because it taxed goods prior to and not during exportation).

582. *Spalding*, 262 U.S. at 66; *see supra* notes 119-27 and accompanying text (examining *Spalding* decision that determined process of exportation to begin upon delivery of goods by exporter to carrier).

ing and preparation stage and has begun the process of exportation.[583] Because liability for the HMT attached at the time of loading of cargo to be exported from the United States,[584] the CIT in *U.S. Shoe* found that the HMT taxed cargo far along the process of exportation.[585] The CIT reasoned that if the delivery of cargo in *Spalding* was sufficiently within the stream of exportation, then the next step of loading that cargo onto a vessel would also fall within the Export Clause prohibition.[586]

b. Does the HMT Attach to the Value of the Goods?

The *Almy*,[587] *Fairbank*,[588] *Hvoslef*,[589] *Thames and Mersey*,[590] and *IBM*[591] line of cases demonstrated the inclination of the Supreme Court to invalidate taxes that not only burden the exported goods but also the articles and documents that facilitate the exportation of the goods.[592] Based on this line of precedent, the CIT in *U.S. Shoe* concluded that the HMT represented

583. *Turpin*, 117 U.S. at 507; *see supra* notes 106-12 and accompanying text (discussing *Turpin*, *Cornell*, and *Spalding* holdings illustrating distinction between intending to export and exporting).

584. 26 U.S.C. § 4461(c)(2)(A) (1994).

585. *U.S. Shoe*, 907 F. Supp. at 418.

586. *Id.* The CIT compared the HMT with the entrance point to the process of exportation set up in *Spalding* and concluded that the HMT is applied to goods well beyond this point. *Id.*

587. *Almy*, 65 U.S. at 169; *see supra* notes 136-41 and accompanying text (discussing *Almy* which held taxes on bills of lading to be unconstitutional burdens on exportation).

588. *Fairbank*, 181 U.S. at 283; *see supra* notes 143-50 and accompanying text (discussing *Fairbank* holding which found taxes on foreign bills of lading to be unconstitutional taxes upon exports).

589. *Hvoslef*, 237 U.S. at 1; *see supra* notes 151-58 and accompanying text (considering *Hvoslef* case holding taxes on charter party contracts for shipment of cargo in violation of Export Clause for essentially taxing exports themselves).

590. *Thames & Mersey*, 237 U.S. at 19; *see supra* notes 160-68 and accompanying text (addressing *Thames & Mersey* and conclusion that taxes on marine risk insurance polices are closely associated to value of exported goods and therefore unconstitutional).

591. *IBM*, 59 F.3d at 1234; *see supra* notes 169-78 and accompanying text (reviewing *IBM* holding which similarly held that taxes on marine risk insurance polices violated Export Clause by taxing closely to value of exported goods themselves).

592. *See Almy*, 65 U.S at 169 (invalidating tax upon bill of lading); *Fairbank*, 181 U.S. at 283 (holding tax upon foreign bill of lading is tax on exported goods themselves); *Hvoslef*, 237 U.S. at 1 (holding that tax upon charter parties contracts is unconstitutional); *Thames & Mersey*, 237 U.S. at 19 (holding that tax upon marine insurance policies violates export clause); *IBM*, 59 F.3d at 1234 (upholding *Thames & Mersey* and holding tax upon marine insurance policies unconstitutional).

a tax applied even more closely to the exported goods than the well-established precedent on which the court relied.[593] In fact, the CIT determined that the HMT assessed liability directly on the value of the cargo itself and not upon any documents used in exportation or any services rendered to assist exportation.[594] Accordingly, the CIT concluded that neither of the two tests set forth above supported the constitutionality of the HMT.[595]

III. *U.S. SHOE PROTECTS THE U.S. MARITIME INDUSTRY FROM THE BURDENS OF THE HMT AND SHOULD BE UPHELD ON APPEAL*

Upon review, the Federal Circuit should uphold the decision by the CIT that the HMT violates the Export Clause of the Constitution. By placing a tax on exports, the HMT violates the enumerated restriction of the Export Clause and the underlying goals behind its adoption. The Constitution, therefore, requires that the HMT be invalidated and the problems it has spawned corrected.

A. *Economic Considerations*

U.S. commerce should be protected from any undue burdens placed upon it by export taxes in order to facilitate economic growth and maintain the U.S. position in the emerging World economy.[596] In 1995, foreign trade accounted for over twenty percent of the U.S. gross domestic product.[597] By the year 2010, the combined value of imports and exports likely will increase to a total of US$1.6 trillion, accounting for nearly 1.5 billion tons of foreign cargo.[598]

As a result of CFTA and NAFTA and the emphasis they place on free international trade, the importance of U.S. ports to the economic well-being of the United States will increase in coming years.[599] CFTA and NAFTA intended to create free trade access between the United States, Mexico, and Canada in

593. *U.S. Shoe*, 907 F. Supp. at 418.

594. *Id.* As the Court commented, "Congress could not have imposed the Tax any closer to exportation, or more immediate to the articles exposed." *Id.*

595. *Id.*

596. *Stromberg Statement*, *supra* note 16, at 144-45.

597. *Id.*

598. *Id.* at 145.

599. *Id.*

order to stimulate international trade and investment among the three countries and with the rest of the World.[600] The HMT contradicts the policies underlying the passage of CFTA and NAFTA by placing a burden on the exportation of goods out of the United States. The HMT also placed the U.S. export industry at a severe disadvantage vis-a-vis the rest of the world by forcing a rise in prices on such market-volatile goods as agricultural products.[601] The continued health of the growing U.S. export industry depends on remaining free of burdens such as the HMT, and the Federal Circuit should consider this fact in reviewing the CIT decision.

Just as the national economy reaps the benefits of export trade, so too do local economies.[602] In 1989, port usage accounted for 1.2 million jobs, provided US$28.4 billion in personal income, generated US$3.6 billion in state and local taxes, and produced daily economic impacts of US$268 million.[603] These numbers will presumably continue to rise as export trade remains a key ingredient to the economic success of the United States.[604] Unfortunately, the HMT has had a negative effect on these local economies by diverting business to other ports and to other modes of transportation such as rail and truck.[605] As a result of this diversion, the ports such as Seattle and Tacoma are likely to suffer losses of approximately 1300 and 2500 jobs, respectively.[606] Also, because of this diversion, the port of Boston has lost approximately two million tons of cargo to Canadian ports over the last ten years.[607] In addition, traditional shipping

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600. Alexander, *supra* note 29, at 48-49.

601. *See supra* notes 314-20 and accompanying text (examining competitive disadvantage placed upon U.S. exporters by HMT).

602. *Aylward Statement, supra* note 16, at 76.

603. *Id.*

604. *Stromberg Statement, supra* note 16, at 145. As Stromberg explains:

> Ports activity links every community in our nation to the world marketplace — enabling us to create export opportunities and to deliver imported goods more inexpensively to consumers across the nation. With the passage of NAFTA and GATT, the important role our ports play in the economic well-being of the nation will only increase.

Id.

605. *See supra* notes 406-16 and accompanying text (discussing diversion of cargo to Canada).

606. *Ports Statement, supra* note 423, at 166-67.

607. *Tax Drives Firms to Canadian Ports, Exporters Trucking Goods North*, PATRIOT LEDGER, May 2, 1995, at 5.

vessels such as the "Incan Superior," hurt by the increased HMT, gradually are ceasing operations through U.S. ports, thereby leading to even more lost port use, income, and jobs.[608] Local economies are essential to the success of the national economy; in order to operate successfully, they need to be protected from the adverse trends created by the HMT.

Admittedly, U.S. ports and harbors do need maintenance and repair to keep them operational and available to play the important role that they do. Although, the Government would like the commercial shippers to provide a larger portion of this cost,[609] the HMT is not the answer. Prior to 1986, general government funding supported port and harbor maintenance.[610] The adoption of the HMT addressed the issue of sharing the cost of port and harbor maintenance and not the necessity for more money.[611] Together, private industry and the federal government can successfully provide for port and harbor maintenance without adopting tax measures such as the HMT. The public port industry, for example, has contributed more than US$12.5 billion over the last forty-five years to develop and maintain port facilities.[612] The Federal Government along with the port industry have spent nearly US$4 billion over this time to improve and maintain the U.S. waterways infrastructure.[613] Additionally, in 1992, the public ports spent US$671.8 million on construction and modernization of terminal facilities and channel dredging.[614] Furthermore, the American Association of Port Authorities estimates that it will invest US$514 million in local dollars to dredging during 1993-97.[615]

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608. *Cumulative Impact of Taxes and Various Fees Levied on the Maritime Industry: Hearings Before the Subcommittee on Oversights and Investigations, House Merchant Marine and Fisheries Committee*, 102d Cong., 1st Sess. 124 (May 23, 1991) (statement of Davis Helberg, Executive Director, Seaway Port Authority of Duluth).

609. *See supra* notes 375-78 and accompanying text (describing government spending on harbor maintenance and reasons for adoption of HMT).

610. *Id.*

611. H.R. REP. No. 228, 99th Cong., 2d Sess. 5 (1985); S.R. No. 128, 99th Cong. 1st Sess. 9 (1985).

612. *Stromberg Statement 94*, *supra* note 407, at 480.

613. *Id.*

614. *Id.*

615. *Id.*

B. *Constitutional Considerations*

The decision in *U.S. Shoe* should be upheld in order to preserve a long-standing Supreme Court precedent, that of the broad interpretation of the Export Clause as a prohibition on any burden upon exportation.[616] The Export Clause has enabled the U.S. export industry to remain free from impediments and operate successfully to further the U.S. economy for the past 209 years. It would be unwise to abandon this view and adopt a narrow view based on the Import-Export Clause. The CIT was correct in maintaining the sanctity of the Export Clause and in upholding the legal consequences that traditional Export Clause interpretation has generated. The Export Clause and the Import-Export Clause are distinct provisions that should be considered and analyzed individually.

Traditionally, U.S. courts analyzed the Import-Export Clause in the same manner as the Export Clause.[617] The entire basis for the *Michelin* decision was that the Import-Export Clause was distinct from the Export Clause and that the purposes and prohibitions of each were distinct.[618] As a result, the *Michelin* Court abandoned the traditional interpretation of the Import-Export Clause and found it necessary to limit its interpretation to apply only to certain types of imposts or duties, not to all taxes.[619] Ultimately, the reason the Court adopted this new Import-Export Clause approach was that it recognized the distinction between this clause and the Export Clause.[620]

The Government would like the courts to apply the *Michelin* approach to analysis of taxes under the Export Clause.[621] Upon review, the Federal Circuit should not apply this narrow *Michelin* approach to Export Clause analysis. It would be circular and illogical to apply the *Michelin* Import-Export Clause analysis to the very clause it was meant to differentiate from, the Export Clause.

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616. *See supra* notes 93-178 and accompanying text (examining traditional Export Clause analysis).

617. *See supra* notes 179-86 and accompanying text (reviewing traditional analysis of Import-Export Clause prior to *Michelin*)

618. *See supra* notes 198-235 and accompanying text (examining narrow *Michelin* approach to Import-Export Clause analysis)

619. *Id.*

620. *Id.*

621. *See supra* notes 547-57 and accompanying text (explaining government argument for narrow Export Clause approach)

The *Michelin* approach has not been applied to a federal tax and it is not appropriate to do so now. Furthermore, if the traditional, broad approach to the Export Clause is abandoned in favor of a new, narrower approach, based on the Import-Export Clause, the court would empower Congress to reintroduce a tax that burdens exportation. By adopting a narrow approach, courts, in effect, would be inviting Congress to enact additional measures similar in content and effect to the HMT, with possibly even more severe consequences.

C. *Trade Agreement Implications*

Article 314 of NAFTA prohibits any party to the Agreement from imposing a tax upon exports.[622] The HMT, as it stands, is a tax on exports.[623] The decision in *U.S. Shoe* should be upheld in order to shield the United States from possible repercussions of the HMT violating Article 314 of NAFTA.[624] In the event such a violation occurs, the Commission would have the authority to enforce removal of the HMT or to require the United States to compensate Canada and/or Mexico for financial losses stemming from the HMT as the result of increased export prices due to the HMT.[625] Moreover, continued use of the HMT could open the door for similar measures in retaliation by Canada and Mexico,[626] thereby increasing the cost of those countries exports to the U.S. consumer. Furthermore, continued implementation of this tax could result in the loss of privileges the United States presently possesses under NAFTA.[627] Although these last two option are highly unlikely, the implementation of the HMT could lead to potentially significant restrictions on the foreign free trade that the United States now enjoys.

CONCLUSION

As the United States enters the next millennium, export trade in the ever expanding international marketplace will play

622. NAFTA, *supra* note 28, art. 314, 32 I.L.M. at 303.

623. *See supra* notes 93-178 and accompanying text (presenting CIT discussion of HMT as tax on exports).

624. *See supra* notes 347-63 and accompanying text (describing NAFTA dispute resolution mechanisms and consequences of NAFTA violations)

625. NAFTA SUMMARY, *supra* note 344, at 102.

626. McKim, *supra* note 243, at 516.

627. *Id.* at 516 n.279.

an integral role in the future economic success of our country. By establishing the HMT, the U.S. Congress enacted a measure that thwarts this essential foreign export trade. The economic strength of the United States in the increasingly important and expanding international marketplace is dependant on the elimination of adverse measures such as the HMT. The CIT's decision holding the HMT unconstitutional, therefore, should be upheld in order to maintain the vitality of the U.S. export industry and to preserve the important economic benefits that U.S. ports and harbors create both locally and nationally. Finally, the traditional export analysis applied in this case should also be upheld to maintain existing limitations on Congress' ability to tax exports and to ensure the success of the U.S. export industry and the U.S. economy for decades to come.