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Harbor Maintenance Tax: All Dredged up and No Place to Go, The

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THE HARBOR MAINTENANCE TAX: ALL DREDGED UP AND NO PLACE TO GO

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I. A BRIEF HISTORY OF THE HARBOR MAINTENANCE CONTROVERSY

Even the most cursory reading of the history of the United States will reveal a particular American disdain for taxes in all forms. The nature and shape of the democratic republic and the Constitution that establishes its form of government was forged in the furnace of revolution fueled by the Sugar Act, the Stamp Act, the Townshend Acts, and countless other taxes imposed on the Colonies by the British Crown during the 1700's.[1] In the Convention that ultimately produced the Constitution in 1787, the memory of earlier taxation issues rose to the surface of the debate.[2] As a direct result, many of the various articles of the Constitution were written specifically to limit the federal government's ability to levy taxes on the citizens of the new country.

One such limitation was the Export Clause, a seemingly innocuous phrase that simply declares "No Tax or Duty shall be laid on Articles exported from any State."[3] In the days before trains, automobiles, steamboats, or airplanes, the ocean-going sailing ship was the only link for communication and commerce between the Old World and the New. Just as the creators of the Constitution never could have envisioned the magnitude of the transformation of the transportation industry, or even the types and sizes of vessels moving cargo via the oceans in the 1990's, neither could they have envisioned a time when the simple Export Clause

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1. *See generally* JOHN A. GARRATY, A SHORT HISTORY OF THE AMERICAN NATION (3rd ed. 1981)(summarizing the various taxes enacted upon the colonies from their founding until the Declaration of Independence).

2. *See* Brief for Respondent at 10-11, United States Shoe Corp. v. United States, 1998 WL 19842, at *10 (U.S. Jan. 15, 1998)(No. 97-372)(quoting 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 305-06 (rev. ed. 1966).

3. U.S. CONST. art. I, § 9, cl. 5.

would become the center of a controversy over billions of tax dollars. The Export Clause, essential to the compromise that allowed the signing and ratification of the Constitution, is indeed the central issue of judicial concern in the question of the Harbor Maintenance Tax.

The Harbor Maintenance Tax was imposed in 1986 as part of the comprehensive Water Resources Development Act,[4] and was subsequently codified in the Internal Revenue Code.[5] The tax was implemented on an ad valorem basis for the use of federally-maintained waterways.[6] Only the use of inland waterways was excluded from the tax.[7] The tax applied equally to imports, exports, domestic shipments, and passengers,[8] although certain specific commodities and activities were excluded.[9]

The stated purpose of the Harbor Maintenance Tax was to fund the maintenance of federally-maintained harbors and ports.[10] A major part of this maintenance involved the dredging of the harbors and channels of United States ports, a process made necessary by both the natural process of silting and the increasing size and draft of vessels calling those ports. Primary responsibility for this activity for some time has been delegated to the United States Army Corps of Engineers.[11]

In order to administrate the collection and distribution of the tax, Congress authorized the United States Customs Service to collect the tax, which was paid by the exporter or importer of record, or the shipper of record.[12] The tax was originally set at a rate of .04% of the value of the shipment,[13] but was later increased to .125%, an increase of more than 300%.[14] These funds were placed in the Harbor Maintenance Trust Fund, created in the same Act as the tax.[15] Disbursement of funds required additional authorization by Congress.[16] The primary designated recipient of these funds were the United States Army Corps of Engineers, the De-

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4. *See* United States Shoe Corp. v. United States, 907 F.Supp. 408, 411 (Ct. Int'l Trade 1995); *see also* Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082 (codified as amended in scattered titles of 33 U.S.C.).

5. *See* United States Shoe Corp., 907 F.Supp. at 411; *see also* Harbor Maintenance Tax of 1986, 26 U.S.C. § 4461 (1994).

6. *See* 26 U.S.C. §§4461, 4462(a)(2) (1994).

7. *See id.* §4462(a)(2)(A)(i) (1994).

8. *See id.* §§4461(c)(1), 4462(a)(3)(A) (1994).

9. *See id.* §4462(a)(3)(B) (1994). The statute specifically exempts a wide variety of commodities and uses from the Harbor Maintenance Tax. A list of some cargoes exempted include: fish and other aquatic animals not previously landed on shore, bunker fuel, ships' stores, equipment necessary for operations of a vessel. *See id.*

10. *See* S. Rep. No. 99-126, at 7 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6644.

11. *See id.*

12. *See* 26 U.S.C. §4461 (c)(1)(A)-(C) (1994).

13. *See* S. Rep. No. 99-126, at 18 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6650.

14. *See* 26 U.S.C. §4461(b) (1994).

15. *See id.* §9505(b) (1994).

16. *See id.* §9505(c) (1994).

partment of the Treasury, and the Department of Commerce.[17]

The process for the collection of the tax for exports was fairly straightforward. With each shipment over a U.S. port, Customs required a Shipper's Export Declaration to be presented to Customs as a part of the required documentation accompanying the shipment.[18] While payments of the Harbor Maintenance Tax could be made at any time, the general practice was to file a report quarterly with Customs of all exports moving via the ports.[19] This report verified the total value of the exported goods which were subject to the tax. This figure was then used to calculate the amount of the tax on an ad valorem basis, with the funds being submitted to Customs and subsequently placed in the Harbor Maintenance Trust Fund for disbursement at a later time when authorized by Congress.[20]

Almost from its inception, the Harbor Maintenance Trust Fund ran a significant surplus. By the end of fiscal year 1996, the Fund had a cumulative surplus of over $865 million, and projections at the time were predicting a surplus of $3 billion by the year 2001.[21] The annual expenditures of the Fund were approximately $480 million, including funding for part of the maintenance under an agreement with Canada for portions of the St. Lawrence Seaway.[22]

United States Shoe Corporation brought an action in 1994 to recover the taxes paid on exports during the second quarter of 1994, alleging that the Harbor Maintenance Tax was an unconstitutional tax on exports in violation of the Export Clause.[23] The Court of International Trade held that the tax was indeed unconstitutional as applied to exports.[24] The United States government appealed the decision to the Court of Appeals for the Federal Circuit in 1997, where the decision of the lower court was upheld.[25] The United States subsequently appealed to the Supreme Court which affirmed the ruling of the court of appeals. The Court held that the Harbor Maintenance Tax, only as applied to exports, was an unconstitutional tax on exports in violation of the Export Clause.[26] This review and analysis of the history of the entire controversy, from the Court of Inter-

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17. *See id.* §9505(c)(3) (1994).

18. *See* 15 CFR §30.3 (1997). *See also* 15 CFR §§30.1-30.22 (1997)(for general overview of the various requirements of the Shipper's Export Declaration).

19. *See* 19 CFR §24.24(e)(2)(ii) (1993).

20. *See* 26 U.S.C. §§4461(b), 9505(c) (1994).

21. *See* Brief for Respondent at 3, United States Shoe Corp. v. United States, 1998 WL 19842 (U.S. Jan. 15, 1998)(No. 97-372).

22. *See id.*

23. *See* United States Shoe Corp. v. United States, 907 F.Supp. 408, 412 (Ct. Int'l Trade 1995).

24. *See id.* at 421.

25. *See* United States Shoe Corporation v. United States, 114 F.3d 1564, 1577 (Fed. Cir. 1997).

26. *See* United States Shoe Corp. v. United States, 118 S.Ct. 1290, 1296 (1998).

national Trade through the Supreme Court, will examine the constitutional issues raised in the case, including those raised by the government in defense of the tax. In addition, some of the questions which remain following the decision will be examined.

The ultimate power of the Supreme Court is the power to declare a statute, properly introduced by the Congress and signed into law by the President, to be a violation of the Constitution itself.[27] In such instances, the Court exercises its primary check and balance of the other branches of government. Constitutional challenges are relatively rare, and never taken lightly. The Court is very cautious to venture into the domain of the elected representatives, and does so only when the rights, freedoms, and responsibilities of the citizens are being violated by existing law.

Congressional statutes are presumed constitutional unless successfully challenged in court.[28] The Harbor Maintenance Tax was collected in accordance with the statute until successfully challenged by *U.S. Shoe*.[29] In arguing this case, U.S. Shoe Corp. relied on the doctrine of *stare decisis*, historical precedent, to buttress its position regarding the nature of the tax. A line of historical cases regarding the nature of Congressional taxation limits, particularly related to exports, was examined in detail. This controversy is of particular interest in that the government significantly changed its position between the district court trial and the appellate trial. In doing so, two entirely separate and distinct arguments arose. The first regarded the limits, if any, of the authority of Congress to regulate commerce. This issue was determined first at the Court of International Trade, and upheld at the appellate level and by the Supreme Court.[30] The second issue concerned the nature of the various tests used to distinguish between constitutionally permitted user fees and unconstitutional taxes, first determined by the court of appeals. In the subsequent appeal, the Supreme Court examined the issue and provided a different analytical framework for testing a user fee for constitutionality.[31]

II. JURISDICTIONAL ISSUES

As in all court battles, the proper forum is both essential to insure a sound judgment and a ripe ground for conflict. Whether the effort to defeat jurisdictional authority by the government was a matter of forum shopping or zealous advocacy is irrelevant; the courts at all levels examined and ruled on the question of proper jurisdiction.

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27. *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

28. *See* Fairbank v. United States, 181 U.S. 283, 285 (1901).

29. *See* United States Shoe Corp. v. United States, 907 F.Supp. 408, 412 (Ct. Int'l Trade, 1995).

30. *See* United States Shoe Corp., 118 S.Ct. at 1296.

31. See *id.* at 1295.

In the statute establishing the Harbor Maintenance Tax, Congress expressly granted jurisdiction over issues arising from the tax to the Court of International Trade.[32] Quoting the language of the statute, the court held 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."[33] The court further examined the legislative history, as well as its previous role in deciding issues arising from the Harbor Maintenance Tax, as grounds for its jurisdiction over *U.S. Shoe*.[34]

On appeal to the Court of Appeals for the Federal Circuit, the government argued that jurisdiction was found only under 28 U.S.C. § 1581(a) instead of § 1581(i) as claimed by U.S. Shoe Corp.[35] The contention is clear for an obvious reason: 28 U.S.C. § 1581(a) requires the exporter to file a protest with Customs before seeking judicial relief, and then limits recovery only to amounts protested within ninety days of payment.[36] 28 U.S.C. § 1581 (i) allows the action to be filed without an initial Customs protest within a two-year statute of limitations from the date on which the cause of action originally arose.[37] Jurisdiction under 28 U.S.C. § 1581(a) is the more exacting standard, and has the effect of eliminating all those claims pending before both the Court of International Trade and the Federal Court of Claims for which no initial Customs protest was filed.

The court of appeals found that 28 U.S.C. § 1581(a) required a "decision" to be made by Customs, a protest of the decision, and a denial of the protest, before judicial review is sought.[38] The government argued that the receipt of payment was sufficient to be a "decision," but the court found this argument lacking.[39] Relying on a previous decision from *Dart Export Corp. v. United States,* 43 C.C.P.A. 64 (1956), the court noted that a protestable decision involved an analysis and adjudication by Customs, not mere acceptance of funds.[40] The court determined that Customs merely accepted funds authorized by statute.[41] It thus held that § 1581(a) was not applicable.[42]

The court then examined 28 U.S.C. § 1581(i) as the only remaining

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32. *See* United States Shoe Corp., 907 F.Supp. at 410.
33. *Id.*
34. *See id.*
35. *See* United States Shoe Corp. v. United States, 114 F.3d 1564, 1570 (Fed. Cir. 1997).
36. *See id.* at 1568.
37. *See id.*
38. *See id.*
39. *See id.* at 1568-69.
40. *See id.* at 1569.
41. *See id.*
42. *See id.*

basis of jurisdiction. It found first that the language of the statute itself authorized jurisdiction over the matter.[43] 28 U.S.C. § 1581(i) refers to "administration and enforcement with respect to the matters referred to in" the previous provisions of the statute.[44] The court determined that the action before it was clearly such a matter of "administration and enforcement."[45] The court also turned to precedent in its decision in *Conoco Inc. v. U.S. Foreign Trade Zone Board,* 18 F.3d 1581 (Fed Cir. 1994), in which it held that 28 U.S.C. § 1581(i) "was intended to give the Court of International Trade broad residual authority over civil actions arising out of federal statutes governing import transactions . . ."[46] Since the statute authorizing the Harbor Maintenance Tax treated the Tax as a customs duty for jurisdictional purposes, the court of appeals found that the Court of International Trade indeed had sufficient jurisdiction under 28 U.S.C. § 1581(i) to hear the matter.[47]

In the subsequent appeal, the Supreme Court upheld the court of appeals regarding the jurisdictional question.[48] In addition, in a footnote to the ruling, the Court stated that the Court of Federal Claims lacked jurisdiction over Harbor Maintenance Tax issues, as such jurisdiction was properly found in the Court of International Trade.[49] The Court recommended that plaintiffs with claims before the Court of Federal Claims file motions under FED.R.CIV.P. §1631, allowing for inter-court transfers to the Court of International Trade for hearing.[50]

III. THE ABILITY OF THE EXPORT CLAUSE TO LIMIT THE CONGRESSIONAL POWER TO REGULATE COMMERCE

Congress has almost unlimited power to regulate commerce between the several states and foreign nations granted to it by the Constitution.[51] At the Court of International Trade, the government argued that the Commerce Clause was superior to the Export Clause, allowing a tax on exports if the tax was solely for the purpose of regulating the commerce affected by exports and not for the purpose of raising revenue.[52] U.S. Shoe Corp. countered that such was not the case, arguing instead that the Export Clause was a limitation on the commerce power given to Con-

43. *See id.* at 1571.
44. *Id.*
45. *See id.*
46. *Id.*
47. *See id.*
48. *See* United States Shoe Corp. v. United States, 118 S.Ct. 1290, 1293 (1998).
49. *See id.*
50. *See id.* at 1294.
51. *See* U.S. CONST. art. I, § 8, cl. 3.
52. *See* United States Shoe Corp. v. United States, 907 F.Supp. 408, 413 (Ct. Int'l Trade, 1995).

gress.[53] In determining the proper understanding of the Export Clause, the courts turned not only to precedent, but also to the legislative intent of the Founders from the records of the Constitutional Convention of 1787.[54]

The Export Clause was one of a number of highly controversial elements of the Constitutional Convention.[55] The question of export taxation was one of great significance to the compromises that enabled the Founders to join two economically diverse regions into one unified nation. The discrepancy between the Northern colonies and the Southern colonies in terms of exported products during the time of the Revolution was severe. The North produced few manufactured goods, while the South was abounding in agricultural products for export such as tobacco, turpentine, and cotton. The Southern delegation to the Convention feared that a Congress controlled by the North could strangle the Southern economy by levying an oppressive tax on exports. An equal fear was that a disproportionate amount of the federal revenue could be raised from revenues produced by taxing Southern prosperity in the form of exports by a Northern controlled Congress, if Congress was given the authority to tax exports.

Several amendments to the Export Clause were proposed at the Convention, yet all failed. The first would have changed the wording of the clause to prohibit export taxes only "*for the purpose of revenue*,"[56] thus opening the door to export taxation of some regulatory nature. The second proposal would have granted Congress the authority to tax exports with the approval of a two-thirds majority of both Houses.[57] Other amendments offered the possibility of exemptions for certain commodities,[58] or the option that the export tax ban should run for only a limited number of years.[59] All attempts to amend the Export Clause failed.[60] Congress was expressly denied the power to tax exports.

The government attempted to apply the non-revenue producing, regulatory standard to the issue of the Harbor Maintenance Tax in *U.S. Shoe*.[61] In doing so, it relied on the "exception" allowed in *Moon v. Freeman*, 379 F.2d 382 (9th Cir. 1967), for regulatory programs authorized by the Commerce Clause that have little economic impact on the

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53. *See id.* at 411.

54. *See id.* at 413.

55. *See* Brief for Respondent at 10, United States Shoe Corp. v. United States, 1998 WL 19842 (U.S. Jan 15, 1998)(No. 97-372)(quoting 2 MAX FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787 305-06 (rev. ed. 1966).

56. *Id.* (emphasis added).

57. *See id.*

58. *See id.*

59. *See id.*

60. *See id.* at 10-11.

61. *See* United States Shoe Corp. v. United States, 907 F.Supp. 408, 413 (Ct. Int'l Trade 1995).

exporter.[62] *Freeman* is a single, non-challenged anomaly in the broader spectrum of Export Clause decisions. In *Freeman*, a wheat farmer failed to comply with the terms of wheat export regulations, resulting in a federally imposed expense of $168.[63] The farmer sued to recover the funds, claiming them to be an unconstitutional tax on exports.[64] The court held that the funds were not an export tax, but instead a user fee, permitted under the Commerce Clause because it was regulatory in nature instead of revenue producing; therefore, it was not limited by the Export Clause.[65] Part of the court's rationale was that the Commerce Clause and the Export Clause were not to be taken together, but instead that each had separate and distinct powers within themselves.[66] This holding was somewhat of a departure from the traditional line of cases interpreting the power of the Export Clause.

The interpretation of the overarching power of the Commerce Clause as interpreted in the holding of Freeman was not followed in *U.S. Shoe*.[67] The Court of International Trade instead looked to the language of the Export Clause itself, and also to the holdings from both *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824), and *North American Co. v. S.E.C.*, 327 U.S. 686 (1946). In *Gibbons*, the Court held that commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, *other than are prescribed in the constitution.*"[68] In *North American*, the Court found that Congress's commerce powers are limited by "express provisions of other parts of the Constitution."[69] The Court of International Trade found an express limitation to the power of the Commerce Clause to be contained in the Export Clause.[70]

Following the decision from the Court of International Trade, the government filed an appeal with the Court of Appeals for the Federal Circuit. While the appeal was pending, the Supreme Court heard another appeal requiring an interpretation of the Export Clause. In *United States v. International Business Machine Corp.*, 517 U.S. 843 (1996), the Court reaffirmed the historical interpretation of the power of the Export Clause to limit Congress's taxation authority.[71] The Court found that a tax based

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62. *See id.*

63. *See* Moon v. Freeman, 379 F.2d 382 (9th Cir. 1967).

64. *See id.* at 386-87.

65. *See id.* at 393.

66. *See id.* at 389.

67. *See* United States Shoe Corp. v. United States, 118 S.Ct. 1290, 1296 (1998).

68. Gibbons v. Ogden, 22 U.S. (9 Wheat) 196 (1824) (emphasis added).

69. North American Co. v. SEC, 327 U.S. 686, 704-05 (1946).

70. *See* United States Shoe Corp. v. United States, 907 F.Supp. 408, 413 (Ct. Int'l Trade 1995).

71. *See* United States v. International Business Machines Corp., 517 U.S. 843, 863 (1996).

on the value of a marine insurance policy for an export shipment was in fact an indirect tax on the export itself, and thus was a violation of the Export Clause.[72] In short, the Court stated "the requirement of the Constitution is that exports should be free from any governmental burden."[73] Shortly after the *IBM* decision was announced, the government withdrew the "Export Clause v. Commerce Clause" argument from the appeal, choosing to focus instead on an entirely different issue, that being the definition and construction of a permissible user fee.

The court of appeals noted, in passing, the ability of the Export Clause to limit the Commerce clause, based on *IBM*, and turned its attention to the issue of whether the Harbor Maintenance Tax is a pure tax or a user fee.[74] The Supreme Court also emphasized the power of the Export Clause in its ruling in *U.S. Shoe*, based on the language from its decision in *IBM*, holding that "the Export Clause allows no room for any federal tax, however generally applicable or nondiscriminatory, on goods in export transit."[75]

The Court thus established a rationale consistent with historical precedent and legislative intent. The Export Clause serves as a limitation on the commercial regulatory power of Congress by prohibiting the taxation of goods in export transit. As a result of this holding, a determination of the nature of the fee imposed is required in order to resolve the issue in *U.S. Shoe*. If a fee is determined to be a tax, it is by its very nature unconstitutional. If, on the other hand, a fee is found to be a permitted user fee, it will pass the constitutional standard. As a result, the government case on appeal is limited to a discussion of the nature of the Harbor Maintenance Tax itself; specifically, whether the Harbor Maintenance Tax is a permissible user fee allowed under the Export Clause.

IV. TAX OR USER FEE?

The courts over the years have established a primary and secondary test for determining whether a charge on a good or service is a regulatory user fee or a tax. In making this determination in *U.S. Shoe,* the Supreme Court addressed only the primary test, enunciated in *Pace v. Burgess*, 92 U.S. 372 (1875).[76] The secondary test, enunciated in *Massachusetts v. United States,* 92 S.Ct. 1153 (1978), was discussed in the decision by the court of appeals.[77] In this analysis, both will be examined to reveal the

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72. *See id.* at 846.

73. *Id.* at 848.

74. *See* United States Shoe Corp. v. United States, 114 F.3d 1564, 1572 (Fed. Cir. 1997).

75. United States Shoe Corp. v. United States, 118 S.Ct. 1290, 1294 (1998).

76. *See id.* at 1295.

77. *See* United States Shoe Corp., 114 F.3d at 1571-72.

rationale of the courts on this issue.

In 1868, Congress enacted a law which required a federal excise tax to be paid on tobacco products.[78] The only exemption was on tobacco intended for export.[79] To insure that tobacco was properly taxed and not fraudulently exempted and later diverted for domestic use, the government required a stamp to be placed on each package of tobacco intended for export.[80] The cancelled, affixed stamp was evidence that the federal excise tax had not been paid on the tobacco.[81] Originally, the cost per stamp was twenty-five cents.[82] This amount was later lowered to ten cents per stamp in the revised act of 1872.[83]

In *Pace*, the manufacturer brought suit against Burgess, the tax collector, seeking to recover the money paid for the stamps over a period of four years, alleging that the payment for the stamps amounted to a tax on exports.[84] The court instead held that the fees were not a tax on exports, but instead a fair payment for services rendered to the manufacturer by the tax collector.[85] It reasoned that the purpose of the stamps was not the raising of revenue, but just the contrary. The stamp did not levy a tax; it allowed for exemption from a tax, a clear benefit to the exporter.[86] In the process, a two-part test developed which has been used historically to differentiate between a tax or duty and a use fee.

The first part of the test involves the basis of the valuation for the fee. In *Pace*, neither the value nor the quantity of the tobacco covered by one stamp was defined by Congress.[87] There was no limitation to the size of the package,[88] whether it was a single box or an entire bale. The stamp was a per unit fee, with the shipper alone determining how much tobacco was in one unit. In the language of *Pace*, the value and size of the unit was "unlimited, except by the discretion of the exporter or the convenience of handling."[89] The stamp fee was specifically not an ad valorem fee.

In addition, the *Pace* court found that the fee was not excessive in relation to the service provided.[90] The court held that it was reasonable for the government to collect a fee calculated to cover the costs of ad-

78. *See* Pace v. Burgess, 92 U.S. 372, 374 (1875).
79. *See id.*
80. *See id.*
81. *See id.*
82. *See id.*
83. *See id.*
84. *See id.* at 373-74.
85. *See id.* at 375.
86. *See id.*
87. *See id.*
88. *See id.*
89. *Id.*
90. *See id.* at 376.

ministrating a program that gave tax exemption, holding that "[T]he proper fees accruing in the due administration of the laws and regulations . . . are in no sense a duty on exportation. They are simply the compensation given for services properly rendered."[91]

In *U.S. Shoe*, the Supreme Court specifically employed the two prongs of the *Pace* test in order to determine whether the Harbor Maintenance Tax, as applied to exports, was a permissible user fee or a tax.[92] The first prong of the test is the basis of valuation, the method by which the amount of the fee is determined.[93] The Court held that the Harbor Maintenance Tax was based solely on the value of the cargo, a true ad valorem fee.[94] It thus violated the first part of the Pace test. The second prong of the test required that a user fee must be directly related to the cost of the benefit received by the shipper.[95] In applying the second prong of the test to the Harbor Maintenance Tax, the Court noted that "the connection between a service the government renders and the compensation it receives for that service must be closer than is present here."[96] The court held that the Harbor Maintenance Tax violated both aspects of the *Pace* test and thus was a tax, not a constitutionally permitted user fee.[97]

The government argued that ad valorem-based fees had been found permissible by the courts, citing three separate and distinct bases of authority found in the Constitution.[98] Three diverse cases are used to support the argument. *In United States v. Sperry Corp.*, 493 U.S. 52 (1989), Sperry attacked the validity of a 1.5% user fee collected on all claims awarded by the Iran-United States Claims Tribunal, a tribunal established to settle claims related to the freezing of Iranian assets in the United States following the exile of the Shah. In rejecting Sperry's argument, the court held that the user fee was not required to be an exact valuation of the cost in each particular case, but merely a "fair approximation" of the cost of the total administration of the tribunal.[99] This "fair approximation" received from the proceeds of each claim was determined to be a lawful taking under the authority of the Takings Clause.[100] As applied to the Harbor Maintenance Tax, the government argued that the tax was valid, as a more precise valuation of the costs of services rendered to the exporters was not required.[101] Thus, the government argued that the Takings

91. *See id.* at 375.
92. *See* United States Shoe Corp. v. United States, 118 S.Ct. 1290, 1295 (1998).
93. *See id.*
94. *See id.*
95. *See id.*
96. *Id.*
97. *See id.*
98. *See id.*
99. United States v. Sperry Corp., 493 U.S. 52, 60-61 (1989).
100. *See id.* at 58-59.
101. *See* United States Shoe Corp. v. United States, 118 S.Ct. 1290, 1294-95 (1998).

Clause serves to give a constitutional basis of authority to develop an ad valorem based user fee for the Harbor Maintenance Tax.[102]

The government also cites *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972), as authority for the validity of the ad valorem nature of the tax.[103] In *Evansville*, the court upheld a flat user fee charged per person utilizing the flights to and from Dress Memorial Airport in Evansville, Indiana.[104] The Court upheld the validity of the tax as it was a fair compensation for the service rendered by the airport authority.[105] As it did not unnecessarily restrict interstate commerce and travel, the court found that the flat rate fee assessed on all passengers, regardless of destination, was not in violation of the Commerce Clause.[106] In *U.S. Shoe,* the government attempts to apply the *Evansville* holding to the Harbor Maintenance issue, asserting that the fee is "a permissible user fee" for the benefit rendered to the shipper, and thus is a valid user fee under the auspices of the Commerce Clause.[107]

Furthermore, the government looks for support to *Massachusetts v. United States*, 435 U.S. 444 (1978), in which a flat federal fee on aircraft, including state owned aircraft, did not violate a state's immunity from federal taxation. The court in *Massachusetts* held that the fee was a fair compensation for the services provided to state owned aircraft operators, *i.e.*, the efforts of the Federal Aviation Administration, navigational aids, air traffic controllers, etc.[108] In doing so, the court enumerated a three-part test to determine the validity of a user fee.[109] First, the fee could not discriminate against a constitutionally protected interest.[110] Second, the fee must be a fair approximation of the amount of use of the service.[111] Third, the cost must not be excessive in relation to the actual costs of providing the service.[112]

This alternative test is not addressed by the Supreme Court; the second prong of the test is, however, examined in some detail by the court of appeals in the decision on appeal from the Court of International Trade. The first and third elements are ignored completely. The court found that the Harbor Maintenance Tax failed this test on a number of levels. First, the "amount of the [Harbor Maintenance Tax] has no relationship to the

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102. *See id.*
103. *See* United States Shoe Corp., 118 S.Ct. at 1295.
104. *See* Evansville-Vanderburgh Airport Authority Dist. v. Delta Airlines, Inc., 405 U.S. 707, 717 (1972).
105. *See id.*
106. *See id.*
107. *See id.* United States Shoe Corp., 118 S.Ct. at 1295.
108. *See* Massachusetts v. United States, 435 U.S. 444, 466 (1978).
109 *See id.* at 467.
110. *See id.*
111. *See id.*
112. *See id.* at 469.

size or weight of the vessel or the necessary depth of the port required by the vessel."[113] As an example, the court pointed to the reality that a low value, high bulk product (e.g., timber), would pay less Harbor Maintenance Tax than a high value, low bulk product (e.g., computer parts), even though the port needs of the high bulk carrier would be significantly greater.[114] Second, there is no direct correlation between the amount of money collected at a given port and the cost of operating or maintaining that particular port.[115] Third, a true user fee is generally very broadly based, and the court found that the Harbor Maintenance Tax was riddled with too many exempt commodities and port uses to be a true user fee.[116] The court of appeals thus rejected all three of the arguments from the alternative test that the government holds forth for the validity of the Harbor Maintenance Tax as a valid user fee.

In its final decision, the Supreme Court returned to the supremacy of the Export Clause in restricting congressional authority to tax exports as its primary basis for reaching a determination for the constitutional validity of the Harbor Maintenance Tax.[117] *Sperry* is valid under the Takings Clause; *Evansville* is valid under the Commerce Clause; *Massachusetts* is valid under the State's Immunity Clause, but all three fail under the Export Clause.[118] Regardless of other bases for validity, the strict, narrow interpretation of the language of the Export Clause prohibits actions allowable under other Constitutional provisions.

The logic of the Court is simple and straightforward. The Harbor Maintenance Tax fails both prongs of the time-honored *Pace* test.[119] It is therefore not a user fee, but a tax.[120] In the aspect to which this tax is applied to exports, it is unconstitutional, a violation of the specific prohibition on the taxation of exports found in the Export Clause.[121]

V. QUESTIONS REMAINING FOR CONSIDERATION

While not examined by the Supreme Court, the Court of International Trade addressed the definition of "exported articles" to determine the precise nature of an export shipment under the Export Clause.[122] It

113. United States Shoe Corp. v. United States, 114 F.3d 1564, 1572 (Fed. Cir. 1997).

114. *See id.* (referencing United States Shoe Corp. v. United States, 907 F.Supp. 408, 415 (Ct. Int'l Trade 1995)).

115. *See id.*

116. *See id.*

117. *See* United States Shoe Corp. v. United States, 118 S.Ct. 1290, 1296 (1998).

118. *See id.* at 1295.

119. *See id.*

120. *See id.* at 1295-96.

121. *See id.* at 1296.

122. See United States Shoe Corp. v. United States, 907 F.Supp. 408, 415-416 (Ct. Int'l Trade 1995).

defined two tests by which it is possible to determine when a cargo enters the stream of exportation.[123] The first is the "immediacy of the exportation."[124] Even if the cargo has not yet exited the territorial jurisdiction of the United States, if the documents transferring title to the foreign entity have been transferred and the cargo delivered to the carrier, the goods are considered to be in transit for export.[125] While this definition may be helpful in defining an export shipment in theory, there could be possible conflicts with the language of existing international business practices.

The latest revision of the Incoterms 1990, adopted by the International Chambers of Commerce, defines in clear language the rights, responsibilities, duties, and liabilities of shippers and consignees in the process of international transportation of goods.[126] While not binding in terms of international law or treaty,[127] the use of Incoterms in defining transportation responsibilities is often embodied in the language of commercial contracts. Much of the language of the specific Incoterms involves a determination of the point at which the cargo passes hands, the point at which title and liability is transferred.[128]

The differing "legal definition" and "practical definition" could cause some confusion. Consider, for example, a shipper from Chicago moving cargo via intermodal transport (a combination of truck and ocean vessel) to London, England. The terms of the shipment are DDU[129]—delivered, duties unpaid. The shipper is responsible for the goods and maintains title until the goods are delivered to the buyer's door.[130] If the language of the court (cargo tendered to carrier *and* transfer of title) is applied to determine the point at which the cargo enters the "stream of export," then the answer in this case is London. This seems to be a strange conclusion when the cargo has in fact been in transit, out of the United States territorial control for several thousand miles! A possible solution to this confusion is to define the language more succinctly. An export can easily be defined in a manner consistent with the Incoterms and U.S. export policy as follows: A cargo is said to have entered the stream of export transit at the earliest point at which *either* the title is transferred in accordance with the terms of sale (Incoterms), *or* the cargo is tendered to the carrier at the point of export. This distinction would

123. *See id.* at 417.
124. *Id.*
125. *See id.*
126. *See generally* FRANK REYNOLDS, INCOTERMS FOR AMERICANS (1993) ("[s]implify[ing] and answer[ing] questions about Incoterms for U.S. foreign traders"). Incoterms are international sales/shipping terms, used in an attempt to unify agreement on shipping terms.
127. *See id.* at 4.
128. *See id.* at 3-4.
129. *See id.* at 89.
130. *See id.*

avoid either pre-mature or delayed identification of the point at which a cargo enters the stream of export without requiring a re-writing of the Incoterms.

VI. REMEDIES

Another issue confronting the courts following the *U.S. Shoe* decision is the issue of remedies. It is important to note that the decision on the trial court level was one of summary judgment; a full hearing was never undertaken.[131] The requested refund was limited to a request for the tax collected over the prior two years, a statute of limitations found in Customs related claims.[132] In a strongly worded concurring opinion, Judge Musgrave argued that any tax imposed and collected unconstitutionally was a violation of the Fifth Amendment Due Process Clause, a "deprivation of 'life, liberty, or property, without due process of law.'"[133] He further advised a full refund of all Harbor Maintenance Taxes received from exported goods since the inception of the tax.[134] In looking at the impact on the government, Judge Musgrave noted that a full refund will hardly be a strain on the Harbor Maintenance funding system, as only approximately $700 million had been collected in export taxation over the years of the $2.7 billion collected in total.[135] As the current surplus is in excess of $1 billion, with surpluses expected to continue to grow on import revenues alone, he urged a total refund to all exporters who have paid the Harbor Maintenance Tax.[136]

As of July 10, 1998, over five thousand seven hundred claims were pending before the Court of International Trade related to the Harbor Maintenance Tax on exports.[137] Following the Supreme Court's ruling in *U.S. Shoe*, the matter of remedy was returned to the Court of International Trade for adjudication.[138] The court received proposals from plaintiff, defendant, and various third parties, and issued a court order regarding the Harbor Maintenance Claims Resolution Procedure on July 23, 1998.[139] The process outlined in the Court's plan covers claims for refunds of the Harbor Maintenance Tax paid on exports for all claimants

131. *See* United States Shoe Corp. v. United States, 907 F.Supp. 408, 421 (Ct. Int'l Trade 1995).

132. *See id.*

133. *Id.* at 421-422 (Musgrave, J., concurring).

134. *See id.*

135. *See id.* at 426.

136. *See id.*

137. *See* Jack Lucentini, *Judging the Harbor Maintenance Tax*, J. OF COM. (July 6, 1998) <http://www.joc.com>.

138. *See* United States Shoe Corp v. United States, No. 94-11-00668, 1998 WL 419353, at *1 (Ct. Int'l Trade 1998).

139. *See id.*

having a claim before the court dated within two years of the filing of *U.S. Shoe.*[140] The question of the impact of the statute of limitations on older claims is still pending, as is the issue of jurisdiction over claims which have previously not been before the Court of International Trade. The court has selected *Stone Container Corp. v. United States*, Court No. 96-10-02366, and *Swisher Int'l., Inc. v. United States*, Court No. 95-02-00322, to serve as test cases for these as yet unresolved issues.[141] Recognizing that many claimants have claims involving these two issues in addition to claims related to exports only, the court is requiring severance of all other claims from export claims in order to expedite refunds.[142] The process outlined by the court for the refund of the tax paid on exports is straightforward, and progresses in three stages.

The first phase is an initial review of all claims currently before the court.[143] Each claimant will complete a claim form no later than October 15, 1998, and submit it to the United States Customs Service for certification.[144] Customs is then required to search its electronic databases for

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140. *See id.*

141. *See id.* at *2.

142. *See id.*

143. *See id.* at *1.

144. *See id.* The Harbor Maintenance Tax Refund Claim Form is re-created as follows:

HARBOR MAINTENANCE TAX REFUND CLAIM FORM

Date of Filing of First Complaint: ____ __/ _____ / _____
Month Day Year

Instructions: Please supply all of the information requested below. If payment was made under more than one name or exporter identification number, please identify all possible names and EINs. Attach additional sheets if necessary. This form is to be used only by exporters who have filed complaints in the Court of International Trade. Any forms submitted by exporters who do not have a case pending will not be processed.

(cont'd)

1. Name of Plaintiff(s):
2. Exporter Identification Number(s):
3. Exporter Address(es):
4. Please list all complaints and date of filing in the Court of International Trade covered by this refund claim form and attach copies to this form.
5. Has the plaintiff previously received from the Government any refunds of Harbor Maintenance Tax payments on exports for any reason? _____ No. _____ Yes.

If the answer is "yes," please specify the dates and amounts of such refunds:

6. Name and Address to which Harbor Tax Maintenance Payment Report and Certification is to be Mailed____

Payment Information or Documentation Supplied by Plaintiff (optional)

Authorized Representative of Plaintiff

Court No. _____

the payments claimed by the exporter on the claim form.[145] Once this search is completed, Customs returns the form to the claimant on the Harbor Maintenance Tax Payment Report and Certification form.[146] The claimant then has an opportunity to review the information received from Customs.[147] If no discrepancies are found or challenged, the claimant certifies the form, signifying agreement with Customs records, and submits the Form, along with an official judgment to the Department of Justice for signature, and filing with the court.[148]

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145. *See id.*

146. *See id.* The Harbor Maintenance Tax Payment Report and Certification form is recreated in full as follows:

HARBOR MAINTENANCE TAX PAYMENT REPORT AND CERTIFICATION

A. To be completed by Customs:
1. Name of Plaintiff (including all known variations):
2. Exporter Identification Number:
3. Quarterly Payments Not Previously Refunded to Plaintiff
Payment Quarter Amount Paid Date Paid
Total Amount Paid _____
4. Refunds, If Any, Previously Made By Customs
Payment Quarter Amount Refunded Date Refunded
Total Amount Refunded _____
5. Total Amount Due _____
Signature of Customs
B. To be completed by plaintiff:
I hereby certify on behalf of plaintiff that, to the best of my knowledge and belief, plaintiff paid the Harbor Maintenance Tax payments listed in number 3 and is entitled to a refund of those payments as listed in number 5.
Authorized Representative of Plaintiff

147. *See id.* at *2.

148. *See id.* The Judgment form is recreated in full as follows:

JUDGMENT

Pursuant to the procedures established by Order of the Court in Slip Op. 98-____, it is hereby agreed by counsel for the parties,
(A) Plaintiff, _____; and
(B) Defendant, the United States of America ("United States") that:
1. The claims and refunds covered by this Judgment are claims in Court No(s). _____ (attached) relating to payments of the Harbor Maintenance Tax (HMT) on exports.
2. The court has jurisdiction under 28 U.S.C. § 1581(i).
3. The action was commenced on _____.
4. The amounts set forth on the attached Harbor Maintenance Tax Payment Report and Certification were HMT payments for exports that plaintiff has certified were made and that have not previously been refunded.
5. Plaintiff is entitled to refunds of the payments on the attached Harbor Maintenance Tax Payment Report as provided by law in accordance with the

The court is requiring a minimum of five hundred claims to be processed by Customs each month, with the first set to be presented to the court no later than December 15, 1998.[149] An additional five hundred are due each month thereafter.[150] These terms make it clear that the court expects a rapid and systematic refund of all monies due and properly claimed in refund.

The second phase of the process is set to begin no later than March 15, 1999, or sooner if the Phase I review is completed ahead of schedule.[151] In the event that a claimant disagrees with the information provided by Customs on the Certification Form in Phase I, each claimant is required to submit documentation in support of their disputed claim to Customs, who must again attempt to verify the accuracy of the claim.[152] In doing so at this level, a search of the hard copy records is required as well as a search of the electronic databases.[153] It is presumed that many disputes will be settled during this process based on information supplied by the exporters. Once this additional verification is completed, Customs will provide an amended Harbor Maintenance Tax Payment and Certification Form to the exporter as in Phase I.[154] If agreement is reached this time, the claimant will submit the signed Certification, along with a judgment form, to the Department of Justice for signing, filing, and payment.[155]

Phase III is the final step, and is reserved for claims in which disputes are not decided in Phase I and II.[156] In this step, disputes will be brought before the court as would any other dispute for relief involving a

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decision in United States v. United States Shoe Corp., — U.S. ——, 118 S.Ct. 1290, 140 L.Ed.2d 453 (1998).

6. Interest shall be paid on the refunded amounts in accordance with a schedule set by the court should appellate court proceedings in International Business Machines Corp. v. United States, Court No. 94-10- 00625 finally resolve that interest is owing on HMT payments.

7. All other non-severed claims in this action are dismissed.

8. Undersigned counsel for the United States and for plaintiff represent that they are authorized by the United States and plaintiff, respectively, to consent to this judgment form.

9. The refund checks issued pursuant to this judgment shall be mailed to plaintiff within 30 days, care of the undersigned attorneys for plaintiff.

10. Each party will bear its own attorney fees, expenses and costs.

SO ORDERED:

149. *See id.*
150. *See id.*
151. *See id.*
152. *See id.*
153. *See id.*
154. *See id.*
155. *See id.*
156. *See id.*

court-ordered remedy.[157]

One variation of the Phase I documentation process arises due to the nature of the day to day operations of an exporter. Many corporate and individual exporters utilize the services of freight forwarders not only for arranging loading and transportation, but also for export documentation as well. In many instances, this includes the processing and presenting of the Shipper's Export Declaration to customs at the time of export. This document is the source of the information regarding the exporter of record, the exporter's Federal Employee Identification Number, the nature and quantity of goods being exported, and their value. The information from this form was used to compute the amount of the Harbor Maintenance Tax on exports. Many exporters used freight forwarders to compile a quarterly sum of their shipments, and to calculate and pay the Harbor Maintenance Tax on their behalf.

In these cases, the court has recognized that Customs will be faced with an impossible burden in sorting out which payments by which freight forwarder were for the benefit of which exporter.[158] As such, the court is requiring exporters in this category to provide additional detailed information to assist Customs in locating the necessary information, including copies of form CF349, the Quarterly Summary Report, and other forms or compilations that will assist Customs in identifying and properly crediting tax payments.[159]

The issue of interest due on refunds is also currently pending final settlement. While the court has ordered interest to be paid, it recognizes that the government has a right to appeal, and has issued a stay on interest payment pending final resolution.[160] At present, it has selected *International Business Machine Corp. v. United States*, Court No. 94-10-00625 as the test case for determining the payment of interest.[161] Should it find that interest is indeed owed, a second refund will be paid based on the court's interest schedule and the amounts paid to the claimants in the first judgment.[162]

VII. IMMEDIATE EXPANSION OF *U.S. SHOE*

U.S. Shoe holds that the Harbor Maintenance Tax on exports is a violation of the Export Clause.[163] The Court of International Trade wasted no time in applying this ruling to other situations pending before it, fur-

157. *See id.*
158. *See id.* at *1.
159. *See id.*
160. *See id.*
161. *See id.* at *4.
162. *See id.* at *1.
163. United States Shoe Corp. v. United States, 118 S.Ct. 1290, 1296 (1998).

ther dismantling the current Harbor Maintenance Tax in a decision on June 9, 1998, less than three months after *U.S. Shoe*.

In *Princess Cruises, Inc. v. United States*, No. 94-06-00352, 1998 WL 418109 (Ct. Int'l Trade 1998), Princess Cruises brought suit against the United States opposing the collection of Harbor Maintenance Taxes. The statute authorizing the Harbor Maintenance Tax required the tax to be collected not only on goods in export or import, but also on passengers based on the value of the ticket for passengers leaving United States ports.[164] Following the reasoning of *U.S. Shoe*, the court found that since the Harbor Maintenance tax on exports was unconstitutional, and since the statute itself deemed passengers to be "exports" for the purpose of the Harbor Maintenance Tax, the Export Clause controlled in this instance as well.[165] The Court held on summary judgment that cruise passengers are not subject to Harbor Maintenance Tax liability.[166]

Following the order of the Court in *U.S. Shoe* regarding the refund process, the court amended its order in *Princess Cruises* on August 5, 1998, requiring a full refund, plus interest, of all Harbor Maintenance Taxes covered by the *Princess Cruises* opinion.[167]

VIII. THE FUTURE OF HARBOR MAINTENANCE FUNDING

The rule of law is neither created nor maintained in a vacuum; decisions always affect people. While the role of the judiciary has been properly demonstrated in the constitutional review of the Harbor Maintenance Tax, this set of decisions will not change the essential nature of harbors, rivers, and tides. Sand and silt still march inevitably to the sea. The courts have judged, and now the legislature must act. It is left to Congress to provide a proper solution to the harbor maintenance problem, one which will both meet the needs of the Constitution and of the shipping industry. Several models have been proposed as solutions, and the next Congressional session will be forced to fashion a sound policy.[168]

The first model is a historical model. For more than two hundred years, the necessary dredging and maintenance of the ports of the United States were financed by the general treasury.[169] Philosophically, this method recognizes the national interest and benefit of a well-maintained and smoothly-functioning national port system.[170] Such a system invites

164. *See* Princess Cruises, Inc. v. United States, No. 94-06-00352, 1998 WL 418109 at *1 (Ct. Int'l Trade 1998).

165. *See id.*

166. *See id.*

167. *See* Princess Cruises, Inc. v. United States, No. 94-06-00352, 1998 WL 465220 at *1 (Ct. Int'l Trade 1998).

168. *Dredging Harbors*, J. OF COM. (Aug. 27, 1998) <http://www.joc.com>.

169. *See id.*

170. *See id.*

the free flow of import and export cargoes, maintaining the flow of trade. Incoming cargoes move from the ports to all parts of the inland United States, while the goods produced in factories and farms from the heartland move through the same ports.[171] In such a system, the cost of maintaining the port system is not a debit to be found on a Congressional budget report, but a necessary investment in a strategic asset of the nation's economic infrastructure.[172]

The second model is based on pure free market economics. Instead of a nationally funded port system, each individual port would succeed or fail on its own, based entirely on its ability to procure cargoes for import and export.[173] The assumption is that the use of fees for maintenance would be deflated because of competition. Arguably, this would require that some inefficient ports would cease to operate, resulting in lost jobs, revenues, tax bases, and populations. The resulting inequity is a result too severe for modern political realities, and in the grand scheme of things is more likely than not a poor economic decision. Ports do not stand alone. Economic benefits of the ports are spread across a large geographic region. In addition, the natural conditions of some harbors (i.e., varying depths, degrees of silt inflitration, population densities, tides, labor costs) greatly affect the economic viability of some ports. The pure free market model is simply not viable in our current diversified, intermodal, transcontinental, transnational transportation economy.[174]

The third model is one recently proposed by the Clinton administration to replace the current Harbor Maintenance Tax.[175] This model is based loosely on the Harbor Maintenance Tax with a few significant changes, carefully molded and contoured to fit the parameters created by the rulings in *U.S. Shoe*. It will be presented to Congress in early September 1998, but probably will not be acted upon this year.[176]

The model legislation has the goal of raising $980 million, more than twice the current annual expenditures for the harbor maintenance projects.[177] The purpose of the newly-proposed Harbor Services User Fee is to fund a variety of projects, including maintenance dredging, channel deepening, terminal berth dredging, the United States' portion of the operation of the St. Lawrence Seaway,[178] maintenance and operation of the Army Corps of Engineers' fleet of dredging vessels, and the cost of ad-

171. *See id.*
172. *See id.*
173. *See id.*
174. *See id.*
175. *See* Peter Tirschwell, *Shippers, carriers, ports assail Clinton harbor tax structure*, J. OF COM. (Aug. 27, 1998)<http://www.joc.com>.
176. *See* Tim Sansbury, *Clinton team reveals new harbor tax plan*, J. OF COM. (Aug. 26, 1998)<http://www.joc.com>.
177. *See id.*
178. *See* Tirschwell, *supra* note 173, at 1.

ministrating the Harbor Services User Fee program.[179]

The proposed Harbor User Service Fee is a fee levied directly against the user of port services—the vessel owner.[180] Such a fee would pass constitutional muster, at least if applied to the same standard found in *U.S. Shoe*. First, there is no violation of the Export Clause as the assessment is not on an exported cargo, but on a vessel using port services. Second, the above structure would pass the two-prong approach of the *Pace* test. It is not an ad valorem based fee, as neither the value of the cargo nor the vessel is taken into consideration. In addition, the fee would be related to the service rendered, and could be fairly and reasonably calculated and applied directly to the point and amount of use—the vessel.

The fee is based on a new unit of measurement created just for this program, the "vessel capacity unit" (VCU).[181] While it is unclear exactly what a VCU is, and how one is calculated, preliminary indications are that the VCU is based partially on the gross tonnage of a vessel, the net cargo tonnage of a vessel, and a factor related to the amount of the vessel not reserved for carrying cargo.[182] Bulk carriers and tankers will pay the fee for each port entry based on a value per VCU, while container vessels and passenger carriers will pay the fee only on one port of call per voyage.[183] The rates are not fixed, but variable, based on the nature of the cargo.[184] For instance, preliminary reports indicate that containerized cargoes will pay a rate two times that of tankers, five times that of bulk carriers, and seven times that of passengers.[185] These inconsistencies and variables make the calculation of the Harbor User Service Fee unwieldy and unpredictable in terms of revenue projections.

There are many possible criticisms of the Harbor User Service Fee that oppose the funding plan on a variety of philosophical and practical bases. First, it can be argued that the new fee is simply the old tax in new clothing; a de facto tax that will be more than the old Harbor Maintenance Tax and easily passed on to consumers by the vessel owners as a part of the cost of doing business.[186] In addition, the vessel owners as well as the exporters using their services already pay corporate taxes.[187] The additional imposition of the Harbor User Service Fee would be an unfair tax burden, especially as the entire country benefits from the use of the ports and the cargoes moving through them.[188]

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179. *See* Sansbury, *supra* note 174, at 2.
180. *See id.*
181. *See id.*
182. *See id.*
183. *See id.*
184. *See id.*
185. *See id.*
186. *See* Tirschwell, *supra* note 173, at 1.
187. *See id.*
188. *See id.*

Finally, there is some question as to whether the new fee will pass constitutional muster. Part of the Court's analysis, based on the *Pace* rule, requires that the fee be closely related to the service rendered. Some believe that West Coast ports, which move a heavy burden of freight through ports which require little dredging, will pay a disproportionate share of the tax, in essence subsidizing the costs for more expensive, less revenue-producing eastern ports.[189] Only if the port system is considered as an integrated whole could this system meet the proximity test of *U.S. Shoe*.

IX. CONCLUSION

The flow of cargo through the ports of the United States is essential. The ever-increasing size, both in length and draft, of ocean vessels calling United States ports requires modernization and deepening of our channels, berthings, and turning facilities. Such improvements are costly, but necessary. The Court found the cost of the Harbor Maintenance Tax to be too great. No amount of dredging can excuse the imposition the Tax placed on the Constitution.

The decision in *U.S. Shoe* was appropriate. The Court clearly defined the role of the Export Clause in maintaining a proper limitation on the power of the Commerce Clause, and properly applies the time-honored interpretations of *Pace*. In doing so, it affirmed the ideals of the American jurisprudential tradition which require even good and necessary projects, such as the funding of harbor maintenance, to bow to the integrity of the document that is responsible for maintaining not only our commerce and our harbors, but more importantly, our freedoms.

189. *See id.*