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# ***Princess Cruises, Inc. v. United States:* Will the Love Boat Finally Sink the Harbor Maintenance Tax?**

**Sara Lundell**

The Harbor Maintenance Tax<sup>1</sup> has been a thorn in the sides of importers and exporters since its enactment in 1986.<sup>2</sup> It has harmed U.S. ports, effectively diverting trade to Canadian ports.<sup>3</sup> Moreover, the tax violates the United States Constitution when applied to exports<sup>4</sup> and may violate the General Agreement on Tariffs and Trade 1994 (GATT) when applied to imports.<sup>5</sup> Yet the money generated by the tax is necessary for the continued maintenance and improvement of United States ports.<sup>6</sup> The United States Congress should thus abolish the Harbor Maintenance Tax and replace it with an acceptable source of funding.

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1. See *infra* Part I-A.

2. See Nicholas Roegner, *Supremes Sink HMT*, 12 EXPORT PRAC., May 15, 1998, available in 1998 WL 10115964.

3. See Howard Schragin, *U.S. Shoe Corp. v. United States: A Victory for U.S.-Canada Maritime Trade*, 19 FORDHAM INT'L L.J. 1764, 1804 (1996) (discussing the difference in tax liability a shipper faces at U.S. ports—approximately US\$75,000—in comparison to Canadian ports—approximately US\$432-US\$8640).

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

5. See Request for Consultations by the European Communities: United States—Harbour Maintenance Tax, Feb. 16, 1998, available in 1998 WL 61306 (W.T.O.) [hereinafter Request for Consultations by the European Commission]; Request for Consultations: Communication From Canada: United States—Harbour Maintenance Tax, Mar. 3, 1998, available in 1998 WL 92144 (W.T.O.) [hereinafter Request for Consultations by Canada]; Request for Consultations: Communication From Japan: United States—Harbour Maintenance Tax, Mar. 3, 1998, available in 1998 WL 92142 (W.T.O.) [hereinafter Request for Consultations by Japan]; Request for Consultations: Communication From Norway: United States—Harbour Maintenance Tax, Mar. 5, 1998, available in 1998 WL 96663 (W.T.O.) [hereinafter Request for Consultations by Norway].

6. See Tom Ichniowski & Debra Rubin, *Administration Studies Options After Court Nixes Harbor Tax*, ENGINEERING NEWS-REC., Apr. 13, 1998, at 12 (noting the President of the American Association of Port Authorities' statement that Congress must act quickly to prevent critical dredging delays).

This Comment argues that the recently decided *Princess Cruises, Inc. v. United States* should be upheld by the Federal Circuit on review. *Princess Cruises* holds that the Harbor Maintenance Tax, as applied to cruise ship passengers, is an unconstitutional tax on exports. By affirming the lower court's decision, the Federal Circuit will hasten the death of this unconstitutional tax and force Congress to replace it with a source of funding that complies with both the Constitution and GATT.<sup>7</sup>

Part I provides background information about the Harbor Maintenance Tax and examines it in light of the Constitution and GATT. Part II analyzes the Court of International Trade's (CIT) decision in *Princess Cruises*. Part III analyzes the Harbor Maintenance Tax in light of the United States' obligations under GATT. Part IV sets out a proposal for Congress to achieve its goal of an improved navigation system without violating either the Constitution or GATT.

## I. BACKGROUND TO *PRINCESS CRUISES, INC. v. UNITED STATES*

### A. THE HARBOR MAINTENANCE TAX

Congress enacted the Harbor Maintenance Tax (HMT) as part of the Comprehensive Water Resources Development Act of 1986.<sup>8</sup> The Act was designed to improve and maintain the nation's navigable water system by raising funds for required capital expenditures through increased taxes on fuel and a new tax on harbors.<sup>9</sup> Prior to the Act, the costs for such expend-

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7. See *Princess Cruises, Inc. v. United States*, 15 F.Supp.2d. 801, 805 (Ct. Int'l Trade 1998).

8. See Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082. See also the following Public Laws enacted by the 105<sup>th</sup> Congress, which in aggregate appropriate \$3.2 billion from the Harbor Maintenance Trust Fund to pay for general construction, operation, maintenance, emergency repairs and administrative expenses related to the Harbor Maintenance Tax: Energy and Water Resources Development and Appropriations Act, Pub. L. No. 105-62, 111 Stat. 1320, 1325 (1997); Omnibus Consolidated and Emergency Supplemental Appropriations Act, Pub. L. No. 105-277, 112 Stat. 2681, 2681 (1999); Act of May 1, 1998, Pub. L. No. 105-174, 112 Stat. 58, 71; Energy and Water Development Appropriations Act, Pub. L. No. 105-245, 112 Stat. 1838, 1839 (1998); Treasury and General Government Appropriations Act, Pub. L. No. 105-61, 111 Stat. 1272, 1279 (1997).

9. See S. Rep. No. 99-126, at 7 (1986), reprinted in 1986 U.S.C.C.A.N. 6639, 6644; H.R. Rep. No. 99-228, at 5 (1986), reprinted in 1986 U.S.C.C.A.N., 6705, 6709. The Senate report describes the sorry state of the nation's locks and dams—ninety-seven of the 240 existing locks are at least fifty years old—and predicts that capital expenditures of between \$5.2 billion and \$12 billion will be required to rehabilitate them by the year 2003. S. Rep. No. 99-126, at 7-

itures were paid from the general funds of the U.S. Treasury.<sup>10</sup>

The statute imposes the HMT on “any port use,” which it defines as “the loading of commercial cargo on, or the unloading of commercial cargo from, a commercial vessel at a port.”<sup>11</sup> The tax is levied on an ad valorem basis, originally set at 0.04 percent<sup>12</sup> and currently set at 0.125 percent of the value of the commercial cargo being loaded or unloaded in United States ports.<sup>13</sup>

Collected when the cargo is loaded or unloaded,<sup>14</sup> the money from the tax is placed in the Harbor Maintenance Trust Fund and used to pay for all expenses incurred by the Department of Treasury, Army Corps of Engineers, and the Department of Commerce in administering the HMT, “but not in excess of \$5,000,000 for any fiscal year.”<sup>15</sup> This cap on spending has resulted in a current surplus estimated at over \$1 billion in the Harbor Maintenance Trust Fund.<sup>16</sup>

## B. THE HMT AND THE UNITED STATES CONSTITUTION

The United States Shoe Corporation, along with approximately 4000 U.S. exporters,<sup>17</sup> challenged the HMT as a violation of the Export Clause of the Constitution.<sup>18</sup> The Export Clause

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8, reprinted in 1986 U.S.C.C.A.N. at 6644-45. Despite the apparently dire situation facing the inland waterway system, the report lists the “single most significant feature” of the bill as its modern harbor development policy. S. Rep. No. 99-126, at 7-8, reprinted in 1986 U.S.C.C.A.N. at 6645.

10. See Stephen J. Thompson, Port Maintenance and Improvements, and Federal User Fees: Overview and Selected Policy Options, CRS Rep. for Congress 1, 1 (last updated Sept. 24, 1998).

11. 26 U.S.C. § 4461(a) (1996).

12. See S. Rep. No. 99-126, at 9, reprinted in 1986 U.S.C.C.A.N. at 6646; H.R. Rep. No. 99-228, at 5, reprinted in 1986 U.S.C.C.A.N., at 6709-10.

13. See 26 U.S.C. § 4461(b).

14. See *id.* § 4461(c)(2). Accord H.R. Rep. 99-228, at 6, reprinted in 1986 U.S.C.C.A.N. at 6709-10; S. Rep. No. 99-126, at 9, reprinted in 1986 U.S.C.C.A.N. at 6646-47 (stating “[t]he fees will be collected on all cargos loaded and unloaded at America’s commercial harbors, including those in the Great Lakes.”).

15. 26 U.S.C. § 9505(c)(3) (1996).

16. See Schragin, *supra* note 3, at 1803. See also *infra* notes 37-38 and accompanying text.

17. See *United States v. United States Shoe Corp.*, 118 S.Ct. 1290, 1293 n.2 (1998) (noting that 4000 cases raising this claim were stayed in the Court of International Trade (CIT) at the time it decided the case). See also Tracy Hollingsworth, *Refunds for Harbor Maintenance Taxes*, 185 J. Acct. 6, 63 (1998); *Supreme Court Reviews Case Against Federal Cargo Taxes*, LRP Publications Eurowatch, Nov. 28, 1997 (both noting an excess of 4000 cases in the pipeline regarding the HMT).

18. See *United States Shoe Corp.*, 118 S.Ct. at 1293.

states: "No Tax or Duty shall be laid on Articles exported from any State."<sup>19</sup> The CIT and the Court of Appeals for the Federal Circuit both held that the HMT, as applied to exports, is an unconstitutional tax.

In *United States v. United States Shoe Corporation*, a unanimous Supreme Court affirmed the decision of the Federal Circuit.<sup>20</sup> In reaching its conclusion, the Court looked to its most recent decision involving the Export Clause: *United States v. International Business Machines Corp. (IBM)*.<sup>21</sup> IBM held that the Export Clause "categorically bars Congress from imposing any tax on exports."<sup>22</sup> The Court, however, noted that the Export Clause does not bar legitimate user fees, which are fees that lack the attributes of a generally applicable tax or duty and are "designed as compensation for government-supplied services, facilities, or benefits."<sup>23</sup>

To determine whether the HMT was such a fee, the court applied the test it developed in *Pace v. Burgess*.<sup>24</sup> In *Pace*, the challenged provision was an exception to the federal excise tax on tobacco.<sup>25</sup> Congress provided that the tax would not apply to tobacco destined for export. To prevent fraud, Congress required all export-bound tobacco to bear a stamp indicating that intention.<sup>26</sup> The stamps cost twenty-five cents per package, but there was no limit on "the quantity or value of the tobacco pack-

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19. U.S. CONST., Art. I, § 9, cl. 5.

20. 118 S.Ct. at 1295.

21. See *id.* at 1292 (citing *United States v. Int'l Bus. Machs. Corp.*, 517 U.S. 843 (1996)).

22. *United States Shoe Corp.*, 118 S.Ct. at 1296. See also *IBM*, 517 U.S. at 846 (extending Export Clause protection from federal taxation "not only [to] export goods, but also services and activities closely related to the export process.").

23. *United States Shoe Corp.*, 118 S.Ct. at 1292. Accord *Pace v. Burgess*, 92 U.S. 372, 375-76 (1876).

24. See *United States Shoe Corp.*, 118 S. Ct. at 1292 (citing *Pace*, 92 U.S. at 372-76). Although the Court separates the test into these two distinct characteristics in *United States Shoe Corp.*, in the *Pace* opinion this separation is far less clear. In *Pace*, the court seems to decide the issue on the nature and purpose of the fee and merely adds in closing that the constitutional fee is also not excessive. See *Pace*, 92 U.S. at 376. This is more logical than separating the test of whether a fee is merely compensation for services rendered into two parts, since if the fee does only cover costs, than by definition it is not excessive. The only way a fee could pass the first part of the test, yet fail the second is if the costs themselves are excessive. Based on the current surplus in the Harbor Maintenance Trust Fund, perhaps the Court is suggesting that they are.

25. See *United States Shoe Corp.*, 118 S.Ct. at 1295.

26. See *id.*

aged for export or the size of the stamped package.”<sup>27</sup> When the stamp program was challenged under the Export Clause, the Court concluded that the cost of the stamp program was not a tax on exports, but rather “compensation given for services [in fact] rendered.”<sup>28</sup> The Court relied on two factors to arrive at this decision. First, the stamps “bore no proportion whatever to the quantity or value of the package”<sup>29</sup> on which they were affixed. Second, the fee was not excessive.<sup>30</sup>

Applying the *Pace* test to the HMT on exports, the Court found that the HMT failed the first prong.<sup>31</sup> The HMT is applied on an ad valorem basis, set at 0.125% of the value of the cargo intended for export.<sup>32</sup> But, as the Court pointed out, the value of export cargo bears little relation to the amount of government services a vessel carrying such cargo actually uses.<sup>33</sup> The Court agreed with the Federal Circuit that, in order to assess a vessel’s port use, the HMT would have to reflect such relevant factors as “size and tonnage of a vessel, the length of time it spends in port, and the services it requires.”<sup>34</sup> The Court affirmed the Federal Circuit’s judgment that the HMT, as applied to exports, cannot be justified as a legitimate user fee and is instead an unconstitutional tax.<sup>35</sup>

The Court did not find it necessary to address the second prong of the *Pace* test, whether the fee imposed was excessive.

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27. *Id.*

28. *Id.*

29. *Id.* The Court implies that of the three types of tariffs—ad valorem, specific and mixed—an ad valorem tax could never qualify as a legitimate user fee. *See id.* An ad valorem tax is set as a certain percentage of the *value* of the goods taxed. *See* JOHN H. JACKSON ET AL., LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS: CASES, MATERIALS AND TEXT ON THE NATIONAL AND INTERNATIONAL REGULATION OF TRANSNATIONAL ECONOMIC RELATIONS, 373-74 (3d ed. 1995). A specific tax is a flat charge per unit or *quantity* of goods, such as the stamp cost imposed on each package of tobacco in *Pace*. *See id.* Finally, a mixed tax is some combination of the ad valorem and specific taxes. *See id.*

30. *See United States Shoe Corp.*, 118 S.Ct. at 1295.

31. *See id.* at 1292. United States Shoe Corporation had paid the HMT on articles it exported during the period of April-June 1994 and then filed a protest with the Customs Service alleging that the HMT is an unconstitutional tax on exports. *See id.* at 1291. When the Customs Service answered with a letter stating that the HMT is not an unconstitutional tax on exports, but rather a fee imposed on port users, United States Shoe brought an action in the CIT seeking a refund of the taxes it had paid under what it considered a constitutionally prohibited tax on exports. *See id.*

32. *See* 26 U.S.C. § 4461(b) (1996).

33. *See United States Shoe Corp.*, 118 S.Ct. at 1295.

34. *Id.*

35. *See id.* at 1296.

However, it would most likely have found the fee excessive.<sup>36</sup> The Harbor Maintenance Trust Fund has accumulated a large surplus, currently estimated to be from \$650 million<sup>37</sup> to over \$1 billion.<sup>38</sup> This surplus provides substantive evidence that the HMT is excessive and does not reasonably correlate with the cost of services actually used by those who are subject to the tax.<sup>39</sup> It is hard to see how the HMT would qualify as a legiti-

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36. The current surplus in the Harbor Maintenance Trust Fund shows that the fee is much greater than necessary to pay for harbor maintenance costs. See *Supreme Court Reviews Case Against Federal Cargo Taxes*, *supra* note 17.

37. See Schragin, *supra* note 3, at 1803. See also *Supreme Court Reviews Case Against Federal Cargo Taxes*, *supra* note 17 (stating that the surplus is expected to rise to \$3 billion by 2001); Roegner, *supra* note 2 (stating that the Harbor Maintenance Fund currently has more than \$12.4 billion awaiting distribution).

38. See *Hearings before the Water Resources and Env't Subcomm. of the House Comm. on Trans. and Infrastructure*, 105th Cong., (1998) (statement of Harry N. Cook, President of the National Waterways Conference, Inc.), available in 1998 WL 11515806.

39. According to the petitioner, the Supreme Court seems to have followed the lead of the Court of Appeals for the Federal Circuit in ignoring the issue of whether the HMT is excessive and determining the tax's constitutionality on the apparent relation between the cost imposed and the service provided. See Brief for Petitioner at \*19, *United States v. United States Shoe Corp.*, 118 S.Ct. 1290 (1998) (No. 97-372), available in 1997 WL 772730 [hereinafter Brief for Petitioner]. However, both parties addressed the issue in their briefs. See *id.*; Brief for Respondent at \*6, No. 97-372, *United States v. United States Shoe Corp.*, 118 S.Ct. 1290 (1998) (No. 97-372), available in 1998 WL 19842 [hereinafter Brief for Respondent]. The Petitioner emphasizes that the size of the surplus in the Trust Fund is irrelevant because the surplus is not paid into the general revenues of the United States Treasury. See Brief for Petitioner at \*18, n.8. Petitioner relies on the fact that the money in the Trust Fund cannot be used for anything other than operation and maintenance of harbor facilities and on the fact that the Court of Appeals for the Federal Circuit never concluded that the HMT is excessive to support its position that the fees collected under the HMT are not excessive. See *id.* at \*20, n.10. Respondent relies on the CIT's finding that the HMT is excessive because it is used to fund future projects rather than to repay the government for services rendered and because it produces an ever expanding surplus. See Brief for Respondent at \*6. Respondent also argues that surplus is relevant to the question of excessiveness because it shows that the revenues provided by the HMT are clearly in excess of the federal costs of harbor maintenance and there is no evidence which suggests that the surplus is a merely temporary occurrence explainable by the year-to-year fluctuations in need, as the Government contends it is. See *id.* at \*42. It is important to note that both Petitioner and Respondent addressed the issue of excessiveness under the three-prong test set forth in *Massachusetts v. United States*, 435 U.S. 444 (1978) and *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972). However, the Supreme Court expressly stated in *United States Shoe Corp.* that "[t]hose decisions involved constitutional provisions other than the Export Clause, however, and thus do not govern here." *United States v. United States Shoe Corp.*, 118 S.Ct. 1290, 1295 (1998).

mate user fee because it is both unrelated to the services rendered and excessive.

### C. THE HMT AND GATT

On February 6, 1998, seven weeks before the Supreme Court declared the HMT an unconstitutional tax on exports<sup>40</sup> and months before the CIT extended that ruling to taxes imposed on cruise ship passengers<sup>41</sup>, the European Communities submitted a Request for Consultations to the United States and the Dispute Settlement Body of the World Trade Organization (WTO) to challenge the imposition of the HMT on imports.<sup>42</sup> Canada, Japan, and Norway later joined the European Communities in this request.<sup>43</sup> The Request for Consultations alleges that the HMT constitutes an infringement of Articles I, II, III, VIII and X of GATT, as well as the WTO Understanding on the Interpretation of Article II:1(b) of GATT. The arguments supporting the complaining parties' position on each of the challenged provisions are described in Part III, *infra*.

## II. PRINCESS CRUISES, INC. v. UNITED STATES

In *Princess Cruises, Inc. v. United States*, the Princess Cruise Line challenged the imposition of the HMT on its passengers as an unconstitutional tax on exports.<sup>44</sup> The CIT agreed, relying on its own reasoning in *United States Shoe Corporation*.<sup>45</sup> The court found that the definition of commercial cargo

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40. See *United States Shoe Corp.*, 118 S.Ct. at 1292.

41. See *Princess Cruises, Inc. v. United States*, 15 F.Supp.2d 801, 805 (Ct. Int'l Trade 1998).

42. See Request for Consultations by the European Commission, *supra* note 5. See also EUROPEAN COMMISSION, 1998 REPORT ON UNITED STATES BARRIERS TO TRADE AND INVESTMENT 16 (1998) (describing the European Communities' objections to the HMT).

43. See Request for Consultations by Canada, *supra* note 5; Request for Consultations by Japan, *supra* note 5; Request for Consultations by Norway, *supra* note 5.

44. 15 F.Supp.2d 801 (Ct. Int'l Trade 1998). The case arose from an audit conducted by the Customs' Regulatory Audit Division which suggested that Princess had under paid Arriving Passenger Fees and HMT fees for the period spanning 1986-1991. See *id.* at 802. Customs then issued two bills to Princess for the underpayment of fees. See *id.* In response, Princess filed a protest and a lawsuit. See *id.* Pursuant to the Customs regulations, the tax was based on the ticket price paid by the cruise ship passengers "or on the prevailing charge for comparable service if no actual charge is paid." *Id.* at 804.

45. See *id.* at 801-02. "In *U.S. Shoe Corp. v. United States* [citation omitted] this Court held that the Harbor Maintenance Tax was unconstitutional as applied to exports. The decision was affirmed by the Court of Appeals for the

used in the HMT statute, which includes “passengers transported for compensation or hire,”<sup>46</sup> was enough to bring the tax within the Export Clause “even though passengers cannot be said to be ‘exported.’”<sup>47</sup> After determining that the statute equated passengers with export cargo, the court simply applied its holding from *United States Shoe* and concluded that the “HMT, with respect to passengers, also runs afoul of the Export Clause of the Constitution.”<sup>48</sup>

The *Princess Cruises* decision is well reasoned and should stand on appeal. The Court of Appeals for the Federal Circuit is unlikely to reverse the CIT because the reasoning is similar to that of *United States Shoe*. The Supreme Court has unambiguously deemed the HMT, as applied to exports, an unconstitutional tax.<sup>49</sup> Since the statute itself lists passengers as exports,<sup>50</sup> passengers cannot be taxed under the current case law holding the HMT is unconstitutional as applied to exports.

This is the most logical direction for the Court of Appeals for the Federal Circuit to follow.<sup>51</sup> It would otherwise have to engage in linguistic torture to find that the legislature did not mean what it expressly said in the statute—namely, that commercial cargo, defined to include passengers, does not include passengers. While in some situations it may be appropriate to torture the statutory language to preserve the spirit of the law,<sup>52</sup> in this case even the spirit of the law is unconstitutional

Federal Circuit (“CAFC”) [citations omitted], and, finally, by the United States Supreme Court, [citations omitted].” *Id.*

46. 26 U.S.C. § 4462 (3)(a).

47. *Princess Cruises, Inc. v. United States*, 15 F.Supp.2d 801, 804 (Ct. Int’l Trade 1998).

48. *Id.* at 805. Subsequently, the CIT granted the plaintiff’s motion to amend the Judgment to make a more specific order regarding the arriving passenger fee – the other charge at issue in the case – and denied plaintiff’s Motion for Rehearing. *See id.* at 805.

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

50. *See* 26 U.S.C. § 4462(a)(3) (1996). Commercial cargo is defined as “any cargo transported on a commercial vessel, including passengers transported for compensation or hire.” *Id.*

51. *See e.g.*, *Bishop v. Linkway Stores, Inc.*, 655 S.W.2d. 426 (Ark. 1983). The *Bishop* Court stated that “where the meaning of an act or constitutional amendment is clear and unambiguous,” the court has no authority to construe the act as meaning “anything other than what it says.” *Id.* at 428.

52. *See Holy Trinity Church v. United States*, 143 U.S. 457 (1892) (holding that an act prohibiting persons and corporations from assisting foreigners in coming to the United States for employment did not cover a foreign clergyman even though the plain language of the law appeared to cover that line of work). The *Trinity* Court noted that, “it is a familiar rule, that a thing may be within

and would not be helped by an interpretation that is contrary to the plain meaning.

### III. ANALYSIS OF THE HMT AND GATT

#### A. ANALYSIS OF THE HMT AND THE NATIONAL TREATMENT OBLIGATION

Since the Export Clause only prohibits the application of the HMT to exports, its application to imports is still constitutionally valid. However, by removing the HMT from exports while maintaining it on imports, the United States violates its national treatment obligation under GATT.<sup>53</sup> The HMT effectively grants the advantage of tax-free port use to products originating in the United States and denies this advantage to products from countries other than the United States. Discrimination based on country of origin, as the European Communities, Canada, Japan, and Norway have all recognized,<sup>54</sup> is the classic national treatment violation case.

GATT Article III, the national treatment clause, protects like products of foreign origin from being treated less favorably than those of domestic origin.<sup>55</sup> It is likely that the HMT violated Article III from its enactment. The HMT applies to all products imported into the United States via United States ports, yet does not apply to like products produced and consumed within the United States, even if the domestically produced goods are shipped via United States' waterways. This conclusion is reinforced by the Member countries' request for consultations to challenge the HMT even before the tax was removed from exports.<sup>56</sup>

Prior to the removal from exports, the United States may have been able to exonerate the HMT under the "user fee" exception of GATT Articles VIII and II:2(c) by arguing that the HMT did not treat foreign imports less favorably than domestic products because the importers were only paying for services actually rendered. However, the GATT panel, like the Supreme

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the letter of the statute and yet not within the statute, because not within its spirit." *Id.* at 459.

53. See Request for Consultations by the European Commission, *supra* note 5; Request for Consultations by Canada, *supra* note 5; Request for Consultations by Japan, *supra* note 5; Request for Consultations Norway, *supra* note 5.

54. See *id.*

55. See *id.*

56. See *id.*

Court, is unlikely to accept that argument because the HMT bears little relation to the cost of services actually rendered.<sup>57</sup>

Because the HMT most likely violates GATT's general obligations, the United States must look to the authorized exceptions to GATT, Articles XX and XXI, to see if it can justify its tax. Article XX contains general exceptions to GATT. It provides that as long as government measures do not constitute arbitrary or unjustifiable discrimination or a disguised restriction on international trade, those measures that would otherwise violate GATT are permissible if necessary to protect public morals,<sup>58</sup> human, animal or plant life or health,<sup>59</sup> or one of the other enumerated exceptions.<sup>60</sup>

The United States' motive in continuing to apply the HMT against imported goods is purely economic: now that it has lost 30% of the revenue it is accustomed to receiving from the HMT on exports, it needs the remaining 70% derived from taxing importers to fund its harbor maintenance and development costs.<sup>61</sup> Unfortunately, economic strategy in isolation does not fall under the specific exceptions of Article XX. Article XXI Security Exceptions cannot save the HMT either, since the United States cannot argue that it is imposing an import tax in order to protect its essential security interests.<sup>62</sup>

Since the United States' discriminatory action against imports violates the national treatment clause, is not a legitimate user fee, and is not excusable under any of the exceptions, any panel appointed to hear the dispute should find the United States in violation of GATT. If the United States continues to

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57. See *United States v. United States Shoe Corp.*, 118 S. Ct. 1290, 1295 (1998). Being an ad valorem tax, the amount paid is based on the dollar value of the cargo carried by each ship, not on the amount of services that each ship requires.

58. See General Agreement on Tariffs and Trade, Article XX(a), Oct. 30, 1947, 61 Stat. A11, T.I.A.S. 1700, 55 U.N.T.S. 194 [hereinafter GATT].

59. See *id.* art. XX(b).

60. See *id.* art. XX(c)-(j) (listing the following other exceptions: relating to importation or exportation of gold or silver; necessary to secure compliance with other agreements, laws or regulations not inconsistent with GATT; relating to products of prison labour; imposed to protect national treasures or exhaustible natural resources; or necessary to ensure essential quantities of certain materials for a domestic processing industry when the domestic price of material is held below world price, or material is in short supply).

61. See Ichniowski and Rubin, *supra* note 6, at 12. See also Lyle Denniston, *Justices Void Exports Tax for Dredging*, BALTIMORE SUN, Apr. 1, 1998, at 1C (describing concern expressed by shipping interests about finding an alternative means for funding dredging).

62. See GATT, *supra* note 58, art. XXI.

implement the HMT in spite of such a finding, the affected countries could retaliate against United States goods by imposing higher tariffs or other trade restrictions.<sup>63</sup>

B. ANALYSIS OF THE HMT UNDER GATT ARTICLES II AND VIII<sup>64</sup>

GATT Article II:1 requires Members to limit any and all tariffs to those listed in the Schedules.<sup>65</sup> Under Article II:1, unless the United States is charging less than its tariff binding on each and every good imported, and the amount charged counterbalances the imposition of the 0.125% ad valorem tax, the United States is violating its GATT obligations.<sup>66</sup>

Even if the HMT violates Article II:1, however, it may be excused under the specific exceptions listed in Article II:2. Yet, because the HMT has been removed from domestic products destined for export, the HMT would not likely be excused under Article II:2(a) because it is not equivalent to an internal tax on like domestic products. The HMT similarly finds no help from the second exception listed in Article II:2, because the HMT was enacted to fund harbor maintenance and development,<sup>67</sup> not for any anti-dumping or countervailing duty purposes allowed by Article VI.<sup>68</sup>

The only exception which could possibly save the HMT is the user fee exception listed in Article II:2(c) and authorized by Article VIII:1(a). However, when the United States used this ar-

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63. GATT art. XXIII authorizes retaliation for nullification or impairment of benefits where the contracting parties fail to negotiate a mutually satisfactory solution within a reasonable time. *See id.* art. XXIII.

64. Because Article VIII is very similar to Article II:2(c)'s exception to the obligations of Article II, and because the two are frequently analyzed together by WTO Dispute Settlement Panels, this Comment will analyze them together.

65. *See* GATT, *supra* note 58, art. II, § 1.

66. "Each contracting party shall accord to the commerce of the other contracting parties treatment no less favourable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement." *Id.* art. II, § 1(a). This general requirement to limit tariffs on specific goods to a stated maximum is further circumscribed in Article II:1(b) which states that products of foreign origin described in the Schedule "shall, on their importation into the territory to which the Schedule relates . . . be exempt from ordinary customs duties in excess of those set forth and provided for therein." *Id.* art. II, § 1(b).

67. *See* S. Rep. No. 99-126, at 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6644; H.R. Rep. No. 99-228, at 5 (1986), *reprinted in* 1986 U.S.C.C.A.N., 6705, 6709.

68. *See* GATT, *supra* note 58, art. II, § 2(b).

gument in a similar WTO dispute it was unsuccessful.<sup>69</sup> In 1988, a WTO panel assembled at the request of Canada and the European Economic Communities issued a report on a United States import tax enacted in 1986 called the “merchandise processing fee.”<sup>70</sup> This fee, like the HMT, was collected at the port of entry and was imposed on an ad valorem basis originally set at 0.22 percent of the value of merchandise being entered (later reduced to 0.17 percent).<sup>71</sup> In determining whether this fee was indeed a “customs user fee” permissible under Article II:2(c) or Article VIII:1(a), as the United States argued it was, the panel applied a two part test: 1) whether the purported user fee was a customs related user fee; and 2) whether the fee was commensurate with the cost of services provided.

In applying the first prong of the test, the panel used the drafting history of Articles VIII and II:2(c) to support its interpretation of the provisions as pertaining only to customs-related government services, such as “consular transactions,” “statistical services,” and “analysis and inspections.”<sup>72</sup> The merchandise processing fee passed this prong because the revenue received from the fee was exclusively used to fund the commercial operations of the United States Customs Service and therefore qualified as a customs user fee.<sup>73</sup>

The panel then examined whether the fee imposed was “commensurate with the cost of services rendered” as required by Article II:2(c),<sup>74</sup> or was limited “to approximate cost of services rendered” as required by Article VIII:1(a).<sup>75</sup> The panel concluded that “cost of services rendered” means the actual cost of

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69. *See* United States – Customs User Fee, Feb. 2, 1988, GATT B.I.S.D. (35th Supp.) at 245 (1989) [hereinafter Customs User Fee].

70. *Id.* at 247.

71. *See id.*

72. *See id.* at 275. The Panel noted that there is a well established understanding of the concept of “services rendered” in Articles II:2(c) and VIII:1(a) that the term means “government activities closely enough connected to the processes of customs entry that they might, with no more than the customary artistic license accorded to taxing authorities, be called a ‘service’ to the importer in question.” *Id.* at 276.

73. *See id.* at 247-48. In contrast to the HMT, whose Trust Fund provides funding to the Army Corps of Engineers as well as the Departments of Commerce and the Treasury, receipts from the merchandise processing fee were deposited into a sub-account of the general “Customs User Fee Account” and could only be used to by the U.S. Customs Service. *See id.*

74. *Id.* at 275.

75. *Id.* at 276-77.

services provided to the importer.<sup>76</sup> The panel therefore concluded that the ad valorem method of the merchandise processing fee violated GATT.<sup>77</sup> The panel went to great lengths to point out that the exception granted by Article II:2(c) is an extraordinary exception because it does not comport with the policy justifications of GATT (generally, to reduce all trade barriers and restrict remaining trade barriers to negotiated tariffs set out in the Schedules).<sup>78</sup> Therefore, the panel concluded, “[t]he exception stated in Article II:2(c) requires particularly strict interpretation.”<sup>79</sup>

In light of this report, it seems doubtful that the United States would prevail were it to advance a similar argument in the case of the HMT. First, since the HMT revenues were never intended to relate to customs,<sup>80</sup> the HMT would most likely fail the first prong of the test. The HMT would also likely fail the second prong because the amount collected under the fee has no relation to the value of services provided. The Supreme Court’s *United States Shoe* decision could be adduced in support of such an argument.<sup>81</sup>

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76. *Id.* at 277. See *supra* note 72 and accompanying text (describing what is allowable as a “service” under GATT Articles VIII and II:2(c)).

77. See Custom User Fee, *supra* note 69, at 279.

78. See *id.* at 278.

79. *Id.*

80. See 26 U.S.C. § 9505(c) (1996). The statute lists the types of expenditures that are authorized to derive from the Harbor Maintenance Trust Fund as:

(1) to carry out section 210(a) of the Water Resources Development Act of 1986 [this act provides 100% of the eligible costs to operate the Saint Lawrence Seaway and 40% of the eligible operations and maintenance costs necessary for commercial navigation in all harbors and inland harbors within the U.S.] (2) for payments of rebates of tolls or charges pursuant to section 13(b) of the Act of May 13, 1954, and (3) for the payment of all expenses of administration incurred by the Department of the Treasury, the Army Corp of Engineers, and the Department of Commerce related to the administration of subchapter A of chapter 36 (relating to harbor maintenance tax), but not in excess of \$5,000,000 for any fiscal year.

*Id.* See also H.R. 99-1013 § 210 (Oct. 17, 1986). Notably, United States Customs Service appears nowhere on the list of authorized expenditures.

81. See *United States v. United States Shoe Corp.*, 118 S.Ct. 1290, 1295 (1998).

C. ANALYSIS OF THE HMT UNDER ARTICLES X AND THE UNDERSTANDING ON THE INTERPRETATION OF ARTICLE II:1(b)

Since the challenges to the HMT are still pending, the information available on the complaining parties' arguments is very sparse.<sup>82</sup> Some degree of speculation is therefore required about what aspect of the HMT they are actually challenging when an Article under which they are challenging it contains multiple obligations. Such is the case with Article X and the Understanding on the Interpretation of Article II:1(b) (Understanding). However, given what is known about the HMT, it is fairly safe to assume that it is being challenged under Article X and the Understanding because it was not "published in such a manner as to enable governments and traders to become acquainted" with it<sup>83</sup> and because it was not recorded in the United States' Schedule of concessions.

IV. PROPOSED ALTERNATIVE TO THE HMT:  
A VALID USER FEE

The preceding arguments have demonstrated that the HMT is a sinking ship. Instead of waiting for it to go down, Congress should propose a new method to generate funds for the maintenance of United States ports and harbors that comports with the Constitution and GATT. The continued need for such funds is clear<sup>84</sup> and therefore a legitimate user fee should be enacted.<sup>85</sup> This fee should be carefully designed to pass the Constitutional

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82. I contacted the United States Trade Representatives Office, the Department of Commerce and the Delegation for the European Union, all to no avail. No Executive Branch representatives would speak with me, claiming they could not comment while litigation was pending. The representatives in the Washington, D.C. Office of the Delegation for the European Communities had no information about the arguments the Office planned to make should the request for consultations be granted.

83. GATT, *supra* note 58, art. X:1.

84. See *supra* note 6 and accompanying text. *But see* Thompson, *supra* note 10, at 4 (stating that most ports would take the necessary action to provide ship channels deep enough to accommodate today's largest ships were the federal government to stop providing such services).

85. The only other alternative is for the government to impose a tax at the manufacturing level rather than at the time of export or import. Such a tax was upheld in *Turpin v. Burgess*, 117 U.S. 504 (1886) (holding that the Export Clause only prohibits taxes on goods being exported and not goods merely intended for export). However, such a tax would only help replace the income lost from the tax on exports, since the United States has no authority to tax manufacturing in other countries.

and GATT user fee tests set forth in *Pace* and in Articles II and VIII of GATT.

In order to pass the *Pace* test for exports and avoid an unconstitutional export tax, the new fee must bear no relation to the value of the goods shipped.<sup>86</sup> Instead, the new fee must be closely related to the amount of government services the ship actually uses.<sup>87</sup> Congress would be wise to include the factors enumerated by the Court of Appeals for the Federal Circuit in *United States Shoe* and have the fee reflect "size and tonnage of a vessel, the length of time it spends in port, and the services it requires."<sup>88</sup> Finally, to ensure that the new fee passes the *Pace* test, it must not be excessive.<sup>89</sup> The entire amount collected by the fee must be used for its stated purpose, and the Harbor Maintenance Trust Fund's current surplus must be spent down.

To qualify as a legitimate user fee under GATT, the new fee must be customs related, and the amount must be commensurate with the cost of the actual services rendered. In addition, it must not result in indirect protection of domestic products or taxation of imports or exports for fiscal purposes.<sup>90</sup> That means that the new fee should only cover the cost of actual services each shipper uses, regardless of the products' country of origin or destination, and should not produce any excess revenue. Also, in order to comply with the Understanding on the Interpretation of Article II:1(b), the new user fee must be recorded in the United States Schedule of concessions.<sup>91</sup>

The Clinton Administration has already drafted a plan to replace the HMT but has not yet submitted it to Congress.<sup>92</sup> The new plan, the Harbor Services User Fee (HSUF),<sup>93</sup> is designed to conform to the Constitution and GATT, while providing funds for the maintenance of existing waterways and the construction of additional capital improvements to the nation's ports.<sup>94</sup> The fee is based on ship size and service category.<sup>95</sup> Each ship's vessel capacity will be determined and expressed in

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86. See *supra* note 28 and accompanying text.

87. See *supra* notes 28-30 and accompanying text.

88. *United States v. United States Shoe Corp.*, 118 S.Ct. 1290, 1295 (1998).

89. See *supra* note 30 and accompanying text.

90. See GATT, *supra* note 58, art. VIII:1(a).

91. See *supra* note 83 and accompanying text.

92. See Tim Sansbury, *Clinton Harbor Fee Plan Deferred* (Oct. 6, 1998) (on file with the Minnesota Journal of Global Trade).

93. See *Harbor Services User Fee and Harbor Services Fund* (Aug. 24, 1998) (on file with the Minnesota Journal of Global Trade).

94. See *id.* at 2.

95. See *id.* at 3.

vessel capacity units (VCU).<sup>96</sup> The Shipowner or Shipper will then be charged a certain fee per VCU based on the ship's category: General, Bulker, Tanker or Cruise.<sup>97</sup> The plan states that the categories "were chosen because there are significant differences in the level of service they require."<sup>98</sup> Ships in the General category require channels to be maintained at full dimensions and are therefore charged at the highest rate. Ships in the other three categories require fewer harbor services, as they sail at a less controlling depth or do not operate on strict time schedules and thus can wait for tides or one-way traffic scheduling. Thus, they are charged at lower rates.<sup>99</sup> The HSUF is projected to generate approximately \$1 billion per year, slightly more than is currently collected under the HMT.<sup>100</sup>

Since the new fee will be based on ship size and category rather than on the value of the goods shipped, it would easily pass the first prong of the *Pace* test for legitimate user fees.<sup>101</sup> However, *Pace* also requires that the fee not be excessive.<sup>102</sup> The Administration will have to substantiate its choice of the various fees charged with evidence of the actual cost of services provided in order pass this prong of the *Pace* test. The Council of European & Japanese National Shipowners' Associations claims that the new plan is excessive because it "may disproportionately impact low value, high volume cargo, with the result that some imports or exports may no longer be commercially viable."<sup>103</sup> It thus seems likely that Congress will demand proof that this fee is actually related to the costs of services used by the ships before enacting the HSUF.

If the new plan passes the *Pace* test, it will most likely comply with GATT as well.<sup>104</sup> Like *Pace*, Articles II:2(c) and VIII require that the new fee be commensurate with the actual services rendered. GATT Articles VIII and II:2(c) add the require-

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96. *See id.*

97. *See id.*

98. *Id.*

99. *See id.*

100. *See id.* at 2.

101. *See supra* note 28-30 and accompanying text.

102. *See supra* note 30 and accompanying text.

103. Counsel of European & Japanese National Shipowners' Association, *Talking Points on Proposed Harbor Services User Fee* (Sept. 15, 1998) (on file with the *Minnesota Journal of Global Trade*). However, if these high volume, low value bearing ships are indeed contributing to the wear and tear of the ports and harbors, it is only fair that they bear some of the cost of the services which keep the ports open for their use.

104. *See supra* notes 86-91 and accompanying text.

ment that the service be related to customs. Assuming that Congress ensures that the new fee is tied to customs by, for example, imposing it as a license to import via U.S. harbors, the fee should be considered a legitimate customs fee.<sup>105</sup> GATT Articles II:2(c) and VIII also require that the fee not result in indirect protection of domestic products. Since this new fee is a user fee and not a tax, it can be constitutionally applied to domestic, import, and export ships, thereby eliminating any danger of indirect domestic protection.

The Administration's plan is an improvement over the HMT. Congress, however, should not wait for the Administration to submit it. Rather, using the Administration's draft proposal, Congress should confer with constituents who will be affected by the plan and enact a version which complies with both the Constitution and GATT, while providing the least amount of interference to the shipping industry. If it does so, Congress may even please constituents who have never heard of the HMT, because a customs user fee can be scored as a spending cut.<sup>106</sup> The Congressional Budget Office reasons that, since the government is already providing the service, initiating a fee decreases the cost to the government.<sup>107</sup> This scoring is only available to fees actually linked to benefits persons receive<sup>108</sup> and is therefore applicable to the proposed user fee. Congress should take a hint from popular culture: Captain Stubing and the original Love Boat crew have been replaced by a new and improved version; the Harbor Maintenance Tax should be replaced by a new and improved fee which comports with the Constitution and GATT.

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105. See GATT, *supra* note 58, art. VIII:4(d) (listing licenses among the fees allowable as a fee or charge in connection with importation or exportation).

106. See *Administration to Score User Fees as Spending Cuts to Finance GATT*, INSIDE U.S. TRADE (July 8, 1994) <[http://www.insidetrade.com/sec-cgi/as\\_web.exe?SEC\\_IT1994+D+3494783](http://www.insidetrade.com/sec-cgi/as_web.exe?SEC_IT1994+D+3494783)>.

107. See *id.*

108. See *id.*

