HMT – A Tax, or Not a Tax? That is But the First of Many, Many Questions

Congress enacted the Harbor Maintenance Tax ("HMT") as part of the Water Resources Development Act of 1986.[1] In its original form, the HMT imposed a uniform charge of 0.125 percent of the cargo's value on shipments coming into and going out of U.S. ports. Exporters were liable for the HMT at the time of loading and importers were liable at the time of unloading. Congress intended that the funds would help finance the general maintenance and improvement of U.S. ports.[2]

Once promulgated, the HMT touched the movement of virtually all people and goods in and out of the United States and precipitated a flood of litigation that included thousands of complaints relating to constitutionality, jurisdiction, foreign trade zone ("FTZ") admissions, warehouse entries, foreign military articles, shipments to the Outer Continental Shelf , and more. A customs encyclopedia could be written using the HMT jurisprudence alone.

At the helm was Judge Jane A. Restani.

Judge Restani sat on the original three judge panel with Chief Judge DiCarlo and Judge Musgrave to determine the first of many challenges: Did the HMT contravene the Export Clause's mandate that "[n]o Tax or Duty shall be laid on Articles exported from any State?"[3] From there, Judge Restani tackled other constitutional challenges, questions of jurisdiction, and a myriad of other issues that surfaced as the trade community worked to decipher the legal and practical ramifications of the new law. In the end, Judge Restani's legal acuity and large case management strategy resulted in an orderly and efficient resolution of the winding, lengthy, and complex HMT disputes.

Part One:

Legal Implications

The panoply of legal challenges that Judge Restani adjudicated in the context of the promulgation of the HMT challenges could provide the foundation of any "Customs 101" class. Starting with the United States Constitution, Judge Restani's opinions parsed and determined issues of severability, interest, jurisdiction, statute of limitations, administrative process, protestability, FTZs, and more. For the purposes of this paper, we have highlighted just a few of the challenges argued before Judge Restani.

The United States Constitution

To start, in *United States Shoe Corporation*, Judge Restani—in a three-judge panel with Chief Judge DiCarlo and Judge Musgrave—was asked to determine whether the HMT as imposed upon merchandise exported from the United States passed constitutional muster under the Export

[1] 26 U.S.C. §§ 4461–62, as promulgated by Pub. L. 99-662, § 1402, 100 Stat. 4082, 4266-69 (Nov. 17, 1986).

[2] *Esso Standard Oil Co. (PR) v. United States*, 559 F.3d 1297, 1298 (Fed. Cir. 2009).

[3] U.S. CONST. art. 1, § 9, cl. 5.

Clause.[4] Article 1, Section 9, Clause 5 of the U.S. Constitution provides that "[n]o Tax or Duty shall be laid on Articles exported from any State." After determining that the U.S. Court of International Trade had jurisdiction to hear and determine constitutional issues, the court concluded that Congress's "power to regulate commerce [did] not eclipse the Export Clause."[5]

For the HMT to withstand the constitutional challenge, the court reasoned that it would need to find that the charge defrayed costs of services rendered and that the charge was not excessive.[6] Citing the *ad valorem* HMT's "little nexus" to port maintenance costs and lack of a "mechanism to ensure that the fees collected will be used only or primarily for the cost of port maintenance associated with the shipping" being taxed, the court determined that the HMT was not a permissible "user fee" imposed under Congress's Commerce Clause powers.[7] Accordingly, the court held the HMT "as it applie[d] to exports constitute[d] a tax prohibited by the Export Clause."[8] This decision was upheld by the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit") and, ultimately, the United States Supreme Court.[9]

Equally important to exporting parties, *U.S. Shoe* concluded by determining the jurisdictional basis upon which exporters could seek refunds of HMTs paid upon exports. Two subsections of the court's jurisdictional statute were in tension, each potentially providing parties a route for judicial review but imposing very different prerequisites and deadlines for seeking review. Under 28 U.S.C. § 1581(a), the court has jurisdiction to review the U.S. Customs Service's ("Customs") denial of a protest. At that time, a party was required to protest a Customs decision within ninety days of the date of that decision (*e.g.*, liquidation).[10] On the other hand, 28 U.S.C. § 1581(i) invests the court with broad residual jurisdiction over tariff disputes. Litigants may commence such actions "within two years after the cause of action first accrues."[11] However, jurisdiction under § 1581(i) is not available if another subsection of § 1581 could afford would-be litigants an adequate remedy.[12]

The three-judge panel held that jurisdiction lay under 28 U.S.C. § 1581(i).[13] This determination of the jurisdictional basis upon which exporters could seek HMT refunds resulted in a conversation between Judge Restani and the Federal Circuit that lasted over a decade.

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[4] *U.S. Shoe Corp. v. United States*, 907 F. Supp. 408 (Ct. Int'l Trade 1995) ("*U.S. Shoe*").

[5] *Id.* at 412.

[6] *Id.* at 414.

[7] *Id.* at 415 (internal quotation marks omitted).

[8] *Id.* at 413.

[9] *See United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998).

[10] 19 U.S.C. § 1514(c)(3)(B). Today, the period is 180 days. *Id.*

[11] 28 U.S.C. § 2636(i).

[12] *Miller & Co. v. United States*, 824 F.2d 961, 964 (Fed. Cir. 1987).

[13] 907 F. Supp. at 421.

Jurisdictional Basis for Seeking HMT Refunds

In one of the first cases to arise after the Supreme Court's decision affirming the unconstitutionality of export HMTs, Judge Restani addressed jurisdiction and the time period for bringing actions to recover export HMTs. In *Swisher International*, Judge Restani held—consistent with *U.S. Shoe*—that the denial of a refund request was not a protestable decision reviewable under § 1581(a).[14] Rather, the court's residual § 1581(i) jurisdiction governed.[15] The Federal Circuit reversed, holding that the Supreme Court's HMT decision did not limit other challengers to the residual jurisdiction subsection (and two-year statute of limitations) and that denial of a request to refund export HMTs was a "charge or exaction" and, therefore, a protestable decision reviewable under the Court of International Trade's § 1581(a) jurisdiction.[16]

When it came to HMTs applied to imports,[17] Judge Restani reasoned in *Thomson Consumer Electronics* that the court's residual jurisdiction under § 1581(i) was only available if "jurisdiction is not available under any other provision of 28 U.S.C. § 1581 or if relief under such other provision would be manifestly inadequate."[18] Applying this standard, Judge Restani held that judicial review was available only under § 1581(a) because challenges to the liquidation of entries assessed HMTs were to be made by way of protest pursuant to 19 U.S.C. § 1514(a).[19] As such, the failure to protest the entries made the liquidation of those entries final and judicial review unavailable.[20] The Federal Circuit reversed, however, finding that to protest the constitutionality of the HMT as it applied to imports before Customs "would be an utter futility." Importers were not required to do so before seeking judicial review and, accordingly, the Court of International Trade had jurisdiction to hear the challenge under § 1581(i).[21]

Judge Restani recognized the tension created by this jurisdictional back and forth, noting that the Federal Circuit did not explain "why § 1581(i) could be utilized in *U.S. Shoe*, even though in *Swisher* the court found that § 1581(a) was available to parties who filed or could file refund requests."[22] Ultimately, in *M.G. Maher*, Judge Restani swept the conversation between the two courts into as neat a pile as possible, elucidating as follows: the HMT saga having finally reached a point wherein the courts and Customs had made the availability of HMT export refunds "very

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[14] *Swisher Int'l, Inc. v. United States*, 27 F. Supp. 2d 234 (Ct. Int'l Trade 1998).

[15] *Id.* (consequently, some claims were time-barred by the two-year limitations period).

[16] *Swisher Int'l, Inc. v. United States*, 205 F.3d 1358 (Fed. Cir. 2000).

[17] Judge Restani determined in *Amoco Oil Co. v. United States*, 63 F. Supp. 2d 1332 (Ct. Intl. Trade 1999), that the export provision of the HMT was severable and thus that the HMT could be applied to imports and did not violate the Uniformity Clause or Port Preference Clause of the U.S. Constitution. Judge Restani also determined a separate constitutional issue and held that the HMT did not violate the Export Clause as it applied to interstate shipments. *Florida Sugar Marketing and Terminal Ass'n, Inc. v. United States*, 40 F. Supp. 2d 479 (Ct. Int'l Trade 1999).

[18] *Thomson Consumer Electronics, Inc. v. United States*, 62 F. Supp. 2d 1182, 1184 (Ct. Int'l Trade 1999).

[19] *Id.*

[20] *Id.*

[21] *Thomson Consumer Electronics, Inc. v. United States*, 247 F.3d 1210 (Fed. Cir. 2001).

[22] *M.G. Maher & Co., Inc. v. United States*, 26 Ct. Int'l Trade 1040, 1041 (2002) ("*M.G. Maher*").

clear" to would-be claimants, "HMT refund seekers must pursue claims through customs" and "rejection of such refund requests will lead to § 1581(a) jurisdiction."[23] In that case, the *M.G. Maher* plaintiffs had not done so.[24] Rather than dismiss the action for failure to complete a statutorily required administrative process, Judge Restani called a spade a spade, recognized that "jurisdiction in this area is unsettled," considered the merits "in the interest of judicial economy," and dismissed the claim,[25] thus resolving another group of HMT-related disputes implicating a substantial class of plaintiffs.

Issues Abound

Determining the jurisdictional basis under which the court could preside over HMT claims was just the tip of the iceberg of issues that Judge Restani was required to resolve.[26] Judge Restani presided over issues regarding interest,[27] FTZ admissions,[28] insular possessions,[29] the Outer Continental Shelf,[30] and many more.

One of the most tumultuous issues was whether the HMT was a "tax" at all. Congress instructed that the HMT be administered and enforced as if it were a customs duty.[31] For purposes of the Export Clause, the HMT was determined to be a violative tax.[32] For purposes of imports,

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[23] *Id.*

[24] *See id.* at 1041-42.

[25] *Id.* Plaintiffs' substantive claim challenged Customs' creation of a regulatory deadline for filing HMT refund claims. *See generally id.*

[26] It must be noted that given the sheer quantity and variety of HMT disputes, many other HMT cases were handled by other judges. For example, Judge Musgrave generally handled the line of cases reviewing drawback issues, *see e.g.*, *Texport Oil Co. v. United States*, 1 F. Supp. 2d 1393 (Ct. Int'l Trade 1998), and resolved issues of HMT application to cruise line passengers, *see e.g.*, *Princess Cruises, Inc. v. United States*, 15 F. Supp. 2d 801 (Ct. Int'l Trade 1998).

[27] *IBM v. United States*, 22 Ct. Int'l Trade 519 (1998), *rev'd*, 201 F.3d 1367 (Fed. Cir. 2000) (finding that Congress had not waived sovereign immunity by expressly consenting to such interest payments on export HMT refunds).

[28] *BMW Mfg. Corp. v. United* States, 23 Ct. Int'l Trade 700 (1999) (determining HMT on FTZ admissions were legal because the HMT was not a customs duty for purposes of the statute providing that customs duties are not paid on FTZ admissions), *aff'd*, 241 F.3d 1357 (Fed. Cir. 2001).

[29] *Esso Standard Oil Co. v. United States*, 31 Ct. Int'l Trade 1848 (2007) (holding that Customs should have refunded HMT paid on shipments between insular possessions because Esso's payment was a correctable inadvertence stemming from Customs' decades-long failure to amend its regulations to reflect that HMT was not owed), *rev'd in part*, 559 F.3d 1297 (Fed. Cir. 2009) (holding that erroneously paid HMT was not a correctable error because it was a mistake of law that did not qualify as a correctable inadvertence).

[30] *Aker Gulf Marine v. United States*, 138 F. Supp. 2d 1304 (Ct. Int'l Trade 2000) (holding, with regard to shipments to offshore oil platforms on the Outer Continental Shelf, that because the shipment was not an export as it was not to a foreign country, the HMT applied, and the governing regulations did not exempt the shipments from the HMT).

[31] 26 U.S.C. § 4462(f)(1) (1986).

[32] *U.S. Shoe*, 907 F. Supp. at 408.

however, the HMT was determined to be a user fee.[33] As Judge Restani clarified, "[i]n these areas of constitutional jurisprudence, a revenue measure may be discussed as a tax and yet still be considered a constitutionally-valid user fee."[34]

When exempting imports of foreign military articles, however, the HMT was considered an internal revenue tax.[35] Likewise, for purposes of statutory provisions relating to jet fuel imported into bonded warehouses, the HMT was an internal revenue tax.[36] And, notwithstanding Congress's instructions concerning how the HMT was to be administered,[37] in substance the HMT was not a customs duty for purposes of FTZs.[38]

There were over a thousand claims filed challenging different aspects of Congress's promulgation of the HMT as it related to the administration of customs laws. Judge Restani paired her ability to parse and analyze the issues with the her ability to organize an efficient and comprehensive system by which to methodically address the claims filed.

Part Two:

Large Case Management

Then and now, Rule 1 of the Rules of the U.S. Court of International Trade has provided that Judges of the Court should administer matters according to its Rules in order to "secure the just, speedy, and inexpensive determination of every action and proceeding." This is an extremely tall order when managing litigation implicating over $730 million in refundable taxes and as many as 100,000 potential claimants whose claims "range from less than one hundred dollars to hundreds of thousands of dollars."[39] No less than Judge Restani's substantive legal analysis, the Judge's efforts to ensure that justice delayed (or unnecessarily complicated) did not become justice denied are a testament to her clarity of thought.

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[33] *Thomson Multimedia Inc. v. United States*, 219 F. Supp. 2d 1322 (Ct. Int'l Trade 2002) (holding HMT is a constitutional tax based on *U.S. Shoe*), *aff'd*, 340 F.3d 1355 (Fed. Cir. 2003) (holding HMT was constitutional as applied to imports but was a user fee rather than a tax).

[34] *Nippon Express USA, Inc. v. United States*, 28 Ct. Int'l Trade 1845 (2004).

[35] *Id.*

[36] *CITGO Petroleum Corp. v. United States*, 104 F. Supp. 2d 106 (Ct. Int'l Trade 2000) (holding that the HMT paid upon jet fuel imported into bonded warehouses and later withdrawn as supplies for aircraft fit within the meaning of an internal revenue tax for purposes of 19 U.S.C. § 1309, which provides that supplies for aircraft registered in the United States and engaged in foreign trade may be withdrawn from any customs bonded warehouse free of duty and such taxes).

[37] *See* 26 U.S.C. § 4462(f)(1) (1986).

[38] *BMW Mfg. Corp.*, 23 Ct. Int'l Trade at 700; *see also* note 28, *supra*.

[39] *See Baxter Healthcare Corp. v. United States*, 925 F. Supp. 794, 796 (Ct. Int'l Trade 1996) (nothing the number of potential claimants and range in claim size); Heather Pichelman, Note, "It's Pay-Up Time for the Government on the Harbor Maintenance Tax: Exporters Are Receiving Their Tax Refunds, but What About Interest?" 11 FED. CIR. B.J. 427, 427 (2001) (stating that the government had refunded approximately $732 million dollars to exporters as of October 2000).

The Appropriateness of Class Certification

After the three-judge panel of Chief Judge DiCarlo, Judge Musgrave, and Judge Restani issued its opinion in *U.S. Shoe* and stayed execution of the panel's judgment pending appeal,[40] Chief Judge DiCarlo assigned Judge Restani to guide the sweeping litigation through to an orderly conclusion.[41] Importantly, *U.S. Shoe* represented a "test case" procedure, similar to how the court has thus far handled adjudication of the well over 3,000 Section 301 tariff assessment challenges.[42] Out of "[m]ore than one thousand cases" challenging the constitutionality of export HMTs, only *U.S. Shoe* was taken up to "test" those arguments while the remainder were stayed.[43]

However, insofar as the HMT only amounted to a 0.125% *ad valorem* assessment on exports, certain would-be claimants stood to recover only a relatively small dollar amount. Seeing the potential for class certification under these circumstances, a motion was put to the court. As appellate proceedings wore on, Judge Restani turned to this issue. In *Baxter Healthcare*, Judge Restani recognized that "{r}epresentative plaintiffs' claims are substantial; no conflicts appear; and counsel are experienced. The real point of debate is whether, as a discretionary matter, a class action should be maintained…"[44]

Judge Restani concluded that it should not, holding that the test case procedure was adequate.[45] While recognizing that small claimants faced a "proportionally heavier burden" in having to file their own case,[46] Judge Restani correctly observed that HMT refunds "cannot be paid out without appropriate documentation" such that "{t}he claims resolution process will be cumbersome, but manageable, whether or not a class is certified."[47] The case had been well-publicized, and all HMT refund litigation would be concentrated at the U.S. Court of International Trade regardless, given its unique jurisdictional statute.[48] Judge Restani did not cite Rule 1 of the Rules of the U.S. Court of International Trade, but in essence the Judge concluded that class certification would not result in "just, speedy, and inexpensive determination" of the mega-litigation.

Getting Refunds to Successful Plaintiffs

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[40] *See U.S. Shoe Corp. v. United States*, 19 Ct. Int'l Trade 1413 (1995) (Judgment); *U.S. Shoe Corp. v. United States*, 19 Ct. Int'l Trade 1419 (1995) (Order staying Judgment).

[41] *See Baxter Healthcare*, 925 F. Supp. at 798. As acknowledged in *Baxter Healthcare* and noted above in note 26, *supra*, certain specific disputes were adjudicated by Judge Musgrave.

[42] *See generally In re* Section 301 Cases, 524 F. Supp. 3d 1355 (Ct. Int'l Trade 2021).

[43] *Baxter Healthcare*, 925 F. Supp. at 796. To permit the "test case" panel to address as many relevant legal arguments as feasible, amicus parties were invited to submit papers in *U.S. Shoe*.

[44] *Id.* at 797.

[45] *Id.* at 800.

[46] *Id.*

[47] *Id.* at 799.

[48] *See id.* at 798, 800; *see also* 28 U.S.C. § 1581.

When on March 31, 1998, the U.S. Supreme Court issued its opinion affirming the unconstitutionality of the export HMT,[49] it fell to Judge Restani to devise an orderly process for administering refunds of the unconstitutional tax.[50] After receiving parties' suggestions concerning available administrative resources and proposed approaches,[51] Judge Restani entered a proposed order on July 23, 1998, and thereafter held oral argument on the proposal.[52] The Judge's final Order Establishing Claims Resolution Procedure (the "Order") governing cases brought under § 1581(i) of the U.S. Court of International Trade's jurisdictional statute was entered on August 28, 1998.[53]

In essence, claimants were required to submit a standard form and a copy of their complaint to Customs, which would then query its computer records for information on the claimant's export HMT payments made prior to the two-year limitations period,[54] and provide that to the claimant.[55] If satisfied with Customs' tally, the claimant would fill out and sign a judgment form and transmit it to the Department of Justice to be countersigned and filed with the court.[56] Judge Restani prescribed a minimum pace for Customs to work through claims and required periodic reports to the court.[57] The majority of claimants utilized this process, though alternative avenues existed, *e.g.*, for plaintiffs who brought cases under § 1581(a) of the U.S. Court of International Trade's jurisdictional statute.[58] Given that over $730 million dollars had been refunded to exporters only two years after entry of Judge Restani's Order,[59] the Judge's approach was undoubtedly a success.

It is without question that the road map for large case management laid down by Judge Restani in the HMT cases provided useful lessons for the Judges of the U.S. Court of International Trade when the trade bar launched the next high-volume litigation—challenges to Section 301 duties

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[49] *United States v. U.S. Shoe Corp.*, 523 U.S. 360 (1998).

[50] The question of interest, and how much due, occasioned additional litigation not discussed in detail herein. *See, e.g.*, *U.S. Shoe Corp. v. United States*, 22 Ct. Int'l Trade 613 (1998) (awarding interest from the date of payment of the HMT calculated under 28 U.S.C. § 2411); *U.S. Shoe Corp. v. United States*, 296 F.3d 1378 (Fed. Cir. 2002) (reversing judgment).

[51] *See U.S. Shoe Corp. v. United States*, 22 Ct. Int'l Trade 460 (1998) (noting openness to receive proposals).

[52] *U.S. Shoe Corp. v. United States*, 22 Ct. Int'l Trade 737 (1998) (detailing the proposed plan).

[53] *U.S. Shoe Corp. v. United States*, 22 Ct. Int'l Trade 880 (1998) ("*Claims Resolution Order*").

[54] *See* 28 U.S.C. § 2636(i) (limitations statute).

[55] *See id.* at 880–81.

[56] *Id.* at 881. Additional procedures were prescribed to adjudicate disputed claims. *See id.* at 882–84.

[57] *See id.* at 881–82 ("Customs will build up its response speed so that after December 15, 1998, Customs shall process no fewer than 500 claims per month.").

[58] The court approved claims resolution procedures put in place by Judge Restani for litigants who had protested the export HMT before Customs and established § 1581(a) jurisdiction before the Court were similar to those set forth in the *Claims Resolution Order*. *See Swisher Int'l Inc. v. United States*, 25 Ct. Int'l Trade 183, 183-85 (2001). In addition, an administrative avenue for relief ultimately came into being. *See M.G. Maher*, 26 Ct. Int'l Trade at 1040.

[59] *Compare U.S. Shoe Corp.*, 22 Ct. Int'l Trade at 880 *with* Pichelman, *supra* note 39 (noting the $732 million refunded by October 2020).

that began in September 2020 and quickly numbered in the thousands. On the plaintiffs' side, Judge Restani's analysis in *Baxter Healthcare* likely informed deliberations as to whether the class certification framework would be an appropriate tool for managing the sprawling Section 301 actions. Indeed, irrespective of the angle from which an interested party might approach such cases—as Judge, plaintiff(s), or the government defendant—Judge Restani's opinions remain as instructive today as they were when they were originally published.

Conclusion

While the HMT was promulgated in the 1980s, the lessons of Judge Restani's analysis of plaintiffs' challenges remain instructive today. In particular, the question of when one may properly invoke the U.S. Court of International Trade's § 1581(i) jurisdiction continues to be a flashpoint among litigants, with the tension recognized by Judge Restani in *M.G. Maher* forming a critical part of the analysis. Likewise, the Judge's steady management of the thousand-plus actions before her provides a model blueprint for both Judges and litigants in managing the largest trade disputes. As demonstrated by the filing of over 3,000 actions challenging the U.S. Trade Representative's Section 301 tariffs in 2020 and 2021, such practical lessons continue to be relevant to the U.S. Court of International Trade's administration of "just, speedy, and inexpensive" results.