Trading in Ambiguity: Unraised Issues in Export Clause Interpretation

INTRODUCTION

A country expresses its values through its allocation of economic surplus. When exploitation of environmental resources generates that surplus, a country has a moral obligation to mitigate any harm that may accrue as those resources are depleted. The extraction of environmental resources is thus problematic when it shifts the cost of externality mitigation to parties that are not engaged in the activity. This was the central concern in the recent Fifth Circuit case *Trafigura Trading LLC v. United States*.[1] *Trafigura* raised the constitutionality of an excise charge on oil exports used to remediate environmental damage from oil spills.[2] The Fifth Circuit ruled that the excise charge was a tax in violation of the Export Clause of the Constitution and therefore could not be levied against oil exports, thus stymying funding for the federal program.[3]

The Fifth Circuit's reasoning has broad significance because it restricts the use of excise charges to remediate environmental dangers at home if the good in question is used abroad. Additionally, the Fifth Circuit addressed only the superficial characteristics of an export tax but did not discuss the necessary relation between the export activity and how the excised funds are used.[4] An answer to this second question will have significant ramifications for U.S. oil spill remediation as well as broader environmental policy.

This In Brief proceeds as follows: first, it recounts *Trafigura* and the issues raised in the case; second, it provides a brief history of the Export Clause and its interpretation; third, it discusses the conceptual underpinnings of user fees in the Export Clause context; fourth, it synthesizes current and past rulings and raises novel issues that are implied in *Trafigura* and recent case history; and finally, it concludes with recommendations for potential solutions.

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1. 29 F.4th 286 (5th Cir. 2022).
2. *Id.* at 290–91.
3. *Id.* at 294.
4. *See id.* at 288–89, 294.

I. BACKGROUND

A. Case Summary

Trafigura Trading LLC is a commodity trading company that exports oil.[5] Trafigura brought a tax refund action, alleging that a current federal law (26 U.S.C. § 4611(b)) imposed an unconstitutional export tax on its business.[6] Section 4611(b) funds the Oil Spill Liability Trust Fund (OSLTF), which reimburses oil and gas companies if they spend above a statutory limit while remediating an oil spill.[7] Section 4611(b) applies a flat, "per-barrel" fee[8] on all oil that is exported.[9] The Export Clause of the U.S. Constitution forbids the application of taxes or duties to exports.[10]

Both Trafigura Trading LLC and the U.S. government moved for summary judgment.[11] The trial court ruled in favor of Trafigura, and the case was appealed to the Fifth Circuit.[12] The Fifth Circuit also found in favor of the plaintiff, with a split panel.[13] The narrow issue heard by the Fifth Circuit was whether the charge under § 4611(b) was a "tax" or a "user fee" for the purposes of the Export Clause.[14] The plurality found that the charge was a tax because it did not compensate the government for services rendered to Trafigura, but rather to uninvolved parties, and because the charge was based too closely on the quantity of goods exported.[15] The plurality drew heavily from *Pace v. Burgess*[16] and *United States v. U.S. Shoe*.[17] Judge Graves, in his dissent, argued in a nearly opposite manner on both issues,[18] noting that there is no requirement in the case law that the service rendered by the government only benefits the party paying the charge.[19]

B. Export Clause History

Whether the Constitution vested Congress with the power to tax exports was a sticking point during the Constitutional Convention.[20] Representatives from northern states viewed the ability to tax exports as an integral source of general

5. *Id.* at 289.
6. *Id.* at 289–90.
7. *Id.* at 290.
8. 26 U.S.C. § 4611(c)(2).
9. *Id.* § 4611(b).
10. U.S. CONST., Art. I, § 9, cl. 5.
11. Trafigura Trading LLC v. United States, 485 F. Supp. 3d 822, 825 (S.D. Tex. 2020).
12. Trafigura Trading LLC v. United States, 29 F.4th 286, 287 (5th Cir. 2022).
13. *Id.*
14. *Id.* at 291.
15. *See id.* at 293.
16. 92 U.S. 372 (1875).
17. 523 U.S. 360 (1998).
18. Trafigura Trading LLC v. United States, 29 F.4th 286, 297 (5th Cir. 2022).
19. *Id.*
20. Erik M. Jensen, *The Export Clause*, 6 FLA. TAX REV. 1, 6 (2003).

funding for the nascent country.[21] Southern states, on the other hand, worried about the potential damage that taxes on southern commodity exports could wreak due to their reliance on an agrarian economy.[22] They were concerned that Congress might use export taxes as a tool to restrain their economic[23] and political[24] power.

These competing interests led to fierce debate.[25] A bar on export taxes was so important for some southern states that they conditioned their ratification of the Constitution on its addition to the Constitution.[26] The Export Clause resulted from this debate and bans taxes on exports in "simple, direct, [and] unqualified terms."[27] The Export Clause is as follows: "No Tax or Duty shall be laid on Articles exported from any State."[28]

C. Export Clause Precedent

Export Clause case law leading up to *Trafigura* is relatively scant. The judicial need to determine whether a charge is a tax for the purposes of the Export Clause was first mentioned in a hypothetical by Chief Justice Marshall and has only been addressed a handful of times since. In *Marbury v. Madison*, Justice Marshall affirmed that an inquiry into whether a charge is indeed a tax is characteristically the job of the judiciary.[29] Subsequent case law has inspected the necessary relation between the implementation of excise charges and the export activity in determining whether a charge is a tax.[30] The primary distinction that has emerged is whether a charge is a "tax," which is prohibited by the Export Clause, or a "user fee," which is not.[31] The following Part sketches

21. *See generally* THE RECORDS OF THE FEDERAL CONVENTION OF 1787, VOLUME 1 307 (MAX FARRAND ED., 1966); *id*. at 286 ("Whence; then, is the national revenue to be drawn? From commerce; even from exports . . .").

22. "In the South the planter soon turned to raising a specialized crop for export—tobacco in Maryland and Virginia, rice and indigo in South Carolina." Richard Morris, *Chapter 1: The Emergence of American Labor*, DEPT. OF LABOR, https://www.dol.gov/general/aboutdol/history/chapter1 (last visited Oct. 19, 2023).

23. THE RECORDS OF THE FEDERAL CONVENTION OF 1787, VOLUME 1, supra note 21 at 592 ("[General Pinckney] was now again alarmed at what had been thrown out concerning the taxing of exports. South Carolina has, in one year, exported to the amount of £600,000 sterling; all which was the fruit of the labor of her blacks. Will she be represented in proportion to this amount? She will not. Neither ought she then to be subject to a tax on it. He hoped a clause would be inserted in the system, restraining the legislature from taxing exports.").

24. *Id*. at 307 ("Mr. G[erry] thought the legislature could not be trusted with such a power. It might ruin the country. It might be exercised partially, raising one and depressing another part of it.").

25. *See* Jensen, *supra* note 20 at 12.

26. *Id.*

27. United States v. U.S. Shoe, 523 U.S. 360, 368 (1998).

28. U.S. CONST., Art. I, § 9, cl. 5.

29. 5 U.S. 137, 179 (1803) ("It is declared that 'no tax or duty shall be laid on articles exported from any State.' Suppose a duty on the export of cotton, of tobacco, or of flour, and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the Constitution, and only see the law?").

30. *See* Trafigura Trading LLC v. United States, 29 F.4th 286, 291 (5th Cir. 2022).

31. *Id.* at 291–92.

the relevant precedential history of the Export Clause and the tests that have developed to determine whether something is a tax or a user fee.

1. Pace v. Burgess

Pace serves as the backbone of the precedent discussed in *Trafigura* and establishes the two primary inquiries that later courts have grappled with: whether a charge is implemented in proportion to the quantity or value of the exported good[32] and whether the charge is sufficiently related to the services provided in exchange for the charge.[33] In *Pace*, the Court ruled that a mandatory stamp on exported cigarettes was not a tax because the number and cost of stamps was related to the number of boxes verified by U.S. Customs and not to the number of cigarettes in each box.[34] Additionally, the Court noted that because the plaintiff received a benefit from the use of stamps—exclusion from taxes on cigarettes for domestic consumption—the charge was likely not a tax.[35] Notably, *Pace* provides no roadmap for determining when the benefits accrued to the paying party are sufficient for a charge to be considered a user fee in the context of the Export Clause.

2. United States v. U.S. Shoe

The Court refined the reasoning established in *Pace* in *U.S. Shoe*.[36] In *U.S. Shoe*, the plaintiff alleged that an *ad valorem* port usage fee was unconstitutional as a tax on exports that were shipped out of that port.[37] The Court ruled in the plaintiff's favor, noting that charges based on the value of exported goods are not meaningfully related to the services rendered to the paying party and are therefore a tax.[38]

3. Thames & Mersey Marine Insurance Co. v. United States[39]

Thames & Mersey Marine Insurance Co. v. United States offers a means of evaluating the plurality's decision in *Trafigura*. While not cited in *U.S. Shoe*, *Thames* remains relevant caselaw because it was reaffirmed in the case *United States v. International Business Machines*,[40] which was decided two years prior to *U.S. Shoe*. *Thames* dealt with a similar issue of Export Clause interpretation.

32. Pace v. Burgess, 92 U.S. 372, 375 (1875) ("[N]o proportion whatever to the quantity or value.").
33. *Id.* ("They are simply the compensation given for services properly rendered.").
34. *Id.* at 376.
35. *See id.* at 373.
36. United States v. U.S. Shoe, 523 U.S. 360, 369 (1998) ("The guiding precedent for determining what constitutes a bona fide user fee in the Export Clause context remains our time-tested decision in Pace.").
37. *Id.* at 363–64.
38. *Id.* at 363.
39. 237 U.S. 19 (1915).
40. United States v. Int'l Bus. Mach. Corp., 517 U.S. 843 (1996).

In *Thames*, the Court asked whether the tax is "so directly and closely related to the 'process of exporting' that the tax is in substance" an export tax.[41] The *Thames* Court's inquiry is instructive for two reasons: 1) it frames the principal inquiry as how directly or indirectly related the charge is to the "process of exporting,"[42] and 2) the Court's principal concern is how the charge is enacted rather than how the funds are used.[43] While not binding, *Thames* offers a lens through which to evaluate the test established in *Pace* and used in *Trafigura*.

II. USER FEES

A. In-Case Application

The Fifth Circuit applied the *Pace* test in *Trafigura*.[44] The plurality examined how the charge was related to the export of oil and how the benefits associated with the charge were distributed.[45] Applying *U.S. Shoe*, the court held that the charge was lacking in both respects and deemed the charge a tax.[46] The plurality determined that the per-barrel charge was like the *ad valorem* tax in *U.S. Shoe*.[47] Little reason was provided.[48] The plurality determined that the charge was not reasonably related to the services rendered because of the probabilistic nature of oil spills.[49] Specifically, not all oil exporters cause oil spills and not all benefits accrue to companies that are involved in oil spills.[50] Some of the funds in the OSLTF are used to fund oil spill remediation research grants, and the primary beneficiaries of remediation are users of the environment that has been polluted rather than the payer.[51] The plurality argued that if these activities are considered sufficiently related to the exporting process to be deemed fees, then "the same could be said for virtually every other" charge.[52] Indeed, the plurality went on to document examples of what it considered to be charges that are adequately related to the services rendered to qualify as user fees: "a public agency might charge a user fee to visit a public park, tour a museum, or enter a toll road."[53] The court concluded that "none of [the funded activities] can plausibly be conceived as 'services' provided to exporters in exchange for their payment."[54]

41. 237 U.S. at 25.
42. *Id.*
43. *See id.*
44. Trafigura Trading LLC v. United States, 29 F.4th 286, 291 (5th Cir. 2022).
45. *Id.* at 291–92.
46. *Id.* at 293–94.
47. *Id.* at 292.
48. *See id.*
49. *Id.* at 293.
50. *See id.*
51. *See id.* at 290.
52. *Id.* at 293.
53. *Id.* at 292–93.
54. *Id.* at 293.

The dissent's primary disagreement was with the plurality's conception of the relationship between payer and services rendered.[55] Specifically, it argued that services need not be in sole service of the payer to constitute a user fee.[56] Instead, the dissent hinted at a definition in which services are permissible so long as the payer is at least one of its beneficiaries.[57] The dissent pointed to the plurality's seeming reluctance to consider federal oil spill remediation as of general benefit to an oil exporter as a clear error.[58]

B. Analysis

The underlying conceptual dispute within the panel was whether fees collected for the OSLTF are used in a legitimate way. As stated above, the panel putatively disagreed about two things:[59] whether the procedural checks created in *Pace* were fulfilled, and how to conceptualize user-fee services. The first dispute may be set aside. The plurality reasoned that the charge was implemented in an invalid way like in *U.S. Shoe*.[60] The plurality was effectively silent as to why the charge was like the *ad valorem* tax in *U.S. Shoe* other than a supposed lack of connection to the services rendered by the government, which the plurality itself stated is a separate inquiry.[61]

The second dispute was more substantial and lacked sufficient discussion in the case law to provide the appropriate indicia for analogy. The disagreement seemed to be about whether the service rendered and the charge were sufficiently related.[62] This line of reasoning is flawed. Despite the probabilistic nature of oil spills resulting from oil exports, which is present in all user fee situations discussed by the plurality, oil spill remediation costs track directly with the amount of oil spilled. The true dispute is not whether fees based on volume exported are related to oil spill remediation costs, but whether the use of the funds is legitimate for the purposes of the Export Clause. In other words, the majority and dissent disagree about whether the funds are being used like a user fee or a tax. The case law only hints at this issue. The plurality conceived of a requirement that the services are rendered solely to the payer while the dissent took a broader view.[63] Neither opinion introduced a theory of the requisite relationship between fees and the services that they fund.

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55. *Id.* at 298.
56. *Id.*
57. *See id.*
58. *Id.* ("The plurality dismisses any suggestion that the oil industry generates the need for these anti-pollution measures as a matter of policy.").
59. *Id.* at 295–96.
60. *Id.* at 292.
61. *See id.*
62. *Id.* at 292, 296.
63. *See id.* at 298.

C. Consolidation & Reframing

The *Trafigura* plurality's intuition on this topic, which is likely shared by most, is that things like tolls on toll roads constitute user fees.[64] Any appropriately framed test should thus encompass this basic intuition. A reconceptualization of the case law is helpful in doing so. The Court began its current line of reasoning in *Pace* by establishing fact-specific user fee indicia[65] and in parallel in *Thames* when it asked, "[i]s the tax upon such policies so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation and hence within the constitutional prohibition?"[66] Both the series of questions in *Pace* and the inquiry in *Thames* are ambiguous and encourage concepts and questions that are not separated by later courts. In particular, the current formulation of the issue implies two important questions: whether the charge *looks like* a tax, and whether the funds collected from the charge are *used like* tax revenue. The first category can be thought of as the 'implementation test' and the latter as the 'use test.' Indicia for the implementation test are relatively more common in the case law, while the use test is left undiscussed except for its implicit affirmation in *Pace* and *U.S. Shoe*.

The wording of *Pace* and *Thames* creates conceptual ambiguity regarding how either test is conducted. Namely, the use of the words "proportion" and "quantity or value"[67] in *Pace* and the phrase "directly and closely related"[68] in *Thames* imply that the inquiry is one of physical or temporal proximity (i.e., a physicalist inquiry). This mode of analysis seems to work well when conducting the implementation test, given that the purpose of the test is to determine the relation between physical goods and pricing. For instance, the *Pace* Court used a physicalist approach to positive effect when it ruled that the charge in *Pace* was not a tax since it was not related to the quantity of goods exported.[69] In *U.S. Shoe*, the Court similarly employed a physicalist approach when it determined that *ad valorem* port charges are taxes *per se* since the actual service used by the merchant is related to physical factors like the size and weight of the boat docked at port rather than the value of the goods exported.[70]

The physicalist approach runs into issues, however, when conducting the use test. Indeed, the lack of clarity on this issue seemingly explains the confusion about what constitutes a sufficiently related service and export activity. Namely, the apparent relationship between one thing and another are subject to creative

64. *Id.* at 293.

65. *See* Pace v. Burgess, 92 U.S. 372, 375 (1875) (finding that the indicia need not have any "proportion whatever to the quantity or value of the package on which [the stamps were] affixed" based on the peculiar circumstances of the case's facts).

66. Thames & Mersey Marine Ins. Co. v. United States, 237 U.S. 19, 25 (1915).

67. 92 U.S. at 375.

68. 237 U.S. at 495.

69. 92 U.S. at 376.

70. United States v. U.S. Shoe, 523 U.S. 360, 369 (1998).

phrasing and a judge's external reference points. For example, the *Pace* Court might have construed the domestic tax relief as indirect if it took a broader view of all steps taken during the export of cigarettes, thus driving a temporal wedge between the export of the good and the benefits derived from it.[71]

Another potential criticism of the physicalist approach is that it fails to execute on the purpose of the use test. The use test, which has hitherto remained unstated in the case law, is valuable because it allows courts to differentiate between various charges that look like user fees, but which supply funds for unrelated purposes. Without the use test, for instance, a court could construe a toll road that uses its tolls for general federal funding instead of road maintenance as a user fee.

D. Possible Approaches

Since the Court has provided no guidance on how future courts may evaluate whether a charge passes the use test, it is helpful to establish a set of candidate approaches. There are two methods by which this may be done: an economic and a common law approach.

1. Economic Approach

There are several economic schools of thought that could be used to construct a relatedness standard between the use of funds and the export activity in question. Drawing on basic economics, a court may find that an activity is sufficiently related to a given use of funds so long as the funds are used in service of alleviating externalized costs created by the export activity. Here, the export of oil creates costs that are not borne by the exporter in the form of environmental damage, which the OSLTF is designed to alleviate. As such, oil exportation and the use of funds from the charge at issue are sufficiently related under an economic analysis to constitute a user fee.

One challenge to this approach is that almost all activities create externalities, and this framework would allow the government to tax all exports under the guise of externality mitigation. A potential solution, which is also used by the plurality, is to apply a heightened-scrutiny standard to charges on exports.[72] The use of heightened scrutiny would ensure that any user fee that is implemented furthers only important government interests and that the fee is closely related to those interests. Thus, an externality approach would likely only apply in stark circumstances, like in the case of coastal oil spills.

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71. Notably, the *Pace* Court implicitly assumes that the use of funds for the purposes of export inspection are sufficiently related to the export activity, so the issue is never taken up. *See* 92 U.S. at 374–76.

72. Trafigura Trading LLC v. United States, 29 F.4th 286, 292 (5th Cir. 2022).

2. Common Law Approach

The common law of torts is instructive in this context as it has dealt with a similar issue. Namely, the legal principle of scope of liability in the negligence context may provide a helpful analogy for relatedness. Scope of liability functions to limit the circumstances in which liability for negligent behavior extends.[73] Crucial here is the fact that scope of liability's primary benefit is that it allows courts to match foreseeable negative outcomes with legally culpable behavior. Similarly, a court may follow a comparable analysis to determine whether a use of funds is rightfully paired with the appropriate export activity: first, the court would assess who or what is characteristically affected by the export activity; second, the court would assess how those parties are generally affected; and third, the court would determine if the use of funds corresponds to the appropriate class of persons or resources and for the characteristic issues caused by the export activity. When there is a match, the use of funds may be deemed sufficiently related to the export activity for the purposes of the Export Clause.

This approach may allow for an overbroad application of user fees. A court may, for instance, collect fees from a party participating in an activity so long as the fees are used to fund a program that is only superficially related to the export activity in question. This would of course contravene the purpose of the Export Clause by allowing what most would consider to be a tax despite its specificity. This approach survives this criticism for the same reason that scope of liability survives criticism in tort law; the breadth of a scope analysis is determined by judicial, and sometimes legislative, actors. As such, judges and legislators may tailor the specificity of a scope analysis as befits the situation and time. Far from allowing the broad application of user fees, it is possible that future courts might interpret scope narrowly given the importance of the Export Clause at the time of the Constitutional Convention.

CONCLUSION

The Fifth Circuit's recent decision in *Trafigura* makes it more difficult for environmental agencies to force polluters to pay for the damage that their businesses cause. *Trafigura* points to areas of ambiguity in Export Clause interpretation. The Supreme Court in *Trafigura* determined how user fees ought to look, but it has not determined how governments can use the funds taken from user fees. Two potential solutions for further study are an economic and a common law model of determining whether user fee funds are used within the scope of the government services rendered. Any guidance from the Supreme Court on how the use of user fees ought to relate to the export in question is an

73. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR ECONOMIC HARM § 12 (Am. L. Inst. 2020).

important distinction that will have long lasting ramifications for the federal OSLTF as well as broader environmental policy.

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