UIC Law Review

Volume 17 | Issue 2 Article 14

Spring 1984

Container Corporation of America v. Franchise Tax Board: State Taxation of Foreign Income and the Worldwide Combined Unitary Method: The United States Supreme Court Passes the Buck to Congress, 17 J. Marshall L. Rev. 587 (1984)

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CONTAINER CORPORATION OF AMERICA v. FRANCHISE TAX BOARD: STATE TAXATION OF FOREIGN INCOME AND THE WORLDWIDE COMBINED UNITARY METHOD: THE UNITED STATES SUPREME COURT PASSES THE BUCK TO CONGRESS

The power to levy a corporate income tax is a state right which was first exercised in 1911 and has now been implemented by forty-four states.[1] The most popular[2] corporate in-

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* 103 S. Ct. 2933 (1983).

1. *See* United States Glue Co. v. Town of Oak Creek, 247 U.S. 321 (1918) (Wisconsin income tax upheld as constitutional and not in violation of the commerce clause although taxable income included income from interstate sales). Wisconsin enacted its corporate income tax to help support the rapid increase in the state's public expenditures. Today, forty-four states and the District of Columbia have some type of corporate income tax. COMPTROLLER GENERAL, REPORT TO THE CHAIRMAN, HOUSE COMMITTEE ON WAYS AND MEANS, *Key Issues Affecting State Taxation Of Multijurisdictional Corporate Income Needs Resolving* (July 1, 1982) [hereinafter cited as COMPTROLLER GENERAL REPORT].

The states have the power to levy taxes in accordance with their own laws, subject to constitutional restrictions imposed principally by the due process clause of the fourteenth amendment and the commerce clause. *See* Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) (risk of double taxation of foreign instrumentalities of commerce violated foreign commerce clause); Norfolk & W. Ry. Co. v. Missouri State Tax Comm'n, 390 U.S. 317 (1968) (state property tax violated due process clause and commerce clause because mileage formula yielded grossly distorted result in assessment of taxpayer's rolling stock); Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938) (privilege tax does not violate the commerce clause even if based on gross receipts from sale of advertising by interstate contract for publication circulated in both intrastate and interstate); Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920) (use of formulary apportionment does not violate due process clause in absence of showing that procedure produces unreasonable result). The equal protection clause of the fourteenth amendment and the imports-exports clause also impose constitutional restrictions on state taxing powers. *See* Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976) (nondiscriminatory ad valorem property tax against imported goods that were no longer in import transit did not violate import-export clause). These restrictions, however, have not had the same impact on state taxation of multijurisdictional corporations as the due process and commerce clauses.

To meet the requirements of the due process clause, a minimal connection must exist between the corporation's activity and the taxing state, and the income attributed to the state for taxing purposes must be rationally related to income-generating values within the taxing state. *See* Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207 (1980); Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 445 U.S. 425 (1980). Under the commerce clause, a state is prohibited from adopting a taxing scheme which come tax theory[3] is the worldwide combined unitary business principle,[4] which contemplates a very broad state power;[5] it is

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discriminates against, or places an undue burden on, interstate commerce. *See generally supra* COMPTROLLER GENERAL REPORT.

2. Today, twenty-four states employ the unitary method of tax assessment. Twelve of the twenty-four states have adopted the worldwide approach to unitary taxation. The states employing the worldwide approach, in addition to California, are Alaska, Colorado, Florida, Idaho, Indiana, Massachusetts, Montana, New Hampshire, North Dakota, Oregon, and Utah. *See* Daily Tax Rep. Pub. No. 186, *Unitary Tax* G-3 (Sept. 23, 1983). It is interesting to note that, in 1979, only California and Oregon had employed the worldwide unitary method of taxation. *See* Daily Tax Rep. Pub. No. 188, *Unitary Tax* G-4 (Sept. 27, 1983).

The most recent state to adopt the worldwide combined unitary method is Florida; the Florida state legislators enacted the worldwide approach on July 12, 1983, just fifteen days after the Supreme Court handed down the *Container* decision. *See* Daily Tax Rep. Pub. No. 136, *Court's Blueprint Used By Florida In Unitary Tax Law* G-5 (July 14, 1983).

Indiana is often improperly classified as a worldwide combined unitary state. Indiana's tax is a consolidated gross receipts tax. Related corporations, doing business in Indiana, are consolidated to eliminate intercompany transactions which are not subject to the gross receipts tax. Indiana law does permit worldwide combined unitary income apportionment. It does not, however, require taxpayers to file their tax returns on the worldwide combined basis. *See* IND. CODE ANN. §§ 6-2-1-37 - 6-2-1-53 (Burns 1978); IND. CODE ANN. §§ 6-3-1-1 - 6-3-2-4 (Burns 1978).

3. There are three basic theories used to determine income attributable to a state: separate accounting, specific allocation, and formulary apportionment. *See also infra* note 6.

4. The basic justification for combined unitary apportionment is stated as follows:

> Once formulary apportionment is accepted as the standard method of dividing the taxable income of a single corporation that conducts a unitary business in more than one State, there is no justification, in principle at least, for failing to apply formulary apportionment to the income of a group of controlled corporations that comprise a unitary business. The only difference between the two cases lies in the form of business organization, i.e., the organization of a business enterprise through subsidiaries, as distinguished from branches, a factor that should not affect State tax apportionment.

J. HELLERSTEIN, STATE TAXATION I CORPORATE INCOME AND FRANCHISE TAXES § 8.12 (1983).

5. It is well settled that a state can include, in a corporation's apportionable income, all domestic income from unitary operations so long as the apportionment factor fairly and reasonably attributes the income to the state. Butler Bros. v. McColgan, 315 U.S. 501 (1942) (holding three-factor formulary apportionment method applied to income of taxpayer's wholesales distributing houses in several states constitutional under fourteenth amendment where there is a certain degree of unity of ownership and management). The unitary concept was also more recently articulated in Mobil Oil Corp. v. Comm'r of Taxes of Vermont, 445 U.S. 425 (1980) and Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207 (1980). These decisions held that the "linchpin of apportionability" which establishes the taxpayer's tax liability in appropriate proportion to the taxpayer's business transactions in the state is the "unitary business" principle that the taxpayer's intra-state and extra-state activities form part of a single unitary business. *Cf.* ASARCO, Inc. v. Idaho State Tax Comm'n, 458 U.S. 307 (1982); F.W. Woolworth v. Taxation and Revenue Dept., 458 U.S. 354 (1982). These

also the more controversial theory.[6] In *Container Corporation of*

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cases held that the due process limitation of the fourteenth amendment is not satisfied merely if income in question adds to riches of corporation; the proper inquiry looks to the underlying unity or diversity of the business enterprise, not to whether some economic benefit is derived simply from ownership of stock in another corporation. *See generally* Corrigan, *The Multistate Tax Commission's Reaction to Asarco and Woolworth: Petition for Rehearing*, 1 J. ST. TAX'N 210 (1982) (excerpt from *amicus curiae* brief); Hanson, *Asarco and Woolworth—Refining Mobil and the "Unitary Business" Test for Apportioning Intangible Income*, 1 J. ST. TAX'N 197 (1982); Seago, *The Revitalization of the Unitary Business Principle—Asarco and Woolworth*, 1 J. ST. TAX'N 101 (1982).

6. The constitutionality of the worldwide combined unitary method was questionable. The overall tax liabilities of multinational corporations increased simply because a state would adopt a new method to apportion income to the state. The unitary method of combined reporting also affects large U.S. multijurisdictional companies as well as multinational companies. *See* Dexter, *The Unitary Concept in State Taxation of Multistate-Multinational Businesses*, 10 URB. LAW. 181 (1978).

Today, many corporations do business in more than one state. These multijurisdictional companies also pay most of the state's corporate income taxes. For example, taxes collected from multijurisdictional corporations in 1977 accounted for approximately 56% of the $9 billion states collected from all corporate taxpayers, even though multijurisdictional corporations filed only 18% of the total corporate tax returns. *See* COMPTROLLER GENERAL REPORT, *supra* note 1, at 1.

Because many corporations do business in more than one state, only that income which is reasonably attributable to the state can be apportioned to the state. ASARCO Inc. v. Idaho State Tax Comm'n., 458 U.S. 307 (1982); F.W. Woolworth Co. v. Taxation and Revenue Dept., 458 U.S. 354 (1982); Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207 (1980); Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980); Underwood Typewriter Co. v. Chamberlain, 254 U.S. 113 (1920) (apportionment of separate company income based on the proportion of its net income which its assets within the state bear to its total assets not in violation of the due process or the commerce clause).

States use different methods to apportion taxable income attributable to their jurisdiction. This results in inconsistencies which have led numerous taxpayers to litigate alleged violations of the due process clause and the commerce clause. *See infra* note 114. Generally, three methods are used to determine the tax base of multistate corporations among the states in which the corporation does business: separate accounting, specific allocation, and formulary apportionment. *See* Henszey & Koot, *Is A Three Factor Apportionment Formula Fair?*, 35 THE TAX EXEC. 141 (1983). Separate accounting applies to situations in which a corporation's source of income and expenses is clearly identifiable. *Id.* at 142. Specific allocation is used for passive or nonbusiness income, such as interest income and capital gains. *Id.*

Most states use the formulary apportionment method which is based on the theory that income attributable to a corporation within a certain jurisdiction is a function of a combination of factors; if uniformly applied, it should result in fair apportionment among all the jurisdictions in which the corporation does business. *Id.*

The most common factors used in this method are property, payroll, and sales. The application of these factors by the states may vary from equal weight being given to all three, to the use of only one factor, usually sales. *See generally* L. HALE & R. KRAMER, STATE TAX LIABILITY AND COMPLIANCE MANUAL (1981).

America v. Franchise Tax Board,[7] the United States Supreme Court, for the first time, considered whether the worldwide combined method of unitary state income taxation[8] was constitutional.[9] The question of constitutionality arose[10] because this method may result in double taxation of foreign income[11] thereby impairing uniformity in foreign relations.[12] The Court held that California's worldwide combined unitary tax was constitutional and, in so doing, broadened the taxing power of the states.[13]

Container Corporation of America is a Delaware corporation which has its headquarters in Illinois and does business in California as well as other states.[14] Container Corporation also has foreign subsidiaries that have incorporated in the countries where they operate.[15] In its returns for the years 1963, 1964, and 1965,[16] Container Corporation omitted all of the income, payroll, property, and sales of its foreign subsidiaries when calculating the share of its net income that was apportionable to California

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7. 103 S. Ct. 2933 (1983).

8. *See, e.g.*, CAL. REV. & TAX. CODE ANN. §§ 25123-25136 (West 1979) (permitting worldwide combined unitary taxation).

9. *Id.*

10. The constitutional questions arose under the due process clause, U.S. CONST. amend. XIV, § 1; the commerce clause, U.S. CONST. art. I, § 8, cl. 3; and the foreign commerce clause, U.S. CONST. art. I, § 8, cl. 3. The Court addressed two preliminary issues before it reached the foreign commerce clause question. First, the Court determined Container Corporation was a unitary business. *See infra* note 27. Second, the Court concluded that California's apportionment method was fair. *See infra* note 29.

11. *See infra* note 12.

12. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) (California property tax on cargo containers found unconstitutional). In that case, the Court found there was double taxation by California and Japan; in addition, the tax prevented the federal government from "speaking with one voice" because the United States had already signed a Customs Convention on Containers with Japan. *Id.* at 453-54.

13. 103 S. Ct. 2933 (1983).

14. Container Corporation is in the business of manufacturing custom-ordered paperboard packaging. It produces paperboard from raw timber and wastepaper. The operation of the business is largely domestic. *Id.* at 2943.

15. During the years at issue, Container Corporation owned twenty foreign subsidiaries incorporated and located in four Latin American and four European countries. Container Corporation's percentage ownership of the subsidiaries, directly or indirectly, ranged between 66.7% and 100%. In those companies in which Container Corporation did not own a 100% interest, the remaining interest was owned by local nationals. The foreign subsidiaries were in essentially the same business as Container Corporation. *Id.* at 2943.

16. 103 S. Ct. at 2945 (1983).

under a three-factor formula.[17]

After reviewing Container Corporation's tax returns, the California Franchise Tax Board issued deficiency notices.[18] The Franchise Tax Board contended that Container Corporation should have treated its overseas subsidiaries as part of its unitary business, rather than as a passive investment.[19] Container Corporation paid the additional assessment under protest and brought an action for a refund.[20]

The California Superior Court upheld the Tax Board's additional assessments.[21] The Court of Appeal affirmed the lower court's decision.[22] The California Superior Court, on appeal, refused discretionary review.[23] The United States Supreme Court noted jurisdiction on May 3, 1982.[24]

The United States Supreme Court held[25] that California's tax did not violate the due process clause[26] because Container Corporation and its foreign subsidiaries constituted a "unitary business."[27] The Court further held that California's tax did not

17. CAL. REV. & TAX. CODE ANN. §§ 25105-25136 (West 1979). The three-factor apportionment formula uses payroll, property, and sales factors to apportion income to the state. The formula is:

$$\frac{\left(\frac{\text{payroll in state}}{\text{payroll everywhere}}\right)+\left(\frac{\text{property in state}}{\text{property everywhere}}\right)+\left(\frac{\text{sales in state}}{\text{sales everywhere}}\right)}{3}$$

$$\times \text{ Combined Worldwide Income} = \text{Apportioned Income}$$

For additional discussion on the three-factor formula, see Henszey & Koot, *Is A Three Factor Apportionment Formula Fair?*, 35 THE TAX EXEC. 141 (1983).

18. 103 S. Ct. at 2945 (1983).

19. *Id.*

20. *Id.*

21. *Id.*

22. Container Corp. of Am. v. Franchise Tax Bd., 117 Cal. App. 3d 988, 173 Cal. Rptr. 121 (1981).

23. The memorandum opinion and judgment of the California Supreme Court are not reported.

24. 456 U.S. 960 (1982).

25. Container Corp. of Am. v. Franchise Tax Bd., 103 S. Ct. 2933 (1983). Justice Brennan delivered the opinion of the Court. Justices White, Marshall, Blackmun, and Rehnquist joined. Justice Powell filed a dissenting opinion in which Chief Justice Burger and Justice O'Connor joined. Justice Stevens took no part in the consideration or decision of the case.

26. U.S. CONST. amend. XIV, § 1.

27. The Court began its analysis by identifying the elements which constitute a unitary business. 103 S. Ct. at 2940-42. The Court then concluded that Container Corporation and its subsidiaries were a unitary business. *Id.* at 2948. The Court refused to review in any detail the particular facts of the taxpayer's business. The Court stated:

> The state Court of Appeal relied on a large number of factors in reaching its judgment that appellant and its foreign subsidiaries constituted

violate the commerce clause[28] because application of the three-factor apportionment formula resulted in fair apportionment.[29] Further, the Court stated that double taxation of foreign income did not necessarily violate the foreign commerce clause,[30] and that the impairment of federal uniformity must also be considered when determining whether a state tax on foreign income violates the foreign commerce clause.[31] Also, California's tax did not impair federal uniformity because the tax did not implicate any foreign policy issues which must be left to the federal government, and because the tax did not violate any clear federal directive.[32] Accordingly, the Court affirmed the California Court of Appeal's decision.[33]

> a unitary business. . . . We need not decide whether any one of these factors would be sufficient as a constitutional matter to prove the existence of a unitary business. Taken in combination, at least, they clearly demonstrate that the state court reached a conclusion 'within the realm of permissible judgment.'

Container Corp. of Am. v. Franchise Tax Bd., 103 S. Ct. 2933, 2947-48 (1983).

See also supra note 5 for discussions of recent Supreme Court cases articulating the principles constituting a unitary business.

28. U.S. CONST. art. I, § 8, cl. 3.

29. 103 S. Ct. at 2942-43. The Court determined that California's apportionment methodology was fair because it produced a result which was "certainly within the substantial margin of error inherent in any method of attributing income among the components of a unitary business." *Id.* at 2950. The Court also held that Container Corporation did not satisfy its burden of proof because it failed to show that "there is no rational relationship between the income attributed to the state and the intrastate values of the enterprise." *Id.* at 2948 (quoting Mobil Oil Corp. v. Commissioner of Taxes of Vermont, 445 U.S. 425, 436 (1980)).

In Hans Rees' Sons, Inc. v. North Carolina *ex rel.* Maxwell, 283 U.S. 123 (1931), the Court struck down a North Carolina income tax because the taxpayer was able to establish that the state's method of apportioning income resulted in a tax more than 250% greater than the tax computed by the taxpayer. Container Corporation showed that California's method of apportionment resulted in a tax 14% greater than the tax computed by Container Corporation using formulary apportionment on a separate company basis. *Id.* at 2950. The Court upheld California's tax in *Container*.

It is now apparent, therefore, that fair apportionment will be found to exist when the difference between the tax calculated by the taxpayer and that by the state is less than or equal to 14%. If the difference exceeds 250%, then the apportionment method must be stricken. Obviously, under this guideline, much uncertainty will still exist. For example, it is not certain whether a difference of 23% could be considered to be fair or unfair using the *Hans Rees* and *Container* decisions as guidelines.

30. U.S. CONST. art. I, § 8, cl. 3.

31. Container Corp. of Am. v. Franchise Tax Bd., 103 S. Ct. at 2953. The Court held that double taxation alone does not require a finding of a violation of the foreign commerce clause. *See also infra* note 40 and accompanying text.

32. *Id.* at 2933, 2955-57. *See also infra* note 41 and accompanying text.

33. Container Corp. of Am. v. Franchise Tax Bd., 103 S. Ct. 2933, 2957 (1983). Justice Powell, in his dissent, found that, with respect to the foreign commerce clause issue, the majority failed to apply "close scrutiny" in a manner that met the requirements of that exacting standard of review. *Id.*

The United States Supreme Court began its analysis by determining that any state tax which is levied on the foreign income of a domestic unitary corporation must satisfy four constitutional tests.[34] The state tax must meet the due process clause test and the commerce clause test, which are also applied to the out-of-state income of these corporations.[35] In addition, the tax must satisfy two tests which are imposed by the foreign commerce clause. To meet the due process clause test, a minimal connection between the interstate activities and the taxing state must exist.[36] To meet the commerce clause test, there must be a rational relationship between the income attributed to the state and the intrastate values of the enterprise.[37] The foreign commerce clause tests were best articulated in *Japan Line, Ltd. v. County of Los Angeles*.[38] Under the first test, according to *Japan Line*, the tax cannot result in double taxation of foreign instrumentalities of commerce.[39] "[E]ven a slight overlapping of tax—a problem that might be deemed de minimis in a domestic context—assumes importance when sensitive matters of foreign relations and national sovereignty are concerned."[40] The second test of *Japan Line* states that the state

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In his opinion, the California tax should be struck down because it violated the foreign commerce clause and prevented the federal government from "speaking with one voice." *Id.* at 2959, 2961.

34. *Id.* at 2940, 2950. *See infra notes* 36-40 and accompanying text for additional discussion of the development of the four tests.

35. For the purposes of this casenote, foreign income refers to income derived from a corporation's international operations. Domestic income earned by a corporation in a state other than the state assessing the income tax is "out-of-state income."

36. 103 S. Ct. at 2940. *See* Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207, 219-20 (1980) (*quoting* Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 436-37 (1980)). *See also* Moorman Mfg. Co. v. Bair, 437 U.S. 267, 272-73 (1978) (holding that Due Process Clause requires that no tax may be imposed unless there is some minimal connection between business activities and the taxing state and that the income attributed to the state must be rationally related to values connected with the taxing state); *see also* National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 at 756 (1967) (there must be some minimal connection); Norfolk & Western R. Co. v. Missouri Tax Comm'n, 390 U.S. 317 (1968) (there must be a rational relationship to property values connected with taxing state).

37. *See supra* note 36.

38. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 447-48 (1979).

39. *Id.* at 447.

40. 441 U.S. at 447-48. The Court explained:

> [N]either this Court nor this Nation can ensure full apportionment when one of the taxing entities is a foreign sovereign. If an instrumentality of commerce is domiciled abroad, the country of domicile may have the right, consistent with the custom of nations, to impose a tax on its full value. If a State should seek to tax the same instrumentality on an apportioned basis, multiple taxation inevitably results. . . .Due to the absence of an authoritative tribunal capable of ensuring that the aggregation of taxes is computed on no more than one full value, a state

tax cannot "impair federal uniformity in an area where federal uniformity is essential" or prevent the federal government from "speaking with one voice."[41]

In *Container*, the Court first decided that the tests imposed

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> tax, even though 'fairly apportioned' to reflect an instrumentality's presence within the State, may subject foreign commerce 'to the risk of a double tax burden to which domestic commerce is not exposed, and which the commerce clause forbids.'

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 447 (1979).

See also Evco v. Jones, 409 U.S. 91 (1972). A gross receipts tax on total proceeds received by corporations from certain contracts entered into outside the state would subject interstate commerce to risk of a double tax burden to which intrastate commerce should not be exposed and which the commerce clause forbids); J.D. Adams Mfg. Co. v. Storen, 304 U.S. 307 (1938) (subjecting interstate commerce to risk of double tax burden to which intrastate commerce is not exposed forbidden by commerce clause); Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938) (multiplication of state taxes would destroy interstate commerce and renew barriers to interstate trade which commerce clause sought to remove).

41. 441 U.S. 434 (1979). The Court has long recognized that there are powers granted by the Constitution which, by their nature, are vested exclusively in Congress. *See* Cooley v. Board of Wardens, 53 U.S. (12 How.) 299 (1851) (certain congressional powers "are in their nature national, or admit of one uniform system"). The need for national uniformity in dealing with foreign nations was recognized very early by the Court. Railroad Co. v. Maryland, 88 U.S. (21 Wall.) 456 (1874) (regulation of vehicles of commerce "being instrumentalities of intercommunication with other countries" is assumed by Congress). A clearer statement by the Court expressing the need for national uniformity in international commerce was later expressed in Bowman v. Chicago & Nw Ry., 125 U.S. 465 (1888). In that case, the Court stated: "The organization of our state and federal system of Government is such that the people of the several States can have no relations with foreign powers in respect to commerce or any other subject, except through the government of the United States and its laws and treaties." *Id.* at 482. *See also* Board of Trustees of the Univ. of Ill. v. United States, 289 U.S. 48 (1933). In that case, the Court stated: "In international relations and with respect to foreign intercourse and trade the people of the United States act through a single government with unified and adequate national power." *Id.* at 59. *Accord* Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976). Concerning the import-export clause, the *Michelin* Court found that the Framers' overriding concern was that "the Federal Government must speak with one voice when regulating commercial relations with foreign governments. . ." *Id.* at 285. After noting the *Michelin* Court's finding, the *Japan Line* Court found that "[t]he need for federal uniformity is no less paramount in ascertaining the negative implications of Congress' power to (regulate commerce with foreign Nations) under the Commerce Clause." (footnote omitted). 441 U.S., at 449. *See generally* Comment, *The Negative Commerce Clause—A Strict Test For State Taxation Of Foreign Commerce*, 13 INT'L L. & POL. 135 (1980); Note, *The Foreign Commerce Clause: An Economic Approach to the Negative Effects of State Taxation*, 13 J. MAR. L. REV. 793 (1980); Note, *State Taxation of Foreign-Owned Instrumentalities Used Exclusively in Foreign Commerce is Forbidden by the Commerce Clause When Multiple Taxation or Impairment of Uniform Federal Regulation of Foreign Commerce Would Result*, 19 VA. J. INT'L L. 915 (1979); Note, *State Tax on Instrumentalities of Foreign Commerce Invalid When Tax Results in Multiple Taxation and Impairs Federal Uniformity in Regulation of Foreign Trade*, 12 VAND. J. TRANSNAT'L L. 999 (1979).

by the due process and the commerce clauses were satisfied.[42] The Court then addressed the two tests imposed by the foreign commerce clause.[43] The Court noted the relevance of *Japan Line* in addressing the foreign commerce clause issue,[44] but concluded that it was not controlling in *Container* because the distinctions in the cases amounted to "a constitutionally significant difference."[45]

According to *Container*, the California taxing scheme satisfied the double taxation test of the foreign commerce clause because *Japan Line* did not absolutely require the striking down of a tax that results in only a slight double taxation of foreign income.[46] The *Container* Court noted that the *Japan Line* Court relied on "much more than the fact of double taxation to strike down the state tax."[47] In order to avoid the double taxation in

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42. 103 S. Ct. at 2945-50 (1983).

43. 103 S. Ct. at 2950.

44. *Id.* In *Japan Line*, California attempted to impose an apparently fairly apportioned property tax on cargo containers owned by a Japanese corporation and used in foreign commerce. The cargo containers were also subject to a non-apportioned Japanese property tax. A convention signed by the United States and Japan made it clear that neither national government would impose a tax on cargo containers temporarily imported where the home port was in the other nation. The Court held in *Japan Line* that the California property tax was unconstitutional because it failed to meet the two tests mandated by the foreign commerce clause. *See* Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).

45. 103 S. Ct. at 2953. In comparing *Japan Line* to *Container*, the Court noted three ways in which *Container* was distinguishable from *Japan Line*:

First, the Court concluded *Japan Line* involved a property tax while *Container* involved an income tax. Citing Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425, 444-46 (1980), and Exxon Corp. v. Wisconsin Dept. of Revenue, 447 U.S. 207, 228-29 (1980), the *Container* Court suggested that "the reasons for allocation to a single situs that often apply in the case of property taxation carry little force" in the case of income taxation. *Mobil*, 445 U.S. at 445.

Second, the Court concluded that double taxation was not the "inevitable" result of the California taxing scheme. To support this statement, the Court referred to Chicago Bridge & Iron Co. v. Caterpillar Tractor Co., 103 S. Ct. 3562 (1983). The Illinois application of the worldwide combined apportionment resulted in a refund to Caterpillar from the amount paid in those instances in which Caterpillar previously filed its tax returns on a separate company basis but did not include foreign income. *Container Corp.*, 103 S. Ct. at 2952 n.25. For an additional discussion on this finding by the Court, see *infra* note 82. After the *Container* decision, *Chicago Bridge & Iron* was dismissed for lack of a substantial federal question.

Third, the Court concluded that, in *Japan Line*, the tax fell upon the foreign owners of the instrumentality in foreign commerce; in *Container*, on the other hand, the tax fell on a corporation domiciled and headquartered in the United States. The Court pointed out that they had specifically left open the application of *Japan Line* to "domestically owned instrumentalities engaged in foreign commerce." *Japan Line*, 441 U.S. at 444 n.7.

46. 103 S. Ct. at 2953.

47. For a further discussion of this statement by the Court, see *infra* note 74.

Japan Line, the Court found it reasonable, under the facts of that case, to simply order California not to tax the containers at all.[48] The *Container* Court, however, believed that a "bright-line" rule abolishing the tax completely in order to avoid constitutional violations would be unfair in this case because a portion of the corporation's income was clearly domestic.[49]

The Court rejected the plaintiff's suggestion that California should be required to follow the federal approach to taxation of foreign income.[50] The Court reasoned that requiring California to follow the federal "arm's-length" approach to taxation "would not by any means guarantee an end to double taxation."[51] The Court further reasoned that, because California's method of ap-

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48. The *Container* Court concluded that this bright-line rule had not been unfair in *Japan Line* because "the rule did no more than reflect consistent international practice and express federal policy." 103 S. Ct. at 2953.

49. *Id.*

50. Appellant's Brief On The Merits at 29-36, Container Corp. of Am. v. Franchise Tax Bd., 103 S. Ct. 2933 (1983). Container Corporation argued that because the "arm's-length" approach was the internationally accepted norm for allocating income to taxing jurisdictions and because no California tax credit or deduction was available for foreign taxes paid on foreign income, "double taxation of such income is inescapable. Such improper apportionment of income and resulting double taxation unavoidably frustrate the United States foreign policy of promoting the free international flow of capital and technology and therefore violates the commerce clause." *Id.* at 36.

The federal government uses the arm's-length approach to taxation of interrelated corporations. The arm's-length approach treats each corporation as a separate entity for income tax purposes. Closely related corporations, however, engage in transfers of values that are not fully reflected in formal company ledgers. 103 S. Ct. at 2953. *See generally* Human, *The Tempest Over The Treaty: Implications of the United States-United Kingdom Tax Treaty for State and Local Taxation*, 23 ST. LOUIS U.L.J. 509 (1979) (discussion of 26 U.S.C. § 482 and federal system of separate accounting). Thus, due to the fact that transfers between related corporations may not be reflected in their formal ledgers, 26 U.S.C. § 482 (1982) provides that "the Secretary (of the Treasury) may distribute, apportion, or allocate gross income, deductions, . . . between or among such . . . businesses, if he determines that such distribution, apportionment, or allocation is necessary in order to prevent evasion of taxes or clearly to reflect the income of any such . . . businesses." I.R.C. § 482 (1983).

Unlike the federal approach to taxation, the worldwide combined method of unitary taxation first combines the income from all related corporations that are engaged in the same unitary business and the three-factor apportionment method is then used to apportion the income to the state of California. *See supra* note 17.

51. 103 S. Ct. at 2953. The Court concluded that double taxation can still result even under the federal arm's-length approach despite provisions, such as I.R.C. § 482, which allow the federal taxing authority to reallocate income and expenses to reflect the income of an entity properly. The Court also concluded: "A serious problem . . . is that . . . the precise rules under which they reallocate income among affiliated corporations often differ substantially, and whenever that difference exists, the possibility of double taxation also exists." 103 S. Ct. at 2953-54.

portionment did not inevitably lead to double taxation,[52] it would be "perverse" to require California to follow the federal approach which may itself lead to double taxation at times.[53] Finally, the Court observed that: "In the absence of a central coordinating authority, absolute consistency, even among taxing authorities whose basic approach to the task is quite similar, may be too much to ask."[54]

The Court then examined the second, two-prong test, imposed by the foreign commerce clause.[55] The Court reasoned that the foreign commerce clause imposes the two-pronged test because federal uniformity is essential in international trade.[56] The foreign commerce clause is designed to protect federal uniformity.[57] A state tax may impair federal uniformity and prevent the federal government from "speaking with one voice" in regulating foreign commerce if it either implicates foreign policy issues which must be left to the federal government or violates a clear federal directive.[58] The Court concluded that California's

52. *See infra* note 81.

53. 103 S. Ct. at 2954-55.

54. *Id.* at 2954. The Court footnoted this statement; it recognized that double taxation is sometimes mitigated by provisions in tax treaties which provide for inter-governmental negotiations to resolve differences in the approaches of the respective taxing authorities. The Court further noted that California was in no position to negotiate with foreign governments and that neither the tax treaties nor federal law provided a mechanism by which the federal government could negotiate on behalf of the states. The Court finally noted that, in any event, these negotiations did not always occur or were not always successful. *Id.* at 2954 n.31.

55. *See infra* note 58.

56. 103 S. Ct. at 2951.

57. *See* Michelin Tire Corp. v. Wages, 423 U.S. 276, 286 (1976). In *Michelin Tire*, the Court found that the Framers' intent in drafting the import-export clause was to insure against no concurrent state power to tax the imports because "the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power." *Id.* at 285.

58. 103 S. Ct. at 2955. This marked the first time the Court had introduced this succinct two-pronged test to determine whether federal uniformity was impaired. The genesis of the two tests, however, came from Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 425 (1980). The federal directive test stems from the Court's statement: "Concurrent federal and state taxation of income, of course, is a well established norm. Absent some explicit directive from Congress, we cannot infer that treatment of foreign income at the federal level mandates identical treatment by the States." *Id.* at 448. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) developed the federal uniformity test. In distinguishing the *Japan Line* case from Bob-Lo Excursion Co. v. Michigan, 333 U.S. 28 (1948) (sustaining a Michigan statute's application against foreign commerce clause challenge), the Court stated:

> Whereas in *Bob-Lo* the risk that foreign commerce would be burdened by inconsistent international regulation was 'remote,' the risk that foreign commerce will be burdened by international multiple taxation

tax did not violate either prong of the second foreign commerce clause test.[59]

The *Container* Court stated that the most obvious foreign policy implication of a worldwide combined state income tax would be the threat of offending the foreign trading partners of the United States and, consequently, inciting them to retaliate against the nation as a whole.[60] The Court admitted that it was not competent to determine precisely when foreign nations would be offended.[61] In the absence of explicit directives from Congress,[62] the Court decided that it could only develop objective standards which reflect very general observations about the effect a tax may have on international trade and relations.[63]

Based on that analysis, the Court concluded that the California tax would not lead to significant foreign retaliation because the tax did not create an automatic asymmetry in international taxation.[64] Also, the tax in *Container* was imposed upon a domestic company, rather than a foreign corporation as in *Japan Line*.[65] The Court further reasoned that Container Corporation was amenable to being taxed in California because

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> here has been realized in fact. And whereas the Michigan statute posed no threat at all to the Federal Government's ability to 'speak with one voice' in regulating foreign trade, the impairment of federal uniformity worked by California's statute is substantial.

Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 456 n.20 (1979).

59. 103 S. Ct. at 2953-57.

60. 103 S. Ct. at 2955 (citing Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434 (1979)). "[I]f a novel state tax creates an asymmetry in the international tax structure, foreign nations disadvantaged by the levy may retaliate. . . .Such retaliation of necessity would be directed at American transportation equipment in general, not just the taxing State, so that the Nation as a whole would suffer." Japan Line Ltd. v. County of Los Angeles, 441 U.S. 434, 450 (1979).

61. 103 S. Ct. at 2955.

62. *Id. See infra* note 72 and accompanying text.

63. 103 S. Ct. at 2955.

64. *Id. But see* 103 S. Ct. at 2959 (Powell, J., dissenting). Justice Powell said: "This seems to mean only that the California tax does not result in double taxation in every case. But the fundamental inconsistency between the two methods of apportionment (unitary and federal arm's-length) means that double taxation is inevitable."

65. In *Container*, the Court footnoted this observation and stated:

> We recognize that the fact that the legal incidence of a tax falls on a corporation whose formal corporate domicile is domestic might be less significant in the case of a domestic corporation that was owned by foreign interests. We need not decide here whether such a case would require us to alter our analysis.

Container,103 S. Ct. at 2956 n.32.

For a further discussion on the significance of this statement by the court, see *infra* note 107 and accompanying text. *But see* Justice Powell's dissenting opinion in *Container*, 103 S. Ct. at 2957. Referring to the Court's observation that foreign nations will not retaliate because the legal incidence of the tax is on a domestic corporation, Justice Powell stated:

the amount of tax it paid was more a function of the tax rate than of its allocation method.[66] Finally, the Court decided that United States foreign policy was not seriously threatened. The Court supported its conclusion by stating that the executive branch did not file an *amicus curiae* brief in the *Container* case as it had done in another case with issues similar to those presented in *Container*.[67]

In addressing the second prong of the foreign commerce clause test, the Court decided that federal uniformity was not impaired because the tax did not violate any federal directives.[68] The Court found no clear federal directive prohibiting California's worldwide combined method of unitary taxation because there was no claim that "the federal tax statutes provide the necessary pre-emptive force."[69] Also, according to the Court, California's tax was not a matter of international concern, but was one of only local concern.[70] The Court additionally relied on

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> I have several problems with this argument. . . . Even if foreign governments are indifferent about the overall tax burden of an American corporation, they have legitimate grounds to complain when a heavier tax is calculated on the basis of the income of corporations domiciled in their countries. If nothing else, such a tax has the effect of discouraging American investment in their countries.

Id. at 2959.

66. *Container*, 103 S. Ct. at 2956. *But see* Justice Powell's dissenting opinion. "[T]he argument ignores the political restraints that make such a course (of raising the tax rate) infeasible." *Id.* at 2960. His dissent pointed out that California would have to raise the tax rate for all corporations and this should be done "through the political process in which corporations doing business in California are free to voice their objections." *Id.*

67. The Court noted that the Solicitor General had filed a brief opposing the worldwide formula apportionment by a state in Chicago Bridge & Iron Co. v. Caterpillar Tractor Co., 103 S. Ct. 3562 (1983) (case dismissed). *Container*,103 S. Ct. at 2956 n.33. The Court concluded, however, that, because the Solicitor General had not filed a similar brief in the *Container* case, there was no indication that the government's position in *Chicago Bridge & Iron* still represented its views or that the brief in the *Chicago Bridge & Iron* case should apply to the *Container* case. *Id.*

But see the dissenting opinion in *Container*, noting that the Solicitor General's brief in *Chicago Bridge & Iron* was directly on point and that *Chicago Bridge & Iron* was currently pending before the Court. *Id.* at 2960. Justice Powell concluded: "As long as *Chicago Bridge & Iron* remains before us, we must conclude that the Government's views are accurately reflected in the Solicitor General's memorandum in that pending case." *Id.*

68. *Container*, 103 S. Ct. at 2956.

69. *Id.*

70. *Id.* The Court concluded that a state's taxation of foreign income is really a matter of local concern. *Id.*

> Although the United States is a party to a great number of tax treaties that require the Federal Government to adopt some form of arm's-length analysis in taxing the domestic income of multinational enterprises, that requirement is generally waived with respect to the taxes imposed by each of the contracting nations on its own domestic corporations.

the Senate's rejection of a treaty that would have prevented the states from using the worldwide combined unitary approach of taxing corporations.[71] Finally, the Court noted that Congress has long debated, but has not yet enacted, legislation designed to regulate state taxation of income.[72]

The *Container* decision would undoubtedly have been better reasoned and more consistent with precedent if it had struck down the California tax. Following the guidelines of *Japan Line*, California's tax should have been ruled unconstitutional for a number of reasons. Double taxation in fact occurred. A "bright-line" rule banning double taxation of foreign income could have been easily applied in *Container*. Also, the worldwide combined approach inevitably results in double taxation. In addition, because double taxation is inevitable, the federal arm's-length approach to taxing foreign income is preferable; it is more consistent with the international custom of taxation which is designed, in part, to eliminate double taxation. The federal approach is also preferable because competent authority

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Id. See United States Draft Model Income Tax Treaty of June 16, 1981 Arts. 1(3) & 7(2), *reprinted in* P-H Tax Treaties Par. 1022 [hereinafter cited as Model Treaty].

71. *Container*,103 S. Ct. at 2956. *See also* 124 CONG. REC. 18400, 19076 (1978). *See generally* Human, *The Tempest Over The Treaty: Implications Of The United States-United Kingdom Tax Treaty For State And Local Taxation*, 23 ST. LOUIS U.L.J. 509 (1979) (concluding that prohibition of worldwide unitary apportionment would be a backward step).

72. *Container*,103 S. Ct. at 2956. The first and only major congressional act in the area of state taxation was the Act of September 14, 1959, Pub. L. No. 86-272, 73 Stat. 555 (codified at 15 U.S.C. § 381 (1982)). This legislation was a direct response to the Supreme Court decision in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959), permitting a state to tax the interstate activity of a nonresident corporation which fairly apportioned the corporation's activity to the taxing state. Pub. L. No. 86-272 limits the state taxing power because

> [t]he legislation denies to the States the power to impose taxes on or measured by net income derived within the State from interstate commerce if the 'only business activities within such State. . .' are the solicitation of orders for sales. . .where the orders are sent outside the State for approval or rejection and are filled. . .outside the State.

J. HELLERSTEIN, STATE TAXATION I CORPORATE INCOME AND FRANCHISE TAXES § 6.10 (1983).

Since 1959 there have been several attempts by Congress to bring state taxation into conformity with federal and international standards. *See* Note, *Proposed Congressional Limitations On State Taxation Of Multinational Corporations*, 11 GA. J. INT'L & COMP. L. 343, 345 n.14 (1981). The most recently proposed federal legislation is H.R. 2918, 98th Cong., 1st Sess. (1983) and S. 1225, 98th Cong., 1st Sess. (1983). Both bills are similar—both would prohibit states from using the worldwide combined reporting system in taxing multinational corporations and would require that state rules for taxing dividends received by domestic corporations from their overseas subsidiaries conform to the rules of the federal government. *See* Daily Tax Rep. Pub. No. 89, *State Limits Re-Proposed For Taxing Multinationals* G-1 (May 6, 1983).

can resolve inequities that may arise in international taxation. Furthermore, the presence of the mere threat of retaliation against the United States by foreign trading partners indicated that California's tax impaired federal uniformity. Finally, the Solicitor General's opinion that California's tax impaired federal uniformity was not properly considered by the Court.

When the *Container* Court implied that more than mere double taxation had been relied on when the *Japan Line* tax had been struck down, it failed to specify on what it did rely.[73] A careful analysis of *Japan Line* indicates it relied on only two tests: whether there was double taxation and whether the tax in that case prevented the federal government from "speaking with one voice."[74] The *Japan Line* Court had concluded that: "If a state tax contravenes *either* of these precepts, it is unconstitutional under the commerce clause."[75] In *Container*, double taxation did in fact occur;[76] if *Japan Line* had been followed, that fact alone would have been sufficient for the Court to hold California's tax unconstitutional.[77] Nevertheless, California's uni-

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73. *Container*, 103 S. Ct. at 2953.

74. *Id.* The writer has located eleven articles which comment on Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979). The authors of all eleven articles concluded that, if a state taxes instrumentalities of foreign commerce and the effect of the tax is to subject the taxpayer to double taxation, the state tax is unconstitutional. *See, e.g.*, Note, *A State Tax, Although Consistent With The Commerce Clause Requirements for Interstate Commerce, May Not Be Applied Unilaterally to Foreign Commerce*, 45 J. AIR L. & COM. 559 (1980) (risk of multiple taxation is a burden which is clearly repugnant to the commerce clause); *accord* Note, *Commerce Clause Limits on Direct Taxation of Foreign Containers*, 14 J. INT'L L. & ECON. 153 (1979); Note, *The Foreign Commerce Clause: An Economic Approach to the Negative Effects of State Taxation*, 13 J. MAR. L. REV. 793 (1980); Note, *The Negative Commerce Clause—A Strict Test For State Taxation Of Foreign Commerce*, 13 INT'L L. & POL. 135 (1980); Note, *Limitations On State Taxation Of Foreign Commerce: The Contemporary Vitality Of The Home-Port Doctrine*, 127 U. PA. L. REV. 817 (1979); Note, *Supreme Court Decisions In Taxation*, 33 TAX LAW. 506 (1980); Note, *State Ad Valorem Taxes On Instrumentalities Of International Commerce*, 11 L. & POL'Y INT'L BUS. 1213 (1979); Note, *Taxation of Goods In International Commerce*, 20 HARV. INT'L L.J. 725 (1979); Note, *Constitutional Law—Commerce Clause—State Tax On Instrumentalities Of Foreign Commerce Invalid When Tax Results In Multiple Taxation And Impairs Federal Uniformity In Regulation Of Foreign Trade*, 12 VAND. J. TRANSNAT'L L. 999 (1979); Note, *Constitutional Law—Commerce Clause—State Taxation Of Foreign-Owned Instrumentalities Used Exclusively In Foreign Commerce Is Forbidden By The Commerce Clause When Multiple Taxation Or Impairment Of Uniform Federal Regulation Of Foreign Commerce Would Result*, 19 VA. J. INT'L L. 915 (1979); Note, *Constitutional Law—The Scope Of The Commerce Clause In International Commerce*, 55 WASH. L. REV. 885 (1980).

75. *Japan Line*, 441 U.S. at 451 (emphasis added).

76. *Container*, 103 S. Ct. at 2951.

77. *Japan Line* 441 U.S. at 451, 453.

tary tax was upheld by the *Container* Court.[78]

The *Container* Court had attempted to distinguish *Japan Line* by reasoning that multiple taxation was more easily avoided in *Japan Line* because the Court was able to tell California simply not to impose a tax at all, whereas a similar "bright-line" rule in *Container* would have been unfair because a portion of Container Corporation's income was clearly domestic.[79] This reasoning is specious; the Court could have easily upheld California's method of combined unitary taxation and still have prevented double taxation of foreign income by requiring California to use the "water's-edge" approach to combined unitary taxation. The "water's-edge" approach is based on the same method of taxation California employs. Under the "water's-edge" approach, however, foreign income, and the apportionment factors associated with it, are not included in the unitary group.[80] Because California would have been free to ap-

78. The *Container* decision is an inconsistent application of the constitutional principles developed in *Japan Line* and the result is confusion among both taxpayers and local taxing authorities. This confusion leads to expensive litigation and wastes the Court's resources. For example, in 1945, the Supreme Court held that Ohio's property tax assessment on imported raw materials which were stored in their original containers for later use violated the import-export clause. Hooven & Allison Co. v. Evatt, 324 U.S. 652 (1945). In 1976, however, the Court overruled a 105-year-old precedent banning property taxation of imports when it upheld the constitutionality of a state property tax levied, without regard to the point of origin, on imported tires which had been mixed with domestically manufactured tires and stored for future use. Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976). The *Michelin* Court twice cited the *Hooven & Allison* case without expressly overruling or affirming that case. *Id.* at 281, 301 n.13. Today, *Hooven & Allison Company* is again before the Supreme Court because Ohio now believes it can assess the property tax in light of the *Michelin* case. At a minimum, the Supreme Court should have made a clear statement regarding the precedential value of *Hooven & Allison* in order to prevent needless litigation.

79. *Container*, 103 S. Ct. at 2953.

80. The "water's edge" approach to unitary taxation is based on the same principle as worldwide combined reporting except that foreign source income is excluded from apportionable income unless a dividend is actually paid from subsidiaries. Thus, a "water's edge" approach to unitary taxation would prevent double taxation of foreign income and would not impair the federal uniformity or prevent the federal government from speaking with one voice. *See* Brooks, *Speaking With One Voice—A Uniform Glossary for State Taxation of Interstate Business*, 2 J. ST. TAX'N 5 at 15-16 (1983) (domestic combined reporting includes the "taxpayer-corporation and its U.S. affiliates" (as opposed to foreign affiliates) and "[t]he distinction between worldwide and domestic combination is that states employing domestic combined reporting adopt a 'water's-edge' approach to determine what corporation will be included in the combined group. . .") (emphasis retained).

A clearer distinction between domestic combined reporting, worldwide combined reporting, and the "water's-edge" approach can be made. Domestic combined reporting includes the taxpayer and only U.S. companies owned or controlled by the taxpayer by more than 50%. Worldwide combined reporting includes all companies, foreign as well as domestic, owned portion Container Corporation's domestic income to its jurisdiction, a "bright-line" rule of banning double taxation of foreign income could have been applied in Container.

The *Container* Court also stated that California's method of taxation did not inevitably lead to double taxation, whereas in *Japan Line* the Court held the converse.[81] Mathematically, it can be shown that the worldwide combined method of unitary taxation will always lead to double taxation of foreign income; under the worldwide approach, foreign income will always be included in the state's net taxable income apportionable to that state.[82] Thus, *Container* and *Japan Line* cannot be distinguished on the issue of double taxation.

The *Container* Court stated furthermore that it would not

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by the taxpayer by more than 50%. The "water's-edge" approach taxes only U.S. source income; there is no taxation of foreign source income.

81. *Container*, 103 S. Ct., at 2952. The validity of the Court's conclusion that double taxation under California's tax is not inevitable may be questioned. The *Container* Court reasoned that the double taxation in *Japan Line* necessarily resulted from Japan's claiming the right to tax a given value in full and California's claiming the right to tax the same entity in part. *Id.* The Court then stated that, in *Container*, there were two distinct methods of allocating the income of a multinational corporation to California, either the arm's-length approach or the formulary apportionment. The Court finally concluded: "Whether the combination of the two methods results in the same income being taxed twice or in some portion of income not being taxed at all is dependent solely on the facts of the individual case." *Id.* The Court footnoted this statement and referred to Chicago Bridge & Iron Co. v. Caterpillar Tractor Co., 103 S. Ct. 3562 (1983) (case dismissed) in which the taxpayer paid less Illinois tax under the worldwide combined reporting method than it did using the separate company approach. The Court inferred that, because lower taxes were paid, no double taxation necessarily resulted in *Chicago Bridge & Iron*.

The Court's reasoning is confusing and illusory. First, the *Japan Line* facts are anlogous to the *Container* facts. In *Container*, a foreign jurisdiction claimed the right to tax the foreign income in full (evidenced by foreign tax credits) and California claimed the right to tax the same value in part. Additionally, the Court was not faced with deciding between two distinct methods of allocating the income of Container Corporation to California. The Court could have allowed California to employ the water's-edge combined approach, but did not even consider this alternative. *See supra* note 80 and accompanying text.

Furthermore, the worldwide combined unitary method of apportionment will always lead mathematically to double taxation of foreign income. *See infra* note 82.

82. The appellant, Container Corporation, argued the following:

> (1) United Nations statistics for the years 1974-1980, . . . show that while wages throughout the world are increasing, the same disparity between wages paid United States workers and those in less industrialized countries continues to exist. Furthermore, as the United States Tariff Commission has demonstrated, these differences in wage rates are not offset by lower productivity for workers in various economic settings. These studies are corroborated by other resources.

Appellant's Brief on the Merits at 12-13, Container Corp. of Am. v. Franchise Tax Bd., 103 S. Ct. 2933 (1983).

(2) As stated in Peterson, *California Franchise Tax: Combined Income Reports Affects Foreign Companies*, 44 J. TAX 184, 187 (1976):

. . . .wage levels are considerably lower in Japan, Italy or almost any other country than in the United States. . . .

The same type of disparity exists as to the cost of plant or property. . . .

An apportionment of worldwide income based on property and payroll could never, under these circumstances, properly apportion the income to the local activities that produced it.

Appellant's Brief on the Merits at 13 n.3, Container Corp. of Am. v. Franchise Tax Bd., 103 S. Ct. 2933 (1983).

In addition to the above, however, double taxation of foreign income can be demonstrated mathematically to be inevitable. The following example shows this:

	PARENT	SUBSIDIARY	COMBINED
Incorporated :	United States	England	
Taxable Income :	10MM	1MM	11MM
Federal Taxes :	4.6MM		
Foreign Taxes :		.5MM	
Net Income :	5.4MM	.5MM	5.9MM
Sales In State :	50MM		50MM
Property In State :	20MM		20MM
Payroll In State :	5MM		5MM
Sales Everywhere :	1,000MM	100MM	1,100MM
Property Everywhere:	40MM	8MM	48MM
Payroll Everywhere :	7MM	1.1MM	8.1MM

COMPUTATION OF STATE TAX LIABILITY

Separate Company Return

apportionment factor:

$$\frac{\frac{50MM}{1{,}000MM} + \frac{20MM}{40MM} + \frac{5MM}{7MM}}{3}$$

apportionment factor =	.4214286
FEDERAL NET INCOME	5.4MM
ADD: FEDERAL TAXES	4.6MM
FEDERAL PRE-TAX INCOME	10MM
APPORTIONMENT FACTOR	.4214286
APPORTIONED INCOME	$4,214,286
STATE TAX RATE	10%
STATE TAX LIABILITY	$421,419

Worldwide Combined Return

apportionment factor:

$$\frac{\frac{50MM}{1{,}100MM} + \frac{20MM}{48MM} + \frac{5MM}{8.1MM}}{3}$$

apportionment factor =	.3598017
FEDERAL NET INCOME	5.9MM
ADD: FED/FOREIGN TAXES	5.1MM
FEDERAL PRE-TAX INCOME	11MM
APPORTIONMENT FACTOR	.3598017
APPORTIONED INCOME	$3,957,819
STATE TAX RATE	10%
STATE TAX LIABILITY	$395,782

Based on the above hypothetical, the worldwide combined return results in a $25,647 lower state income tax liability than that computed on the separate return basis ($421,429-$395,782). However, of the $1MM of foreign income, $359,802 (.359802 × $1MM) is apportioned to the state. Since the state income tax rate is 10%, $35,980 of the taxpayer's state income tax liability is due to the inclusion of foreign income. Thus, even though the taxpayer in the above hypothetical would pay less tax under the worldwide combined method as compared to the separate return method in which no foreign income is subject to tax, one cannot automatically conclude that foreign income will not be subject to the taxation by both the foreign jurisdiction and the state. On the contrary, mathematically, foreign income is necessarily subject to double taxation using the worldwide combined method of apportionment.

require California to follow the federal arm's-length approach.[83] *Container* stated that the federal approach does not guarantee an elimination of double taxation.[84] The Court decided that, in the absence of a central authority which would coordinate the state approaches to taxing foreign income with the federal approach, absolute consistency would be too much to ask of state taxing authorities.[85] The Court's rejection of the federal approach on the grounds that it fails to guarantee an elimination of double taxation is inappropriate. Realistic guidelines for determining the constitutional limits of a state taxing scheme would not require an absolute guarantee against double taxation, or even absolute consistency. Accounting is an art form, not an exact science.[86] The federal arm's-length approach[87] to taxation of multinational companies is more consistent with the international custom of taxation than the worldwide combined approach and, at a minimum, would provide a better guarantee of eliminating double taxation of foreign income.[88]

The federal approach is also preferable because it provides for the resolution of inequities which may arise in international

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83. *Container*, 103 S. Ct. at 2954-2955.

84. *Id.* at 2953.

85. *Id.* at 2954.

86. In a college textbook on managerial cost accounting, the authors point out the difficulty of measuring and determining a firm's results of operations. "The determination of income and financial position is important, but any determination is going to be inexact and subject to numerous assumptions. It is interesting to note that no matter how elaborate the cost-accounting system, there would still exist problems of income and financial position determination." H. BIERMAN & T. DYCKMAN, MANAGERIAL COST ACCOUNTING 4 (2d ed. 1976).

In addition, the Court has recognized that any apportionment method will result in some inconsistency. In Container Corp. of America v. Franchise Tax Bd., the Court said:

> Both geographical accounting and formula apportionment are imperfect proxies for an ideal which is not only difficult to achieve in practice, but also difficult to describe in theory. Some methods of formula apportionment are particularly problematic because they focus on only a small part of the spectrum of activities by which value is generated. Although we have generally upheld the use of such formulas, *see, e.g., Moorman Mfg. Co., supra; Underwood Typewriter Co., supra*, we have on occasion found the distortive effect of focusing on only one factor so outrageous in a particular case so as to require reversal.

Container Corp. of Am. v. Franchise Tax Bd., 103 S. Ct. 2933, 2949 (1983).

87. *See* Appellant's Brief On The Merits at 30-31, Container Corp. of Am. v. Franchise Tax Bd., 103 S. Ct. 2933 (1983) (arm's-length standard is internationally accepted norm for income allocation of related taxpayers).

88. One of the principal reasons for concluding a treaty with other trading nations is to remedy the problem of double taxation. *See* Model Treaty Art. 23 (relief from double taxation). *See also* P. POSTLEWAITE, INTERNATIONAL CORPORATE TAXATION § 4.01 (1980) (many nations enter into bilateral agreements or conventions with other trading nations to limit double taxation effects).

taxation, for example, the elimination of double taxation through the use of "competent authority."[89] States imposing a tax on foreign income do not have the power to deal with foreign nations and they have no mechanism such as the competent authority to resolve the problems of double taxation.[90] If the states were required to follow the federal approach when taxing foreign income, however, the necessary competent authority would be automatically provided for them.

The Court's argument that foreign nations will not retaliate if states tax the foreign income of a unitary business lacks an adequate foundation. Automatic asymmetry is not required before a foreign nation will retaliate.[91] The key factor in determining whether a foreign nation will retaliate is that nation's subjective observation whether it needs to react to a worldwide combined state tax.[92]

Container also reasoned that, because the tax is on a domestic corporation, there should be no reason for foreign nations to retaliate.[93] The Court's reasoning is unsatisfactory for a

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89. *See* Model Treaty Art. 26 (extension of information obtained from administrative measures which are used in investigating jurisdiction's own collection of tax). *See also* P. POSTLEWAITE, INTERNATIONAL CORPORATE TAXATION § 4.01 (1980) ("Treaties constitute a workable method of insuring that the foreign jurisdiction makes a correlative reduction in taxes previously assessed, if competent authorities of both jurisdictions agree that income has in fact been misstated.").

90. 103 S. Ct. at 2954 n.31.

91. *See* Memorandum For The United States As *Amicus Curiae* at 3, Chicago Bridge & Iron Co. v. Caterpillar Tractor Co., 103 S. Ct. 3562 (1983) (case dismissed). In *Chicago Bridge & Iron*, Illinois imposed a worldwide unitary tax which resulted in a refund to the taxpayer and which did not result in an automatic asymmetry. Yet, reaction by foreign governments to this tax was clear as the Solicitor General stated in the memorandum:

> We are accordingly advised by the Departments of State and Treasury, the Department of Commerce, acting at the request of the Delegation of the Commission of the European Communities, and the United States Trade Representative, that a number of foreign governments have complained—both officially and unofficially—that the apportioned combined method employed by Illinois and other states creates an irritant in their commercial relations with the United States. Retaliatory taxation may ensue, with consequent damage to international trade.

Memorandum For The United States As *Amicus Curiae*, Chicago Bridge & Iron Co. v. Caterpillar Tractor Co., 103 S. Ct. 3562 (1983) (case dismissed).

92. "Already, several investment projects planned within the United States have been cancelled as a result of state use of worldwide unitary taxation. In addition, several trading partners—notably Japan, the Netherlands, and the United Kingdom—have sent strong letters of protest to the Reagan Administration warning of serious repercussions unless this form of taxation is curbed." Daily Tax Rep. Pub. No. 186, *Tax Policy* G-3 (Sept. 23, 1983).

93. 103 S. Ct. at 2955-56.

number of reasons.[94] For example, foreign nations may be legitimately concerned that states may extend the worldwide combined unitary principle to foreign parent corporations which have subsidiaries in the United States.[95] In addition, foreign nations may have a legitimate concern in trying to prevent the spread of the worldwide unitary principle to third world countries where foreign corporations have many operations.[96]

Container theorized that California's tax did not prevent the federal government from "speaking with one voice" because the federal government had not expressed any concern in the *Container*[97] case and because there was no congressional legislation in the area.[98] The Court's equating the absence of the Solicitor General's *amicus curiae* brief, with a lack of concern by the executive branch on the subject, was not well founded. The Solicitor General had filed a brief in the case of *Chicago Bridge & Iron Co. v. Caterpillar Co.*,[99] which was already before the Court and which dealt with the same issues presented in *Container*.[100] Justice Powell stated in his dissent: "I see no reason to ignore the Solicitor General's view in one case currently pending before the Court when considering another case that raises exactly the same issue. The Solicitor General has not withdrawn his previous memorandum. . . ."[101]

The Court correctly observed that there was no federal di-

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94. For example, the following excerpt is from an article which appeared in a British newspaper fourteen days after the Supreme Court handed down the *Container* decision.

> A new campaign against the recently upheld right of American states to levy unitary taxes will be launched this week. A retaliatory amendment to the Finance Bill could result in American companies losing their British Advance Corporation Tax (ACT) rebate and a stiff note is on its way from Mr. Nigel Lawson, the Chancellor of the Exchequer, to Washington.

Retaliatory Amendment Spearheads Campaign Against Unitary Tax, THE TIMES (London), July 11, 1983, at 15, col. 2.

95. *See* Daily Tax Rep. Pub. No. 187, *Unitary Tax* G-5 (Sept. 26, 1983).

96. *Id.*

97. 103 S. Ct. at 2955-56.

98. *Id.* at 2956.

99. *See* Chicago Bridge & Iron Co. v. Caterpillar Tractor Co., 103 S. Ct. 3562 (1983) (case dismissed) (lack of substantial federal question).

100. *See infra* note 101.

101. 103 S. Ct. at 2960 (Powell, J., dissenting). The Solicitor General filed a Memorandum For The United States as *Amicus Curiae*, Chicago Bridge & Iron Co. v. Caterpillar Tractor Co., 103 S. Ct. 3562 (1983) (case dismissed). At issue in *Chicago Bridge & Iron* was the Illinois worldwide combined unitary method of taxation. The Solicitor General filed an *amicus curiae* brief on behalf of the federal government in opposition to Illinois' method of taxation. The Solicitor General urged the Court to find the Illinois tax unconstitutional because it presented a risk of double taxation and it prevented the federal government from "speaking with one voice" in its dealings with foreign nations. *See* Memorandum For The United States As *Amicus Cu-*

rective prohibiting California from imposing its tax;[102] it does not automatically follow from this, however, that the tax would be consonant with the federal government's ability to "speak with one voice."[103] There was, in fact, considerable evidence before the court to the contrary. For example, numerous letters from foreign heads of state were sent to the federal government; the letters expressed the concern of those leaders and the possibility that they would be forced to take retaliatory action if the states' taxing power were not curbed.[104] In ignoring evidence of the concern of foreign trading partners of the United States,[105] the Court did not properly consider the international implications of California's tax.

The decision in *Container* has allowed various states employing the worldwide combined method of formula apportion-

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riae, Chicago Bridge & Iron Co. v. Caterpillar Tractor Co., 103 S. Ct. 3562 (1983) (case dismissed).

In *Chicago Bridge & Iron*, the taxpayer was entitled to a refund using the worldwide combined method and the Solicitor General admitted that the tax did not "create multiple taxation in fact." *Id.* at 13-14. The Solicitor General recommended: "Accordingly, if the Court wishes to consider the question in this case in the context of a case involving multiple taxation in fact, it may wish to defer decision in this case and note probable jurisdiction in *Container Corporation of America v. Franchise Tax Board* No. 81-523." Memorandum For The United States As *Amicus Curiae* at 14, Chicago Bridge & Iron Co. v. Caterpillar Tractor Co., 103 S. Ct. 3562 (1983) (case dismissed).

After urging for a declaration that the Illinois tax was unconstitutional, the Solicitor General reiterated his recommendation. "If the Court concludes, however, that the record in this case is inadequate to support such a disposition, we urge it to defer resolution of the issue to another case which has a more fully developed record." *Id.* at 16.

102. 103 S. Ct. at 2956.

103. Congress has not acted in this area because of political pressures from lobbying efforts by the states and by the Multistate Tax Commission. *See* Note, *Proposed Congressional Limitations On State Taxation of Multinational Corporations*, 11 GA. J. INT'L & COMP. L. 343 (1981).

104. First, the Court had before it the Solicitor General's *amicus curiae* brief in the *Chicago Bridge & Iron* case which represented the government's views on the problems created by unitary taxation and its effects on the government's ability to deal with foreign nations. *See supra* note 101. Second, Container Corporation had attached the Solicitor General's brief to its own brief and included letters from the United Kingdom and Canada expressing concern over the states' use of the worldwide apportionment method.

105. *See* Appellant's Brief On The Merits at A-6 - A-23, Container Corp. of Am. v. Franchise Tax Bd., 103 S. Ct. 2933 (1983) (letter from Canadian Embassy, letter from Embassy of Belgium on behalf of the Ten E. E. C. Governments as President, and appellant attached a copy of the Memorandum For The United States As *Amicus Curiae* to the *Chicago Bridge & Iron* case). *See also* Memorandum For The United States As *Amicus Curiae* filed by the Solicitor General in Chicago Bridge & Iron Co. v. Caterpillar Tractor Co., 103 S. Ct. 3562 (1983) (case dismissed) (attached letter from British Embassy on behalf of the Ten E. E. C. Governments as President, letter from Canadian Embassy).

ment to collect $600 million to $900 million of tax revenue—revenue that they would have been forced to forego if California's tax had been declared unconstitutional.[106] The *Container* decision, however, conflicts with a national interest in keeping United States multinational companies economically competitive in international trade and in attracting foreign investment into the United States. The *Container* decision was further tarnished because it did not establish any constitutional limitation on a state's power to tax the foreign income of a unitary business;[107] by leaving this question unanswered, the Court will cause taxpayers to engage in even more litigation in the future.[108]

The *Container* decision is wholly unsatisfactory. The evidence of dismay and concern among leaders of the United States' foreign trading partners, that the tax may lead to retaliation against the United States,[109] should not have been ignored. If the states are prohibited from applying the worldwide combined method of taxation to domestic corporations with foreign parents, significant due process complications arise.[110]

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106. *See* Daily Tax Rep. Pub. No. 186 *Tax Policy* G-3 (Sept. 23, 1983) (estimates made by various state officials interviewed).

107. 103 S. Ct. at 2956 n.32. (Court not deciding issue of whether worldwide combined unitary tax was constitutional where tax falls upon domestic corporation owned by foreign interests). *See also* dissenting opinion in which Justice Powell discussed the dilemma the Court will face when confronted by the issue. He wrote:

> There can be little doubt that the parent's government would be offended by the State's action and that international disputes, or even retaliation against American corporations, might be expected. It thus seems inevitable that the tax would have to be found unconstitutional—at least to the extent it is applied to the foreign companies. But in my view, invalidating the tax only to this limited extent also would be unacceptable. It would leave California free to discriminate against a Delaware corporation in favor of an overseas corporation. I would not permit such discrimination without explicit congressional authorization (footnotes omitted).

Container Corp. of Am. v. Franchise Tax Bd., 103 S. Ct. 2933, 2960 (1983).

108. Litigation on this issue has already begun in California. *See* Shell Petroleum N.V. v. Graves, No. c-81-4302. Shell asked for a preliminary injunction to prevent the California Franchise Tax Board from collecting information from Shell Petroleum, a Netherlands corporation, and assessing the tax on its domestic subsidiary, Scallup Nuclear, which includes Shell's foreign income. On August 4, 1982, the U.S. District Court, Northern District of California, held that Shell lacked standing to raise its claims and the controversy was not ripe for a decision because Shell had only received a proposed assessment and had not yet undergone the statutory hearing and appeal process. If the California Franchise Tax Board issues Shell Petroleum an additional assessment based on the inclusion of its foreign source income, Shell will certainly protest the assessment in the courts.

109. *See supra* note 104.

110. The potential due process issue is generally recognized. But, the significance of the issue is discounted by some observers. *See, e.g.*, XX TAX

Container left these problems unresolved.

There appears to be only one rational explanation for the *Container* Court's strained attempt to distinguish *Japan Line*: the Court is seeking to force Congress to take legislative action to regulate state taxation of foreign income.[111] In the past, legislative action by Congress could not realistically be expected in light of domestic political pressures.[112] Legislation designed to regulate state taxation of foreign income of corporations is again pending before both the House and the Senate.[113] The unique combination of political pressure from foreign nations and multinational companies, and the increase in the number of states employing the worldwide combined method of unitary taxation, may, this time, require the executive branch and Congress to take measures to regulate state taxation of foreign income.[114] Although the decision in *Container* was not as well-reasoned as

NOTES PUB. NO. 10, *The Potential Tax Break For Foreign Multinationals* 771, 779-80 (Sept. 5, 1983).

111. The Court has expressed, as early as 1959, its view that it is the job of Congress to regulate the state's taxing power. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 476 (1959) (Frankfurter, J., dissenting) ("The problem calls for solution by devising a congressional policy.").

112. The following statement helps to explain why Congress has refused, or at least has been unable, to legislate in this area. The author is commenting on the United States-United Kingdom tax treaty.

> The states, backed by the prestigious Multistate Tax Commission, stoutly defended the worldwide application of their method of tax determination as the only feasible and fair means for the division of the income of multinational businesses for tax purposes. The states feared large revenue losses, and they objected to the loopholes the treaty approach was said to create for multinational corporations. The states also decried the invasion state tax perogatives. Treasury and taxpayer representatives countered that the state technique is unfair when extended to international operations and was contrary to the best national economic interests. A resolution of this debate is especially difficult to imagine since both camps had valid objections to the other party's scheme for the division of international income.

Human, *The Tempest Over The Treaty: Implications of the United States-United Kingdom Tax Treaty for State and Local Taxation*, 23 ST. LOUIS U.L.J. 509, 511-12 (1979).

113. H.R. 2918, 98th Cong., 1st Sess. (1983) and S. 1225, 98th Cong., 1st Sess. (1983). *See also supra* note 72.

114. President Reagan's support of federal legislation to limit the states' ability to tax foreign source income from multinational corporations is viewed as imperative for its success. It appears, however, that President Reagan will take no stand on this issue until after the 1984 elections. A chronological history concerning the *Container* case illustrates why numerous bills proposing federal legislation of state taxation have failed and how sensitive the issue is to the state government, the federal government, and foreign nations.

(1) November 9, 1981. The Supreme Court notes probable jurisdiction to hear the *Chicago Bridge & Iron* case. 454 U.S. 1029 (1981).
(2) January 18, 1982. Solicitor General submits an *amicus* brief to the Court urging the Court to find worldwide combined unitary

some opinions which have been handed down by the United

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taxation unconstitutional in the *Chicago Bridge & Iron* case. 455 U.S. 917 (1982).

(3) January 21, 1982. Firestorm of protest from governors and local tax officials over the Solicitor General's entering the *Chicago Bridge & Iron* case. Washington Post, Jan. 21, 1982, § G at 1, col. 3.

(4) May 3, 1982. The Supreme Court notes probable jurisdiction to hear *Container Corp. of Am. v. Franchise Tax Bd.* 102 S. Ct. 2034 (1982).

(5) June 27, 1983. Supreme Court hands down *Container* decision upholding constitutionality of worldwide combined unitary taxation. 103 S. Ct. 2933 (1983).

(6) June 27, 1983. Container Corporation decides to file a petition for rehearing due to Court's assumption that federal government had changed its position when it did not file an *amicus* brief in the *Container* case. *See Daily Tax Rep. Pub. No. 197, Supreme Court Refuses to Rehear Unitary Tax Case,* G-1 (Oct. 11, 1983) (petition filed Sept. 3, 1983).

(7) July 12, 1983. Florida legislature passes legislation permitting worldwide combined unitary taxation. Daily Tax Rep. Pub. No. 136, G-5 (July 14, 1983).

(8) July 12, 1983. United Kingdom's Chancellor of the Exchequer writes President Reagan urging him to lead legislation limiting the states' taxing power of foreign income. XX TAX NOTES PUB. NO. 6, *Chancellor of the Exchequer on the Unitary Tax Method* 450 (August 8, 1983).

(9) July 26, 1983. President Reagan requests a recommendation from the Cabinet Council On Economic Affairs regarding the proper position for the executive branch to take on the unitary tax issue. XX TAX NOTES PUB. NO. 9, *Administration Formulating Opinion On Unitary Tax* 759 (Aug. 29, 1983).

(10) August 29, 1983. Reagan Administration is faced with pressure from the states on one side and from foreign governments and multinationals on the other. California, North Dakota, Utah, Vermont, other state governors and tax officials, and congressional delegations and representatives of state groups such as the National Governors Association and National Conference of State Legislators have been lobbying. Some multinational corporations are lobbying through the National Association of Manufacturers, U.S. Chamber of Commerce, and National Foreign Trade Council. Coca-Cola, Colgate-Palmolive, Mobil, and CBI Industries are lobbying separately. Foreign governments are expressing their concerns. The Canadian Embassy, the Delegation of Commission of European States, Italy, Greece, Japan, and the Netherlands have written the Treasury. Britain is the most vocal nation in expressing opposition to unitary taxation. XX TAX NOTES PUB. NO. 9, *Administration Formulating Opinion On Unitary Tax* 759 (Aug. 29, 1983).

(11) September 2, 1983. Container Corporation files a petition for rehearing. Daily Tax Rep. Pub. No. 173, *Cabinet Council Chooses Approach To Unitary Tax* G-6 (Sept. 6, 1983).

(12) September 6, 1983. Cabinet Council On Economic Affairs unanimously recommends that the executive branch support legislation permitting "water's-edge" approach to combined unitary taxation. *Id.*

(13) September 6, 1983. Prime Minister of England, Margaret Thatcher, writes letter to President Reagan expressing British concern over the unitary tax issue and favoring "water's-edge" approach.

States Supreme Court during its celebrated history, the Court may have achieved its goal: because of the decision in *Container*, Congress may now be forced to consider that legislation.[115]

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Daily Tax Rep. Pub. No. 178, *Unitary Tax Decision Delayed By President* G-3 (Sept. 13, 1983).

(14) September 12, 1983. Governor Thompson of Illinois, as Chairman of the National Governors Association, writes President Reagan urging him not to file a brief supporting Container Corporation in its petition for rehearing. XX TAX NOTES PUB. NO. 13, *The Unitary Method of Taxation: Two Views* 1045 (Sept. 26, 1983).

(15) September 12, 1983. Netherlands sends telegram urging abolishment of unitary tax system. Daily Tax Rep. Pub. No. 182, *Unitary Tax Seen Cutting U.S. Overseas Investments* G-6 (Sept. 19, 1983).

(16) September 13, 1983. President Reagan delays decision on unitary tax dilemma. Daily Tax Rep. Pub. No. 178, *Unitary Tax Decision Delayed By President* G-3 (Sept. 13, 1983).

(17) September 14, 1983. Japan government calls on U.S. government to take appropriate measures to abolish the unitary tax system. Daily Tax Rep. Pub. No. 179, *Unitary System Threatens Investment In U.S., Japanese Government Warns* G-5 (Sept. 14, 1983).

(18) September 22, 1983. President Reagan establishes a unitary tax task force to study the issues and to recommend a solution to the controversy. The government decides not to file an *amicus* brief in the Container Corporation's petition for rehearing. Daily Tax Rep. Pub. No. 185, *Reagan To Establish Unitary Task Force* G-4 (Sept. 22, 1983). It is estimated that any recommendation will not be made until late 1984. Daily Tax Rep. Pub. No. 188, *Rep. Conable Criticizes Reagan Unitary Task Force* G-4 (Sept. 27, 1983).

(19) October 11, 1983. Supreme Court refuses to rehear the *Container* decision. 104 S. Ct. 265 (1983).

115. The Unitary Task Force has announced, as its major goal, the "full accountability" of corporations. XXI TAX NOTE PUB. NO. 12, *Unitary Task Force Seeks 'Full Accountability,'* 1132 (Dec. 19, 1983).