UIC Law Review

Volume 13 | Issue 3 Article 10

Spring 1980

Japan Line, Ltd. v. County of Los Angeles - The Foreign Commerce Clause: An Economic Approach to the Negative Effects of State Taxation, 13 J. Marshall L. Rev. 793 (1980)

Marc W. Sargis

*JAPAN LINE, LTD. V. COUNTY OF LOS ANGELES**
THE FOREIGN COMMERCE CLAUSE: AN ECONOMIC APPROACH TO THE NEGATIVE EFFECTS OF STATE TAXATION

In examining the scope of a state's power to tax foreign and interstate commerce, the principle that such commerce should "pay its own way" plays a recurring role.[1] The commerce clause[2] presents no obstacle to the application of this principle for its purpose is not "to relieve those engaged in foreign and interstate commerce from their just share of the tax burden."[3] Imposed taxation is the quid pro quo for benefits actually conferred by the taxing state,[4] and it is accepted that some burden should be borne by the recipient of those benefits.[5]

In tracing the origin of this principle, a logical starting point is the Supreme Court's opinion in *Hays v. Pacific Mail Steamship Co.*[6] In *Hays*, the Court was faced with the question of whether California could impose a full ad valorem property tax[7] on a vessel whose owner was domiciled and subject to taxes in New York. The Court held that California lacked jurisdiction to tax the vessel.[8] The "home port" was declared to be the proper

* 441 U.S. 434 (1979).

1. *See* Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977); Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976).

2. U.S. CONST. art. 1, § 8, cl. 2 provides: "The Congress shall have the power to . . . regulate commerce with foreign nations, and among the several states . . . ."

3. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938).

4. Michelin Tire Corp. v. Wages, 423 U.S. 276, 289 (1976).

5. The principle of "pay your own way" holds true even though the cost of doing business is thereby increased. *E.g.*, Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938).

6. 58 U.S. (17 How.) 596 (1855).

7. An ad valorem property tax is a tax of a fixed proportion of the value of the property to be charged. BALLANTINES' LAW DICTIONARY 39 (3d ed. 1969).

8. The Court asserted that:

> We are satisfied that the state of California had no jurisdiction over these vessels for the purpose of taxation; they were not, properly, abiding within its limits, so as to become incorporated with the other personal property of the state; they were there but temporarily, engaged in lawful trade and commerce with their situs at the home port, where the vessels belonged and where the owners were liable to be taxed for the capital invested and where the taxes had been paid.

and exclusive situs for purposes of property taxation.[9]

Following *Hays*, the home port doctrine retained its vitality, being reaffirmed as to coastal vessels traveling among the ports of different states[10] and extended to vessels moving in inland waters.[11] The doctrine remained viable until an attempt was made to extend its application to instrumentalities of commerce[12] traveling on land in *Pullman's Palace Car Co. v. Pennsylvania*.[13]

In *Pullman's Palace*, the concept of apportionment[14] was injected into commerce clause analysis. Apportionment allows a nondomiciliary state to recover the value of benefits conferred upon those whose operations extend interstate. Thus, it narrows the scope of the home port doctrine. The *Pullman's Palace* Court permitted Pennsylvania[15] to levy a tax on the rolling stock of an interstate rail carrier incorporated under the laws of Illi-

58 U.S. (17 How.) at 598-99.

9. The home port of the vessel was determined by § 3 of the Act of Dec. 31, 1792 (now codified at 46 U.S.C. § 17 (1970)), where it was provided that "every ship or vessel . . . shall be registered by the collector of the district, in which it shall be comprehended the port to which the ship or vessel shall belong, . . . and which port shall be deemed to be that at or nearest to which the owner . . . usually resides." 58 U.S. (17 How.) at 597.

The situs rule was extended in Morgan v. Parham, 83 U.S. (16 Wall.) 471, 479 (1872), where it became a test for determining burdens on interstate commerce. The Court characterized the tax as "an interference with the commerce of the country not permitted to the states." The foundation of the home port doctrine blurred in subsequent decisions. For example, in Sea-Land Servs., Inc. v. County of Alameda, 12 Cal. 3d 772, 528 P.2d 56, 117 Cal. Rptr. 448 (1974), it was apparent to the court that: [T]he earlier decisions dealing with the validity of local property taxes on instrumentalities of foreign and interstate commerce appear to be based at least in part on the *commerce clause*; they refer to an area of commerce subject to the "laws of the general government, to which belong the regulation of commerce with foreign nations and between the states." *Id.* at 781 n.9, 528 P.2d at 62 n.9, 117 Cal. Rptr. at 454 n.9 (quoting Hays v. Pacific Mail Steamship Co., 58 U.S. (17 How.) 596 (1855) (emphasis added). The *Japan Line* Court took the position that the "[h]ome Port doctrine can claim no unequivocal Constitutional source . . . . [T]he Hays court did not rely on the commerce clause . . . . [T]he basis of the Home Port doctrine, rather was common law jurisdiction to tax." Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 443 (1979).

10. Southern Pac. Co. v. Kentucky, 222 U.S. 63 (1911); Morgan v. Parham, 83 U.S. (16 Wall.) 471 (1872).

11. Ayer & Lord Tie Co. v. Kentucky, 202 U.S. 409 (1906); St. Louis v. Ferry Co., 78 U.S. (11 Wall.) 423 (1871).

12. The Court has defined an instrumentality of commerce as "various forms of transportation equipment." 441 U.S. at 444.

13. 141 U.S. 18 (1891).

14. Used as the basis for the assessment in *Pullman's Palace* was such proportion of the railroads capital stock as the number of miles over which cars were run by the railroad in Pennsylvania bore to the total number of miles in Pennsylvania and other states in which Pullman's cars were run. *Id.* at 19.

15. *Id.*

nois. The tax was apportioned according to the track mileage within the taxing state as compared to total track mileage in all other states. Though Pennsylvania's tax was upheld, a distinction was drawn between commerce on land and commerce on water.[16] State interference with transportation by water was forbidden because "the vehicles of commerce by water being instruments of intercommunication with other nations, the regulation of them is assumed by the National legislature."[17] The home port doctrine was further eroded in *Ott v. Mississippi Valley Barge Line Co.*,[18] where the Court saw no practical difference between vessels and railroad cars that move in interstate commerce, and approved an apportioned tax on barges navigating inland waterways.[19]

The apportionment concept was most recently extended in *Braniff Airways v. Nebraska State Board of Equalization & Assessment*,[20] where the taxation of aircraft that travel in interstate commerce was permitted. The taxpayer relied on *Hays* to support the contention that its aircraft attained no taxable situs in Nebraska,[21] analogizing their planes to ocean-going vessels. The Court found a closer relationship between planes flying interstate and boats that ply the inland waters,[22] and it concluded that *Ott* controlled.

These cases illustrate that interstate commerce does "pay its own way," subject only to the following limitations: only a portion of an interstate organism may appropriately be attributed to each of the various states in which it functions,[23] and the tax in practical operation must be related to opportunities, benefits, or protections conferred or afforded by the taxing state.[24] These requirements were satisfied in *Pullman's Palace*, *Ott*, and

16. *Id.* at 23-24.

17. *Id.* at 24 (quoting Railroad Co. v. Maryland, 88 U.S. (21 Wall.) 456, 470 (1874)).

18. 336 U.S. 169 (1949).

19. The taxpayers in *Ott* were foreign corporations engaged in transporting freight in interstate commerce, up and down the Mississippi and Ohio rivers. The corporations held Certificates of Public Convenience and Necessity issued by the Interstate Commerce Commission.

20. 347 U.S. 590 (1954); *see* Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944). In *Northwest Airlines*, a full tax was levied by the corporations state of domicile on aircraft traveling in interstate commerce. It was held that the tax violated neither the commerce clause nor the due process clause of the fourteenth amendment. None of the taxpayers planes were "continuously without the state during the entire tax year." *Id.* at 299.

21. *Id.* at 599.

22. *Id.* at 600.

23. Ott v. Mississippi Valley Barge Line Co., 336 U.S. at 174.

24. *Id.*

Braniff, where the taxes were fairly apportioned to the commerce transacted within the taxing states.

With *Braniff* being the Supreme Court's last step in the continuing erosion of the home port doctrine,[25] an unanswered question remained: what is the status of the home port doctrine with respect to instrumentalities of foreign commerce? This issue was resolved by the United States Supreme Court's decision in *Japan Line, Ltd. v. County of Los Angeles*.[26]

FACTS AND LOWER COURT DECISIONS[27]

The taxpayers, six shipping lines incorporated under the laws of Japan,[28] have their principal places of business and commercial domiciles in Japan.[29] All of the taxpayers' vessels are registered in Japan, where they have their home ports. The vessels are engaged solely in foreign commerce.[30] The containers, like the vessels, are used exclusively in foreign commerce,[31] and are never used for interstate or intrastate transportation of cargo except as continuations of their international voyages.[32] Each container has a Japanese home port.[33] The average stay of any of the containers in California at any one time is less than three weeks.[34] During the tax years[35] of 1970, 1971, and 1972, a number of the taxpayers' containers were physically present in Los Angeles County. This number is fairly representative of the number of containers present in Los Angeles County on other

25. The home port doctrine was somewhat revived by the California Supreme Court in Scandinavian Airlines Sys., Inc. v. County of Los Angeles, 56 Cal. 2d 11, 363 P.2d 25, 14 Cal. Rptr. 25, *cert. denied*, 368 U.S. 899 (1963), where an apportioned property tax on foreign-owned airplanes flying exclusively in foreign commerce was invalidated.

26. 441 U.S. 434 (1979).

27. The facts were stipulated on appeal. Agreed Statement in Lieu of Clerk's and Reporters Transcripts 29, Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979) [hereinafter cited as Agreed Statement].

28. The six shipping lines are: Japan Line, Ltd.; Kawasaki Kisen Kaisha, Ltd.; Mitsu O.S.K. Lines, Ltd.; Nippon Tusen Kaisha; Showa Shipping Co.; and Yamashita Shinnihan Steamship Co.

29. Agreed Statement, *supra* note 27, at 31 (Stipulation #15).

30. *Id.* (Stipulation #16). In addition, all vessels are specifically designed and created to accommodate the subject containers and carry cargo only in such containers. *Id.* (Stipulation #18).

31. *Id.* at 30 (Stipulation #5).

32. *Id.* (Stipulation #6).

33. *Id.* at 35 (Finding of Fact #9). Moreover, each container is in constant transit, save for repair time and time awaiting the loading of cargo. *Id.* at 31 (Stipulaton #11).

34. *Id.* (Stipulation #13).

35. Under California law, a property tax year commences on the first day of July of each year. However, the tax is applicable to all property within the taxing jurisdiction on the preceding March first, commonly referred to as the "lien date." CAL. [REV. & TAX] CODE §§ 401.3 & 2192 (1968).

dates throughout the tax year.[36] On the first of March,[37] property physically present in California is subject to an ad valorem property tax. California assessed[38] and levied taxes on the taxpayers' containers.[39] The taxes were timely paid,[40] and suits for

36. Agreed Statement, *supra* note 27, at 35 (Finding of Fact #16).
37. *See* note 35 *supra.*
38. Fair Market Values

Plaintiff	1970	1971	1972
Japan Line, Ltd.	$ 765,000	$ 885,550	$1,696,900
Kawasaki Kisen Kaisha, Ltd.	1,250,000	977,720	1,768,280
Mitsui O.S.K. Lines, Ltd.	1,251,000	1,228,860	1,342,200
Nippon Yusen Kaisha	1,389,000	1,213,400	1,473,920
Showa Shipping Co.	595,000	553,200	564,340
Yamashita-Shinnihon Steamship Co.	824,000	835,400	734,040
Assessed Values			
Japan Lines, Ltd.	191,250	221,375	424,225
Kawasaki Kisen Kaisha, Ltd.	$ 312,525	$ 244,430	$ 442,070
Mitsui O.S.K. Lines, Ltd.	312,750	307,215	335,550
Nippon Yusen Kaisha	347,250	303,350	293,480
Showa Shipping Co.	148,750	138,300	144,088
Yamashita-Shinnihon Steamship Co.	206,000	208,850	182,760

39. Pertinent provisions in California's tax code are as follows:

CAL. [REV. & TAX.] CODE § 201 (1939): "All property in this State, not exempt under the laws of the United States or of this State, is subject to taxation under this Code."

CAL. [REV. & TAX.] CODE § 117 (1939): "'Lien date' is the time when taxes for any fiscal year become a lien on property."

CAL. [REV. & TAX.] CODE § 405 (1939): "Annually, the assessor shall assess all the taxable property in his county, except state-assessed property, to the persons owning, claiming, possessing, or controlling it on the lien date."

CAL. [REV. & TAX.] CODE § 401.3 (1939): "The assessor shall assess all property subject to property taxation according to its value on the lien date."

CAL. [REV. & TAX.] CODE § 2192 (1939): "Except as otherwise specifically provided, all tax liens attach annually as of 12:01 a.m. on the first day of March preceding the fiscal year for which the taxes are levied."

40.

	1970	1971	1972
Japan Line, Ltd.	$20,512.32	$25,822.70	$54,297.83
Kawasaki Kisen Kaisha, Ltd.	33,519.55	27,515.03	56,581.86
Mitsui O.S.K. Lines, Ltd.	33,543.68	34,763.52	42,948.05
Nippon Yusen Kaisha	37,243.95	35,367.71	37,563.38
Showa Shipping Co.	15,954.03	16,628.77	18,057.89
Yamashita-Shinnihon Steamship Co.	22,094.22	23,930.17	23,392.00

refunds were brought in the Superior Court for the County of Los Angeles.[41]

The superior court ruled in favor of the shipping lines and granted the requested refunds.[42] Relying on the California Supreme Court's opinion in *Scandinavian Airlines System, Inc. v. County of Los Angeles*,[43] the lower court held that as "instrumentalities of foreign commerce 'the containers' are still afforded the benefits of the Home Port rule."[44] Since the taxes were assessed, levied, and collected on an apportioned basis rather than under the home port rule, the property tax was held unconstitutional under the commerce clause.

The Supreme Court of California reversed the superior court's decision by substantially adopting the opinion of the California Court of Appeals.[45] The taxpayers unsuccessfully argued that the home port doctrine was still viable in the area of foreign commerce, where apportionment cannot be substituted except perhaps by treaty or other agreement.[46] The court responded by stating that in *Sea-Land Services v. County of Alameda*,[47] it had specifically addressed the same contention and clearly rejected it.[48]

Initially, the court unanimously held that the home port doctrine does not shield a taxpayer's property from a fairly apportioned ad valorem tax levied by a nondomiciliary state with

41. Agreed Statement, *supra* note 27, at 30 (Stipulation #4).

42. Intended Decision of the Superior Court for the County of Los Angeles, Appendix A to Jurisdictional Statement, 262 [hereinafter cited as Intended Decision].

43. 56 Cal. 2d 11, 363 P.2d 25, 14 Cal. Rptr. 25 (1963).

44. Intended Decision, *supra* note 42, at 272. The rationale behind the intended decision was that:

> A tax levied on the containers by Los Angeles County would violate this section [Commerce Clause] because it was stipulated that plaintiffs pay a tax in Japan. There is no way to prorate the same, as we do in interstate commerce. The Japanese would be paying a double tax, while a domestic company would, by reason of proration, be paying only one tax. To consider proration of taxes with foreign entities is not practical. There is no tribunal that can adjudicate these rights unless it be the International Court and to invoke its services jurisdiction must be consented to by all parties. For this reason . . . vessels which are instrumentalities of foreign-commerce can be taxed in their home port only.

Id. at 282.

45. Japan Line, Ltd. v. County of Los Angeles, 20 Cal. 3d 180, 571 P.2d 254, 141 Cal. Rptr. 905 (1977).

46. *Id.* at 185, 571 P.2d at 257, 141 Cal. Rptr. at 909.

47. 12 Cal. 3d 772, 528 P.2d 56, 117 Cal. Rptr. 448 (1974). In *Sea-Land*, imposition of an ad valorem property tax was upheld against a domestic corporation that owned and operated containers engaged in interstate and foreign commerce.

48. 20 Cal. 3d at 185, 571 P.2d at 257, 141 Cal. Rptr. at 909.

which the taxpayer has sufficient contacts, even if the taxpayer is engaged in foreign commerce.[49] Second, the threat of double taxation from foreign taxing authorities was said to have no role in commerce clause consideration of multiple burdens, since burdens in international commerce are not attributable to discrimination by the taxing state and are matters for international agreement.[50]

UNITED STATES SUPREME COURT DECISION

The United States Supreme Court reversed the judgment of the Supreme Court of California.[51] Jurisdiction was invoked under 28 U.S.C. § 1257(2).[52] The Court commenced its consider-

---

49. *Id.*

50. *Id.* (citing Scandinavian Airlines Sys., Inc. v. County of Los Angeles, 56 Cal. 2d 11, 363 P.2d 25, 14 Cal. Rptr. 25 (1963) (Traynor, J., dissenting). The court rejected two additional contentions raised by the taxpayers. The first was that in practical effect the taxes were indirect duties of tonnage. The court replied that under *Michelin Tire* imports and duties "are essentially taxes on the commercial privilege of bringing goods into the country; while nondiscriminatory and ad valorem property taxes apportion the cost of benefits among its recipients. This being so, the taxes cannot be regarded as tonnage duties." 20 Cal. 3d at 186, 571 P.2d at 258, 141 Cal. Rptr. at 909.

The court also rejected the argument raised by the taxpayers that the containers were being taxed in transit in violation of *Michelin Tire*. The continuous presence of the taxpayers' containers, the court stated, rejects the notion of a fleeting presence which the exemption announced in *Michelin Tire* requires. *Id.* at 187, 571 P.2d at 259, 141 Cal. Rptr. at 910.

The final point offered by the taxpayers and rejected by the court was that the tax violated certain United States treaty obligations and was therefore invalid under the supremacy clause, U.S. CONST. art. VI, § 2. In support of this contention the taxpayers cited a 1953 treaty between the United States and Japan which includes a most favored nation provision with respect to ownership and possession of movable property. The court rejected the challenge stating that properly interpreted, the treaty does not apply to local property taxation at all. *Id.* at 189, 571 P.2d at 261, 141 Cal. Rptr. at 912.

51. Mr. Justice Rehnquist dissented for substantially the same reasons set forth by Justice Manuel in the unanimous opinion of the Supreme Court of California. *See* Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 457 (1979) (Rehnquist, J., dissenting).

52. The statute reads in pertinent part:

> Final judgments or decrees rendered by the highest court of a state in which a decision could be had may be reviewed by the Supreme Court as follows:. . . (2) By Appeal, where is drawn in question the validity of a statute of any state on the grounds of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

28 U.S.C. § 1257(2) (1970). The Supreme Court of California sustained the validity of its tax statute against the taxpayers' contention that it was unconstitutional under the commerce clause, tonnage duty clause, and various American treaties. The United States Supreme Court's appellate jurisdiction "would seem manifest." 441 U.S. at 440.

The Court's jurisdiction did not appear "manifest" to appellees, who at-

ation of the merits of the case with an account of the home port doctrine's origin[53] and evolution.[54] Mindful of the unique status granted ocean-going vessels in several prior cases condoning apportionment, the Court framed the question presented as: "[W]hether instrumentalities of commerce that are owned, based, and registered abroad and that are used exclusively in international commerce, may be subjected to apportioned ad valorem property taxation by a state."[55]

The response to this issue necessitated formulation of a three-segment test, with the first part consisting of four components. When a state seeks to tax instrumentalities of foreign commerce, the following inquiry is required:[56] the state tax may

tempted to recharacterize the California court's decision as one refusing to extend a constitutional immunity from taxation, rather than sustaining the validity of its tax statute against constitutional challenge. *Id.* at 440.

53. *See* notes 1 & 2 and accompanying text *supra.*

54. 441 U.S. at 441-44.

55. *Id.* at 444. In structuring its narrow opinion, the Court did not reach the question of taxability of either foreign-owned instrumentalities engaged in interstate commerce or domestically-owned instrumentalities engaged in foreign commerce. *Id.* at 444 n.7.

56. The Supreme Court rejected the argument that California's tax was prohibited by the Treaty of Friendship, Commerce and Navigation Between Japan and the United States, 4 U.S.T. 2063, T.I.A.S. No. 2863. This treaty provides:

Article XI(1):

> Nations of either party residing within the territories of the other Party, and nations and companies of either Party engaged in trade . . . within the territories of the other Party, shall not be subject to the payment of taxes, fees or charges imposed upon or applied to income, capital, transactions or any other object, or to requirements with respect to the levy or collection thereof, more burdensome than those borne by nationals and companies of such other party.
>
> . . . .

Article XI(4):

> In the case of companies of either Party engaged in trade or gainful pursuit within the territories of the other Party, and in the case of nationals of either Party engaged in trade or other gainful pursuit within the territories of the other Party but not resident therein, such other Party shall not impose or apply any tax, fee or charge upon any income, capital or other basis in excess of that reasonably allocable or apportionable to its territories nor grant deductions and exemptions less than those reasonably allocable or apportionable to its territories . . . .
>
> . . . .

Article XXII(2):

> The term most-favored-nation treatment means treatment accorded within the territories of a Party upon terms of no less favorable than the treatment accorded therein, in like situations, to nations, companies, products, vessels or other objects, as the case may be, of any third country.

The provisions, the Court noted, interdict discrimination, and the taxpayers did not show that Japanese containers are treated any differently than domestic ones for purposes of California's tax.

Also rejected for the same reason was the argument that the tax contraonly be applied to an activity that has a substantial nexus with the taxing state, the tax must be fairly apportioned, it must not discriminate against foreign commerce, and it must be fairly related to the services provided by the taxing state.[57] If the tax satisfies this initial threshold, two additional considerations require analysis. First, whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation; and, second, whether the tax prevents the federal government from "speaking with one voice when regulating commercial relations with foreign governments."[58] A state tax adverse to either of these mandates is repugnant to the commerce clause, and is therefore unconstitutional.[59] It was this novel approach that guided the Supreme Court in striking down the California property tax as exceeding permissible limitations on state taxation.

ANALYSIS

Complete Auto Transit, Inc. v. Brady

All tax burdens do not impermissibly impede foreign and interstate commerce.[60] When examining a state tax to determine whether it tips the commerce clause balance and amounts to an unconstitutional burden, *Complete Auto Transit, Inc. v. Brady*[61] controls. The initial segment of the Supreme Court's inquiry into taxation of foreign commerce is derived from this

---

vened provisions of the General Agreement on Tariffs and Trade, 61 Stat. [5], [6], T.I.A.S. No. 1700, art. III, para. (1) & (2) (1947). The agreement provides in pertinent part:

> [T]he contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution, or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic products.
>
> The products of the territory of any contracting party imported into the territory of any contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied directly or indirectly, to like domestic products.

Other issues not reached or considered by the Court were: (1) whether California's tax constituted an indirect duty of tonnage proscribed by U.S. CONST. art. 1, § 10, cl. 3, (2) whether the imposition of the California tax violated the taxpayer's due process rights, and (3) whether the tax constituted "Imports or Duties" proscribed by U.S. CONST. art. 1, § 10, cl. 2.

57. The test is derived substantially from Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977).

58. Michelin Tire Corp. v. Wages, 423 U.S. 276, 285 (1976).

59. 441 U.S. at 451.

60. *See* Department of Revenue v. Association of Wash. Stevedoring Cos., 435 U.S. 734, 750 (1979).

61. 430 U.S. 274 (1977).

case. *Complete Auto*'s underlying premise is that a state, by exacting more than its fair share of commercial revenues, unduly burdens interstate commerce. The investigation required by *Complete Auto* is not novel in commerce clause analysis.[62] Yet, it possesses several inherent weaknesses.

Complete Auto's situs element[63] will characterize the taxable interstate activity of a foreign container in one of two ways. First, if the taxpayers' containers travel along a "fixed and regular route,"[64] regardless of the length of time spent in each country, a situs is established therein. Alternatively, a United States tax situs can be established even where a foreign corporation's instrumentalities do not travel along "fixed and regular routes." "Habitual employment" within the taxing jurisdiction may be sufficient.[65] Taxation in this situation would be calculated on the fictional "average presence" of the instrumentalities in the country.[66]

Two points illustrate the inadequacy of these characterizations. Pursuant to 19 C.F.R. § 10.41a(a)(1),[67] bonded containers[68] are required to be released by customs without payment of duties and are to be treated as not having entered the United States. It follows therefrom that a container having no "pres-

62. The test has been applied in Central R.R. v. Pennsylvania, 370 U.S. 607 (1962); Braniff Airways, Inc. v. Nebraska, 347 U.S. 590 (1954); and Ott v. Mississippi Valley Barge Line Co., 336 U.S. 169 (1949).

63. If a tax is to be sustained against commerce clause challenge, it must be applied to an activity with a substantial nexus with the taxing state. In simple terms, a tax situs must be established. This is the first element of the *Complete Auto* test.

64. Central R.R. v. Pennsylvania, 370 U.S. 607, 615 (1962). It must be noted that the Court did not determine whether Japan Line's containers traveled over "fixed and regular routes."

65. The "habitual employment" must be of a substantial number of instrumentalities. *Id.*

66. California's tax was based on the "average presence" of the taxpayer's containers. 441 U.S. at 445 n.8. "Average presence" is a term denoting habitual employment.

67. 19 C.F.R. § 10.41a provides: Lift vans, cargo vans, shipping tanks, skids, pallets, and similar instruments of international traffic; repair components.

(a)(1) Lift vans, cargo vans, shipping tanks, skids, pallets, caul boards, and cores for textile fabrics, arriving (whether loaded or empty) in use or to be used in the shipment of merchandise in international traffic are hereby designated as "instruments of international traffic" within the meaning of section 322(a), Tariff Act of 1930, as amended. The Commissioner of Customs is authorized to designate as instruments of international traffic, in decisions to be published in the weekly Customs Bulletin, such additional articles or classes of articles as he shall find should be so designated. Such instruments may be released without entry or the payment of duty, subject to the provisions of this section.

68. A bond serves as security to ensure that a container is not used in interstate or intrastate commerce.

ence" under federal law can have no "presence" under *Complete Auto*.[69] In addition, California law does not authorize utilization of the "average presence" fiction. Section 205 of the California Administrative Code requires that movable property have a situs within the taxing jurisdiction for a period equal to at least six months.[70] Redefinition of the situs element in the realm of foreign commerce seems necessary.

Another problem with *Complete Auto* centers on what is a fair relationship.[71] While indicating that interstate and foreign commerce must "pay their own way," the Supreme Court has required that any tax in practical operation bear a "fair relation" to benefits conferred.[72] Confusion arises, however, when an attempt is made to define what constitutes a "fair relation." *Complete Auto* was grounded in several cases[73] which used language

---

69. *Cf.* McGoldrick v. Gulf Oil Corp., 309 U.S. 414 (1939) (New York sales tax imposed on sales to vessels engaged in foreign commerce of fuel oil manufactured from imported crude petroleum in bond held invalid as infringing Congress' power to regulate commerce). It was stated in *McGoldrick*:

> It is evident that the purpose of the Congressional regulation of the commerce would fail if the state were free at any stage of the transaction to impose a tax which would lessen the competitive advantage conferred on the importer by Congress, and which might equal or exceed the remitted import duty.
>
> The Congressional regulation, read in the light of its purpose, is tantamount to a declaration that in order to accomplish constitutionally permissible ends, the imported merchandise *shall not become a part of the common mass of taxable property within the state*, pending its disposition at ships' stores *and shall not become subject to the state taxing power*. The customs regulation prescribing the exemption from state taxation, when applied to the facts of the present case, states only what is implicit in the congressional regulation of commerce presently involved.

Id. at 429 (emphasis added).

70. 18 CAL. AD. CODE § 205 (1939) provides:

> (a) General. Movable Property is all property which is intended to be, and is, moved from time to time from one location to another . . . .
>
> Movable property has situs where located on the lien date if it has been in the county for more than six of the twelve months immediately preceding the lien date and if it is to remain in or be returned to the county for any substantial period during the twelve months immediately succeeding the lien date . . . .
>
> Property which does not have situs where located on the lien date pursuant to the previous paragraph has situs at the location where it is normally returned between uses or, if there is no such location, at the principal place of business of the owner.

71. The element of apportionment which constitutes part two of the *Complete Auto* test will be discussed in conjunction with multiple taxation. *See* text accompanying notes 82-106 *infra*.

72. Braniff Airways, Inc. v. Nebraska, 347 U.S. 590, 600 (1954).

73. General Motors Corp. v. Washington, 377 U.S. 436 (1964) (upholding imposition of gross receipts tax measured by taxpayer's wholesale activities within Washington); Northwestern States Portland Cement Co. v. Minne-

of general rather than specific benefit. The language becomes critical when one considers the substantial differences in tax liability resulting from court determination that a tax must relate to a general rather than a specific benefit.[74] In justifying exactions by a state[75] under a general benefit standard, judicial scrutiny is lenient,[76] and a tax will seldom be invalidated as having no relation to benefits received.[77]

The trend, however, seems to be shifting from a general benefit standard towards a somewhat stricter approach. In *Michelin Tire*, the court held that the imposition of a nondiscriminatory ad valorem property tax on imports is the "quid pro quo for benefits actually conferred by the taxing state."[78] The Court's resort to specific benefit language indicates that such a tax must bear more than a minimal relation to benefits or services rendered to the taxpayer.[79] The tax imposed by California

---

sota, 358 U.S. 450 (1959) (upholding imposition of income taxes on foreign corporations computed at a nondiscriminatory rate on that proportion of the net income from the corporation's interstate business which was reasonably attributable to its business activities within the state); Memphis Natural Gas Co. v. Stone, 335 U.S. 80 (1948) (upholding imposition of a franchise or excise tax on a natural gas pipeline, used exclusively interstate, as recompense to the state for protection of "local activities in maintaining, keeping in repair and otherwise manning" the 135 miles of pipeline within the state); Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940) (upholding imposition of a tax for privilege of declaring and receiving dividends from property located in Wisconsin, equal to a specified percentage of such dividends).

74. *See* Illinois Central R.R. v. Decatur, 147 U.S. 190, 197-98 (1893) (sets forth differences between user fees and general revenue exactions).

75. The expenditures incurred by the municipalities in the maintenance of the port facilities used by the taxpayers are recovered through two types of specific charges imposed upon the user of port facilities. First, the owner of the vessel is required to pay a dockage charge for the privilege of mooring the vessel. Second, the owner of cargo passing through the harbor is required to pay a wharfage charge for goods passing over the wharf. These charges are used to pay the costs of the port facility, including the costs of police protection, road service, and, in some instances, fire protection.

76. *See* note 73 *supra*.

77. Clark v. Paul Grey, Inc., 306 U.S. 583, 594 (1939).

78. 423 U.S. 289.

79. Specific benefit language has been utilized in upholding several different kinds of taxes. Such language most frequently appears in the user fee cases:

> To justify the exaction by a state of a money payment burdening interstate commerce, it must affirmatively appear that it is demanded as reimbursement for the expense of providing facilities, or of enforcing regulations of the commerce which are within its constitutional power . . . . This may appear from the statute itself. . . or from the use of the money collected, to defray such expense.

Ingles v. Morf, 300 U.S. 290, 295 (1936). *See generally* Comment, *Limitations on State Taxation of Foreign Commerce: The Contemporary Vitality of the Home Port Doctrine*, 127 U. PA. L. REV. 817 (1979) [hereinafter cited as *Limitations on State Taxation*].

is a general levy which is used to fund any and all public needs, apparently without regard to the provision of any specific benefits provided to taxpayers.[80] Moreover, the tax is measured by the value of the container, a criterion which appears to lack any relationship to use of services.[81] Unfortunately, the Court has failed to provide the states with a solid standard to be employed when subjecting its taxes to *Complete Auto*'s benefit/relation test. All of this leads to the conclusion that while *Complete Auto* is potentially suited to foreign commerce clause analysis it lacks the precision it appears to bestow.

The Risk of Multiple Taxation

Having satisfied the *Complete Auto* segment of the Court's newly constructed test, two additional considerations will present themselves. The first requires inquiry into the problems surrounding multiple taxation. The second presents questions regarding federal uniformity.

All taxes add to the expense of carrying on interstate and foreign commerce.[82] Yet it is not for this reason that a tax will be prohibited. Taxes that have been repeatedly invalidated are those that have

> placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed . . . or added to . . . by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on

80. The various agencies entitled to receive a portion of the property tax revenues include:

Taxing Agency	Rate [%]
Los Angeles	2.5157
County	4.0882
Unified Schools	4.7952
Junior College	.4489
Flood Control	.3552
Water Replenish	.0012
Water Agencies	.1700
Mosquito Abatement	.0057
Total	12.3801

There are undeniably significant "spillover effects" that may benefit the owner of instrumentalities of foreign commerce. The owner, for example, may rely upon the local school system to produce an educated workforce. Brief for the Appellees at 21, Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).

81. Newer containers, for example, require the payment of more taxes than older ones, even though the same services are used.

82. *See generally Developments in the Law, Federal Limitations on State Taxation of Interstate Business*, 75 HARV. L. REV. 953 (1962) [hereinafter cited as *Developments in the Law*].

local commerce . . . .[83]

Multiple taxation, in other words, places interstate and foreign commerce at a disadvantage because *intra*state commerce does not bear an equal burden.[84] The concept of apportionment has its foundation in the doctrine prohibiting multiple burdens.[85] Logically, the risk of double taxation is slight when a tax is fairly apportioned.[86] This stems from the Supreme Court's ability to enforce full apportionment by all potential taxing authorities.[87] The Court acknowledges its supervisory role in the interstate commerce apportionment process, but at the same time recognizes its lack of similar authority in foreign commerce cases.[88] Therefore, in the context of foreign commerce, apportionment provides less than a satisfactory solution; especially, where imposition of multiple burdens may have international repercussions.[89] Japan, for example, taxes all of the subject containers.[90] A California tax that reflects a container's presence in the state inevitably leads to the taxpayers being forced to pay more than one full ad valorem property tax. The vice of such a tax is that it subjects foreign commerce "to the risk of a double tax burden to which [interstate] commerce is not exposed, and which the commerce clause forbids."[91]

Justice Traynor, in his dissenting opinion in *Scandanavian Airlines Systems, Inc. v. County of Los Angeles*, considered and rejected the position that the risk of multiple taxation plays a role in foreign commerce clause analysis.[92] "Multiple burdens,"

83. Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 255 (1938).

84. *Limitations on State Taxation*, *supra* note 79, at 828; *Developments in the Law*, *supra* note 82, at 965.

85. In *Ott*, the Court in commenting on the tax imposed in *Pullman's Palace* stated "that tax . . . has no cumulative effect caused by the interstate character of the business. Hence there is no risk of multiple taxation . . . ." 336 U.S. at 174. Likewise, in *Northwest Airlines*, Justice Stone, after criticizing the undue proportion of taxes exacted under a Minnesota statute, believing it to be unconstitutional, suggested that "[i]t is enough that the tax exposes petitioner to the risk of a multiple burden to which local commerce is not exposed." 322 U.S. at 327 (dissenting opinion).

86. California argued that after the decision in Moorman Mfg. Co. v. Blair, 437 U.S. 267 (1978), the fact that a state tax creates multiple burdens is insufficient to condemn it under the commerce clause. The Court rejected California's argument, distinguishing *Moorman* from the instant case. The question presented in *Moorman* was not whether a state may tax instrumentalities of foreign commerce but whether apportionment under the commerce clause calls for mathematical exactness or rigid application of a particular formula.

87. 441 U.S. at 446-48.

88. *Id.*

89. *See* text accompanying notes 124-26 *infra*.

90. Agreed Statement, *supra* note 27, at 31 (Stipulation #14).

91. 441 U.S. at 448.

92. Scandinavian Airlines, Sys., Inc. v. County of Los Angeles, 56 Cal. 2d

he stated, are:

> [A]ttributable to the freedom of foreign countries to adopt rules of their own. Merely because a state court is without jurisdiction to compel independent nations to adopt a uniform nondiscriminatory system of taxation, it does not follow that the states must forego the power to impose taxes that are not in themselves discriminatory.[93]

Traynor's *S.A.S.* dissent was adopted in *Sea-Land Service, Inc. v. County of Alameda*, where the court concluded that "apportionment among nations is a matter for international agreement;[94] it should not be considered as a limitation on a state's power to tax."[95] This attack, however, was confined to the element of discrimination. Absent from his analysis is consideration of the other *Complete Auto* elements.[96] A nondiscriminatory tax must yield, for example, if it is not fairly related[97] to benefits provided, or as in *Japan Line*, when it impairs federal uniformity in an area where federal uniformity is essential.[98]

Japan Line's limitations on state taxing powers reveals two inconsistencies with prior decisions. First, in *Michelin Tire*,[99] where the Court upheld the imposition of a general ad valorem property tax on imported tires and tubes, the double taxation issue was not even considered. It was accepted that the country of manufacture[100] had authority to and may actually have taxed Michelin's tires and tubes on an ad valorem basis. If Georgia, the state of storage and distribution, also possessed power to tax the goods ad valorem, there would have existed a multiple burden which the commerce clause forbids.[101]

11, 32, 363 P.2d 25, 38, 14 Cal. Rptr. 25, 38, *cert. denied*, 368 U.S. 899 (1963) (Traynor, J., dissenting).

93. Sea-Land Servs. v. County of Alameda, 12 Cal. 3d 772, 778, 528 P.2d 56, 67, 117 Cal. Rptr. 448, 459 (1974).

94. Such an argument defeats rather than supports California's position. That California has created a problem susceptible only to Congressional solution concedes that state taxation of foreign-owned instrumentalities is an area where a uniform federal rule is essential. 441 U.S. at 455.

95. Sea-Land Servs. v. County of Alameda, 12 Cal. 3d 772, 778, 528 P.2d 56, 67, 117 Cal. Rptr. 448, 459 (1974).

96. In addition to the requirement that a tax be nondiscriminatory, *Complete Auto* inquires into whether the instrumentality has a nexus with a taxing state, the manner of apportionment, and whether the tax is fairly related to the services provided by the taxing state. *See* text accompanying note 75 *supra*.

97. *See* text accompanying notes 72-80 *supra*.

98. *See* text accompanying notes 113-23 *infra*.

99. Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976).

100. 25% of the tires and tubes are manufactured in and imported over land from Nova Scotia. The remaining 75% are brought to the United States from France and Nova Scotia by sea, in containers. *Id.* at 280.

101. 441 U.S. at 448 (quoting J.D. Adams Mfg. Co. v. Storen, 302 U.S. at 307 (1938)) (upholding construction of a gross receipts tax statute confining exemptions to taxation ad valorem).

Furthermore, the Court's demand that restrictions be placed on state power to tax is inconsistent with the principle that foreign commerce must "pay its own way."[102] Imposition of such restrictions results in a situation where a foreign corporation's tax liability bears no "relation to opportunities, benefits, or protections conferred or afforded by the taxing state."[103] Ultimately, the local taxpayer must subsidize services used by a foreign corporation. This result is clearly contrary to the mandates of *Ott*,[104] *Braniff*,[105] and *Michelin Tire*.[106]

The Necessity of Federal Uniformity

In justifying its retreat from the "pay your own way" maxim, the Supreme Court noted: "Although the Constitution . . . grants the power to regulate commerce with foreign nations and among the several states in parallel phrases, there is evidence that the founders intended the scope of the foreign commerce power to be greater."[107] Simply put, the immunity from taxation granted to the taxpayers' containers originates in the greater reach of the commerce clause when foreign commerce is involved. Thus, two different sets of rules emerge.

In analyzing the negative implications of Congress' power over foreign commerce, early cases are helpful. While the commerce clause conferred on Congress the power to regulate commerce, its possession of authority did not extinguish all state regulatory powers. In *Cooley v. Board of Wardens*,[108] the states were viewed as possessing a residium of power, in a dormancy situation, to enact laws governing matters of local concern[109] which "nevertheless in some measure affect[ed] interstate commerce or even, to some extent, regulate[d] it."[110] It is equally clear that there are powers which, by their nature, are vested exclusively in Congress. The subject of these powers "are in their nature national, or admit of one uniform system or plan of

102. *See* text accompanying notes 1-6 *supra*.
103. Ott v. Mississippi Barge Line Co., 336 U.S. 169, 174 (1949).
104. *Id.* at 169.
105. Braniff Airways, Inc. v. Nebraska, 347 U.S. 590 (1954).
106. Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976).
107. 441 U.S. at 448.
108. 53 U.S. (12 How.) 299 (1855).
109. This rule applies in the absence of conflicting legislation by Congress.
110. *See, e.g.*, Southern Pac. Co. v. Arizona, 325 U.S. 761 (1945) (state regulation making it unlawful to operate within state a passenger train of more than 14 cars or a freight train of more than 70 cars held invalid under commerce clause; regulation was characterized as one requiring uniformity of treatment free from state interference).

regulation . . . ."[111] Implicit in the Court's reasoning is that the regulation of foreign commerce demands uniformity of regulation possible only through exclusive regulation by the federal government. Thus, even in a dormancy situation, Congress' power alone invalidates nondiscriminatory, fairly apportioned state taxation of instrumentalities of foreign commerce.[112] This foreign-interstate dichotomy utilized by the Court to premise[113] its divergence from the "pay your own way" principle dictated the manner in which it would fashion the final portion of its three-part inquiry. The Court held that a state tax which prevents the United States from "speaking with one voice" in the regulation of foreign trade is inconsistent with Congress' power to regulate commerce with foreign nations and is unconstitutionally violative of the commerce clause.[114]

---

111. Cooley v. Board of Wardens, 53 U.S. (12 How.) 298, 319 (1851).

112. In support of this distinction, the Court in Railroad Co. v. Maryland, 88 U.S. (21 Wall.) 456, 470 (1874), noted that "vehicles of commerce by water being instrumentalities of intercommunication with other nations, the regulation of them is assumed by the National Legislature. So that state interference with transportation by water and especially by sea, is at once clearly marked and distinctly discernable." Further support is found in the case of Bowman v. Chicago & N. Rwy., 125 U.S. 465 (1888), where the Court stated:

> The inference to be drawn from the absence of legislation drawn by Congress on the subject excludes state "affecting commerce with foreign nations more strongly than that affecting commerce among the states." Laws which concern the exterior relations of the United States with other nations and governments are general in their nature and should proceed exclusively from the legislative authority of the nation. The organization of our state and Federal 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, its laws and treaties.

Id. at 482.

In Board of Trustees of the Univ. of Ill. v. United States, 289 U.S. 48 (1933), the university insisted that while discharging state functions it was entitled to import articles duty free. The university's contention was rejected, and to support its decision the Court stated that: "[t]he principle of duality in our system of government does not touch the authority of the Congress in the regulation of foreign commerce." *Id.* at 57.

113. Distinctive rules for foreign commerce were specifically rejected by Justice Taney in the License Cases, 46 U.S. (5 How.) 504 (1847), where he said: "The power to regulate commerce among the several states is granted to Congress in the same clause, and by the same words, as the power to regulate commerce with foreign nations, and is coextensive with it." *Id.* at 578; *see* Clark, *Property Taxation of Foreign Goods and Enterprise—A Study in Inconsistency*, 4 PEPPERDINE L. REV. 39, 44 n.22 (1976) (author takes the position that while federal power over each area is complete, there is no special set of rules for foreign commerce).

114. In Department of Revenue v. Association of Wash. Stevedoring Cos., 435 U.S. 734 (1979), a business and occupation tax applied to stevedoring was held constitutional as not violating either the commerce clause or the import-export clause. The tax as applied to the business of stevedoring did not restrain the ability of the federal government to regulate foreign commerce for "no foreign business or vessel is taxed." It follows from the

The *Japan Line* Court indicated three events that would frustrate the achievement of federal uniformity by "preventing this nation from speaking with one voice."[115] To begin with, international disputes might arise over the several different types of apportionment formulae used by the states. Disputes of this kind have arisen domestically, and a court of competent jurisdiction can resolve such controversies.[116] But in the international arena, there exists no such authoritative tribunal. Such disputes are inevitable as long as the several states compute the amount of taxes due under diverse apportionment formulae.[117]

Another possible event, designated by the Court as frustrating federal uniformity, would arise where a novel state tax creates an asymmetry in the international tax structure, and a "disadvantaged nation retaliates." Retaliation of this sort would necessarily affect the nation as a whole. Japan imposes property taxes on instrumentalities of foreign commerce by using an equivalent of the home port doctrine. Shipping containers domiciled in the United States that are located from time to time in Japan are not subject to property taxation in that country.[118] California, by imposing its tax, has created an asymmetry the result of which operates to Japan's disadvantage. To illustrate; the tax sanctioned by the California Supreme Court prompted eleven foreign governments, including Canada, Denmark, France, Japan, Mexico, The Netherlands, New Zealand, Norway, Sweden, the Federal Republic of Germany, and the United Kingdom to issue formal expressions of concern to the State De-

---

Courts statement that state taxes on foreign vessels or containers carried thereon *will* prevent the federal government from "speaking with one voice" in the regulation of foreign commerce.

115. 441 U.S. at 451-54. The three illustrations discussed by the *Japan Line* Court were not considered in *Michelin Tire*, though the facts presented in that case were ideally suited to such analysis. In *Michelin Tire*, the Georgia tax was held to have no impact on the power of the federal government to "speak with one voice" when conducting foreign relations.

116. *See* Moorman Mfg. Co. v. Blair, 437 U.S. 267 (1978) (upholding imposition of a single-factor sales formula for apportioning an interstate corporation's income for state tax purposes under the commerce clause and due process clause of the fourteenth amendment). Because apportionment formulae vary from state to state, some overlapping taxation may occur. The taxpayer, however, can be assured that there is a rough approximation or ceiling which determines the total tax to be paid.

117. In *Moorman*, Iowa's law prescribed a single-factor apportionment formula, while Illinois used a three-factor formula. *Id.* at 270-71. A single-factor formula is presumptively valid, and the produced assessment will only be disturbed when the taxpayer has proved by "clear and cogent" evidence that the income attributed to the state is in fact "out of all proportion to the business transacted . . . in that state" or has led to a grossly distorted result. *Id.* at 273-74.

118. Agreed Statement, *supra* note 27, at 32 (Stipulation #25).

partment.[119]

More importantly, the laws of several countries, including the Federal Republic of Germany, grant exemptions from taxation only on the basis of reciprocity.[120] The imposition of taxes on American-owned containers would follow automatically without further legislative action by any one of these countries.[121] Clearly, state taxation of instrumentalities of foreign commerce upsets the preservation of uniform federal regulation in the area of foreign commerce.

The last event illustrates the proposition that the nation would be prevented from "speaking with one voice" if the several states, following California's example, imposed taxes of their own,[122] thereby subjecting foreign instrumentalities of commerce to varying degrees of multiple taxation.[123] The danger inherent in varying degrees of multiple taxation is not, however, as pronounced as the Court's illustration indicates. After the *Michelin* Court upheld the imposition of nondiscriminatory ad valorem property taxes on imports, the expected flood of similar tax statutes in other states did not materialize.[124] The reasons are apparent; first, several states do not levy personal property taxes on tangible assets.[125] Of those that do, some re-

119. *See* Exhibits E-P, Appendix A to Jurisdictional Statement. The letter from the Government of Japan to the State Department reads:

March 27, 1978

The State of California has imposed a property tax on containers which are owned by foreign shipping lines and kept at Los Angeles terminals for repair or loading. The problem has thus arisen that containers of Japanese ship-owners are doubly taxed by the local governments of Japan and the United States. This tax burden impedes the smooth development of trade between the two countries.

The Japanese Government, being seriously concerned about this situation, requests that the Government of the United States take appropriate actions to terminate the imposition of the California tax and have the tax already paid by the Japanese shipping lines refunded.

120. VERMOGENSEUERGESETZ (VS&G) § 2, par. 3, *reprinted in* BUNDESGESETZBLATT (BVB1) (4-23-74) (W. Ger.)

121. The European Economic Community decided on June 12, 1978 to study suitable counter-measures to take against non-member states whose practices are detrimental to the maritime interests of the members states. Brief for the Appellants at 20, Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).

122. Pursuant to the opinion dated January 31, 1978, of the Oregon Department of Justice, the State of Oregon reversed its position and decided that a personal property tax can lawfully be imposed upon ocean-going containers within Oregon. Brief for the Appellants at 11, Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).

123. 441 U.S. at 453.

124. *See* Hellerstein, *Michelin Tire Corp. v. Wages: Enhanced State Power to Tax Imports*, 1976 SUPREME COURT REV. 99 (1977).

125. *Id.* at 128. Those states are: Pennsylvania, Hawaii, Delaware, and New York.

fuse to impose such taxes to the fullest extent that they are constitutionally permitted. For example, the Illinois Attorney General issued an opinion declaring that *Michelin* would have no effect on the current Illinois statute exempting from taxation certain personal property when stored in its original package.[126]

Second, over thirty-five states have "free port" laws that allow goods to be stored in a state on a tax-free basis under conditions that frequently exempt imports.[127] The purpose behind many of these laws is to enhance a state's status as a distribution center and to stimulate its economy.[128] An analogous situation is presented with respect to the taxation of instrumentalities of foreign commerce. It is unlikely that a state seeking to enhance its economy will rush to follow California's example by imposing similar taxes which would help defeat its goals.

After considering the three aforementioned events, the Court drifted from its dormancy analysis and rested its reasoning, in part, on the exclusivity of the federal government's power to conduct foreign affairs.[129] The Customs Convention on Containers,[130] signed by both the United States and Japan, clearly

126. Opinion of Attorney General No. NP 1125 (July 15, 1976), *reported in* Report Bulletin No. 5, ¶ 5.9, P-H State and Local Taxes (all states unit) (Aug. 3, 1976).

127. CCH STATE TAX GUIDE (All States) ¶ 20-100 (Chart of State Free Port Law Requirements) (1967). To qualify for free-port exemption, goods generally must satisfy some or all of the following conditions: (1) They must have an out-of-state origin and/or destination; (2) they must be stored in a public or other facility not owned by the consignee or consignor; and (3) they must remain in their original packages.

128. One such law is O.R.S. 307.810-5 (1975). The purposes of the Senate bill were enumerated in Weyerhaeuser Co. v. State Tax Comm'r, 244 Or. 561, 419 P.2d 608 (1966):

> Sponsors of the bill assert that its enactment will be beneficial to Oregon because Oregon is so geographically situated as to be a natural distribution point for commerce which either originates in or is destined to Washington, California and overseas points . . . .
>
> SB 424 is designed to enhance Oregon's status as a distribution center and to stimulate the state's economy. Its sponsors feel that its enactment will improve Oregon's competitive tax position and divert commerce through the state which otherwise would not accrue to Oregon.

Id. at 565-66, 419 P.2d at 611.

129. "Complete power over international affairs is in the National Government and is not and cannot be subject to any curtailment or interference on the part of the several states." United States v. Belmont, 301 U.S. 324, 331 (1937).

130. The Customs Convention on Containers, 20 U.S.T. 301, T.I.A.S. No. 6634, provides:

Chapter I, Article 1 (a):

For purposes of this Convention:

(a) The term "import duties and import taxes" shall mean not only Customs duties but also all duties and taxes whatsoever chargeasets forth as the policy of the United States development and facilitation of the use of containers in international commerce.[131] The California tax thwarts rather than promotes this goal and "will frustrate the attainment of federal uniformity."[132] The Court appears, in this portion of its analysis, to confuse commerce clause principles with Federal preemption doctrine. It suggests that the states recoup the value of their services in the form of user fees. Logically, the Court has created a distinction without a difference because a series of specific user fees would produce the same counter-productive effect as the California tax. It is the amount exacted[133] rather than the manner in which revenues are used that will either facilitate or hinder the international use of containers.

CONCLUSION

In its recent attempts to define the permissible scope of state taxation, the Supreme Court has developed a methodology emphasizing economic considerations.[134] Accordingly, analysis has centered on the substantive content of various tax tests. This focus, however, is a novel one where foreign commerce is concerned, and it is clear that the approach advanced in *Japan Line* mandates a result contrary to that reached in *Michelin Tire*. What *Michelin Tire* lacks under *Japan Line* is a *genuine* scrutiny of the negative effects of state taxation. By either ig-

---

ble by reason of importation. Chapter II, Article 2: Each of the Contracting Parties shall grant temporary admission free of import duties and import taxes and free of import prohibitions and restrictions, subject to re-exportation and to the other conditions laid down in articles 3 to 6 below, to containers when they are imported loaded, or imported empty to be re-exported. Each Contracting Party shall retain the right to withhold these facilities in the case of containers which are imported on purchase or otherwise taken into effective possession and control by a person resident or established in its territory; the same applies to containers imported from a country which does not apply the provisions of this Convention.

131. Brief for the United States at 28-29. It is expressly stated therein: [T]he imposition of the property tax in question "would frustrate accomplishment of the federal objective in allowing temporary free admission to the containers under bond" and "[lessen] the effectiveness of the federal regulation by burdening foreign-owned containers with a multiple tax burden that hinders the use of such containers in our foreign commerce."

132. The adverse impact of the tax seems to impair the exclusive power of the federal government to conduct foreign relations and would therefore constitute a violation of the supremacy clause, U.S. CONST. art. 6, § 2, rather than the commerce clause.

133. The opinion in McGoldrick v. Gulf Oil Corp., 309 U.S. 414 allows the prohibition of any tax which raises the price of goods Congress seeks to benefit.

134. Department of Revenue v. Association of Wash. Stevedoring Cos., 435 U.S. 734 (1979).

noring or denying the existence of such an economic approach, *Michelin Tire* invited state taxation without limitation.

What this novel approach compels is case by case determination of the validity of state taxes in the realm of foreign commerce. The effect of a multiple burden or an interference with federal uniformity will be reviewed in light of its economic impact on the nation as a whole. Where the impact adversely affects a desired economic position, the tax will be invalidated. This mechanism is needed to insure world-wide favorable treatment of American-owned goods and instrumentalities and to resolve the tensions "that are unavoidable in a world of sensitive sovereigns in matters touching their dignity and interest."[135]

Marc W. Sargis

135. Perez v. Brownell, 356 U.S. 44, 57 (1958).