IN THE

SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1977
No. 77-1378

JAPAN LINE, LTD., *et al*,
Appellants,

v.

COUNTY OF LOS ANGELES, *et al*,
Appellees.

ON APPEAL FROM THE
SUPREME COURT OF CALIFORNIA

AMICUS BRIEF OF THE MULTISTATE TAX COMMISSION AND PARTICIPATING STATES

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STATE PRINTING PLANT OLYMPIA, WASHINGTON

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CONSENT OF THE PARTIES

Amici are filing this brief with the consent of both parties, whose letters of consent have been filed with the Clerk.

STATEMENT OF INTEREST

The Multistate Tax Commission consists of nineteen states as full members and 1~~3~~2 states as associate members working to resolve problems in state taxation of multistate — multinational businesses.[1] The Commission seeks both

[1]The current regular members are the states of Alaska, Arkansas, California, Colorado, Hawaii, Idaho, Kansas, Michigan, Missouri, Montana, Nebraska, New Mexico, Nevada, North Dakota, Oregon, South Dakota, Texas, Utah and Washington.

The current associate members are the states of Alabama, Arizona, Georgia, Lousiana, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, ~~Oklahoma~~, Pennsylvania, Tennessee, and West Virginia.

uniformity in state tax treatment of such businesses, and fairness and equity between such businesses and smaller in-state businesses. The Commission is working also to advance effective enforcement of state corporate tax laws, and seeks policies which are simple and comprehensible for public officials and business taxpayers alike.[2]

The present case raises matters of vital concern to the Commission and the states. The first part of these is the casual involving of alleged foreign policy concerns to prevent a fair and uniform state or local tax system. As the economics of separate nations become more entwined, virtually every item of commerce touches or is touched by the foreign interests in some way. There is a great difference between foreign economic interests and the policy goals of particular federal officials on the one hand, and foreign policy for constitutional purposes on the other. The states have a vital interest in preventing the federal involvement in foreign affairs from spilling over indiscriminately into state tax policies affecting property or activities within their borders.

The transportation industry poses especially difficult problems in this area, and the Court's discernment must be especially precise. Virtually every item and every activity in commerce today is tied to some degree to interstate and international transportation, and as transportation technology changes, the task of separating one mode from another becomes increasingly difficult. It is essential, for this reason, that the states guard against the unwarranted transfer of the peculiar legal regime, including tax exemptions, which has evolved for international shipping, to transportation equipment fundamentally different in nature and subject to an entirely separate legal and regulatory scheme.

Discernment in this area must be rooted in a precise factual record concerning the nature of both of the

[2]This Court upheld the constitutionality of the Multistate Tax Commssion in *United States Steel, et al. v. Multistate Tax Commission, et al,* ____ U.S. ____ 54 L Ed 2d 682 (1978). This Court there noted the purposes of the Compact and the Commission.

equipment in question and its movements in state, interstate, and international commerce. The states are concerned that such a record be fully developed before this Court rules on the issues posed in this case — issues which are important both in themselves and in their implications for a host of other state tax matters.

One of the most difficult and persistent issues in state business taxation is the equitable treatment of businesses based inside and outside a state. This issue has come before this Court most recently in *Moorman v. Bair*, ____ U.S. ____, 57 L.Ed.2d 197, 98 S.Ct. 2340 (1978).

The states have an immediate interest in any cause before this Court which could compel them to discriminate against firms based within their borders and in favor of firms based elsewhere. The Constitution does not require this Court to institute an inconsistent and discriminatory state tax regime affecting interstate and foreign commerce, and the convenience of foreign based businesses does not alter this fact.

Such a discriminatory regime, moreover, would introduce extreme complexity to state tax laws and their administration, especially when in practice, the equipment in question, cargo "vans" or "containers", flows interchangeably between modes of transportation and between interstate, intrastate, and foreign commerce to a degree ~~to~~ which the record in this case does not define. Simplicity and administrative feasibility in ~~itself~~ themselves may not be ~~a~~ constitutional standards; but ~~it is a~~ they are goals which further impel~~s~~ the states to bring ~~the enclosed matters before~~ the Court ~~in this cause~~, participating in this case.

Finally, the states have a vital interest in insuring that all businesses carrying on activities within their jurisdiction, and benefitting from governmental services and functions, bear their share of the public cost of these activities. This is not just a question of revenues; it is a question of tax justice as well.

STATEMENT

In light of the various assumptions and conjectures upon which the Appellants, their amici curiae, and the

Solicitor General, hereinafter referred to as "Appellants, et al", build their case, we believe that it is essential that this Court be keenly aware of the limited facts that are contained in the record and the limited inferences that can be drawn from those facts. It is also important for this Court to have in mind what are purported to be facts, which are not contained in the record, which the Appellants, et al, rely upon in support of their argument.

In disposition of this appeal, the Court should be aware of: (1) the facts concerning the utilization of the Appellant's containers in California and other parts of the United States are fragmentary and incomplete; (2) that how and to what extent containers are taxed by Japan and other foreign nations is absent from the record; and (3) while the agreed statement indicates that the cargo shipping containers in question were owned and controlled by the Appellants (App. 29), the Appellants' Complaints establish that on the assessment dates (March 1, 1970, 1971 and 1972), the Appellants were the owners and *lessees* of certain cargo containers located in the City of Los Angeles (App. 4, 10, 16).

In further regard to the containers, the agreed statement reads:

> 1. Said containers are used exclusively for the transportation of cargo for hire in foreign commerce. (App. 30).
>
> 2. Said containers are never used for intrastate or interstate transportation of cargo except as continuation of international voyages. (App. 30).
>
> 3. Interstate or intrastate movement of empty containers is solely for the purpose of picking up cargo to be carried in foreign commerce, or returning the containers to ports (principally Los Angeles), all containers thereafter moving by plaintiff's vessels to foreign countries. (App. 30).
>
> 4. All of the loaded containers physically present within Los Angeles County on the lien dates were loaded with cargo either inbound from or outbound from foreign ports. (App. 30).

5. All empty containers physically present within Los Angeles County on the lien dates were loaded with cargo to be carried on plaintiff's vessels in foreign commerce, or carried to other ports (principally in Japan) by plaintiff's vessels. (App. 30).

6. No container had the usual place of return in California or the United States between uses. (App. 30).

7. Each container is in constant transit save for repairs time and time awaiting new cargo. (App. 31).

8. The average stay of any container in California at any one time is less than three weeks. (App. 30).

9. No container is permanently situated in California or scheduled, on departure from Los Angeles, to return to Los Angeles or any other place in California or the United States. (App. 31).

10. In general, all containers carried by plaintiff's vessels as aforesaid, including the subject containers, upon arrival from Japan are discharged from said vessels in the port of Los Angeles and either (1) transported by truck or rail to the ultimate inland destination of the imported cargo contained therein, or (2) unloaded in Los Angeles harbor.

a. Those containers transported to such inland destinations are unloaded at such destinations and are then either (1) reloaded with export cargo at an inland location and transported to one of the plaintiff's vessels by truck or rail for air export, or (2) returned empty by truck or rail to Los Angeles harbor for export or reloading for export, all containers thereafter moving by said vessels to Japan. (App. 31-32).

11. The inland (outside Los Angeles harbor) destinations and origins of cargo carried in said containers include locations in other states, as well as in California. (App. 32).

12. An outboard container may leave the United States through any port, and need not leave through the port to which it entered the United States. (App. 32).

13. The number of containers physically present in Los Angeles County on the lien dates, 1970, 1971, and

1972, is fairly representative of the number of containers present in Los Angeles County on other dates throughout the tax year. (App. 33).

14. All containers of plaintiffs are subject to property tax and are, in fact, taxed in Japan. (App. 32).

15. All of plaintiff's vessels on which the subject containers are carried, are specifically designed and constructed to accommodate the subject containers, and carry only cargo in such containers. (App. 31).

The foregoing statements contain all there is in the record concerning the containers in question and Japan's tax policy or any other tax policy concerning the same.

Based on the record in this cause, the only question presented is whether or not the commerce clause prohibits the Appellees from uniformly applying the California *ad valorem* property tax on the containers leased or owned by the Appellants, which have acquired a taxable situs in Appellees' taxing districts for the years in question.

SUMMARY OF ARGUMENT

In light of the numerous questions left unanswered by the fragmentary and incomplete record in this cause, this Court does not have sufficient facts before it to decide the state tax question here involved. Given this incomplete record, the only conclusion the Court could reach would be to follow the California Supreme Court and decide, as a matter of law, that the "home port doctrine" is no longer a constitutionally required method of determining the situs of movable, tangible personal property for the purposes of state and local *ad valorem* property taxes, irrespective of whether the use of such property is associated with foreign commerce rather than interstate commerce. In no way, should this Court accept the argument of the Appellants, et al, that the "home port doctrine" should be applied to invalidate the taxes in question, (1) without knowing more about the cargo container industry in the United States and throughout the world; (2) without knowing more about the national and international policies and matters concerning the same, including *ad valorem* property taxes and other taxes; and (3) without knowing more about the specific uses to which the cargo containers in question are put in internal commerce in the United States, and the actual business relations concerning these uses. This Court should thus dismiss the appeal for lack of a substantial federal question on the basis of the record presented.

If this Court should take jurisdiction and pass upon the merits, it should affirm the judgment of the California Supreme Court because the Appellants have utterly failed to prove the unconstitutionality of the California property tax in question as applied to them. They have not established that the "home port doctrine" (assuming that this doctrine is an otherwise viable and legitimate constitutional requirement for state and local *ad valorem* property taxation of instrumentalities of foreign commerce), can be applied to the container industry. That Appellants have failed to prove their case follows from the failure of the record to indicate that fungible containers have any "home port" or that they are such an integral part of a ship that they do not acquire a taxable situs apart from the taxable situs of a ship.

There is nothing in the record to indicate that containers are "registered" in any country or have a "home port". Furthermore, since an unknown portion of the containers in question are leased by the Appellants, and the owners of the leased containers and their "domicile" are not known, it is not possible even to apply the home port doctrine to the taxes in question without further evidence. *Pullman's Palace Car Co. v. Pennsylvania,* 141 U.S. 18, *Ott v. Mississippi Barge Lines,* 336 U.S. 169, and *Braniff Airways, Inc. v. Nebraska State Board,* 347 U.S. 590, specifically uphold the constitutionality of the tax in question to the extent that the cargo containers are domestically used and owned. There is no reason to not apply the holdings of these decisions to the containers in question. Although technically they are used in "continuation of foreign commerce," they are in fact put to domestic use.

If this Court nevertheless should accept the argument of the Appellants, et al, that containers are integral parts of a ship and that therefore their taxation is controlled by *Hays v. Pacific Mail Steamship Co.*, 58 U.S. (17 How) 595, *Hays* should be overruled as pertaining to containers. In so doing, this Court would not confront the question of whether the home port doctrine enunciated in *Hays* should be overruled as to ships engaged solely in international commerce (as it was in *Ott v. Mississippi Barge Lines, supra,* concerning ships engaged in interstate commerce).

Argument to the contrary notwithstanding, the only question before this Court is whether the *Hays* doctrine should be extended to containers which are entirely separate from, and are used in an entirely different manner than ships plying international waters.

The double taxation and international policy arguments advanced by Appellants, et al, to extend the *Hays* home port doctrine to containers, are not supported by the record. That California subjects to *ad valorem* property taxation approximately 3/52 of the total number of containers owned or used by Appellants in California during the year, coupled with the agreed statement that Japan, in some unknown fashion, subjects Appellants' containers to taxation, does not establish "double taxation" of the containers. The Court would have to know much more about the actual nature of the Japanese taxes, and about any credits offered by Japan for taxes paid elsewhere, before it could determine that any such "double taxation" exists in practice. Nor does the above-mentioned stipulation establish that California's ad valorem property tax interferes with federal international policy. Nothing in the record or relied upon by the Appellants, et al, supports the proposition that there is any such international policy. That the containers are exempt from federal custom and import duties does not establish any congressional or other federal policy pertaining to state *ad valorem* property taxation of containers. State property taxes are not "chargeable by reason of importation", and thus do not fall within customs duty exemption.

Nor does the letter solicited from the State Department by the Solicitor General (Solicitor General's brief, Exhibit C, p. 14a) establish any United States or international policy concerning state *ad valorem* taxation of containers. In fact, the very necessity for the correspondence between the Solicitor General and the Department of State in itself demonstrates that there is no such established international policy. Moreover, even if the Appellants have clearly established a customary international practice in this regard, such a showing would not control this Court's interpretation of the constitutional realm of state taxing powers. Neither the Appellants, nor their amici curiae, nor the Solicitor General have pointed to any federal legislation, treaty, convention, or any other document that in any way purports to restrict the taxing powers of the states. They argue only by analogy and implication.

In the last analysis, then, these parties are requesting this Court to construe the commerce clause to prohibit the states from applying their tax systems in any manner which would not have any impact on foreign commerce. The premise of this proposed extension of the commerce clause is that any policy touching commerce involving residents of foreign nations is under the exclusive jurisdiction of the United States government. The unprecedented and far reaching effects of such an argument cannot be over-emphasized. It is an argument, for example, that would have invalidated automatically the Washington State legislation considered by this Court in *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978), even though Congress had not legislated in the field and even though the Washington law conflicted with no established federal regulation or policy.

The Appellants, et al, would not stop here. In addition they ask this Court to include within the commerce clause the outmoded situs concepts employed by this Court in *Hays*, to prohibit any state *ad valorem* taxation of the containers in question. In so doing, they are requesting this Court to apply the commerce clause to interstate commerce in a manner it rejected in *Moorman Manufacturing v. Bair,* ___ U.S. ___, 57 L.Ed.2d 197, 98 S.Ct. 2340.

As this Court held in the *Moorman* case, it is up to the Congress and not this Court, to establish under the commerce clause, uniform state taxation to the extent that the national interest requires it.

ARGUMENT

A. Based on the incomplete and fragmentary nature of the record, this case should be dismissed for lack of a properly presented, substantial federal question.

This Court is being asked to decide fundamental constitutional questions on the basis of a fragmentary and incomplete record consisting of Appellants' Complaints and an Agreed Statement.

The record contains no adequate description or definition of the containers in question, nor of the ways in which they are used in maritime, inland, and air-borne commerce.[3] Such information may be significant in disposing of the constitutional issue.[4]

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[3](1) When they move on highways, are the containers required to be registered under any circumstances for motor vehicle purposes, or are the operators moving such containers required to be licensed? If so, what effect would this Court's decision have on such registration or licensing requirements?

(2) Were the containers in question capable of being used for storage as well as for transportation? If so, were they so used?

(3) Do they ever move in inland commerce and under the control or direction of the receiver or of some third party?

(4) Is a demurrage charge levied if they are not promptly unloaded by the receiver?

(5) Are they subject to admiralty law and maritime jurisdiction when they are out of the port areas?

(6) Do Appellants have possession and control of the containers when they move out of the storage area for movement in interstate and intrastate commerce?

(7) Are the containers ever loaded or unloaded by the shippers or receiver's employees? Do such functions fall within the jurisdiction of any labor unions other than the maritime or longshoremen's unions?

(8) Is maritime insurance applicable to the containers and their contents while they are being transported on land?

In short, the record is completely devoid of essential information concerning how the container business actually operates in practice in the United States and in world commerce.

The brief of the Institute of International Container Leases, Ltd. indicates that the container business is separate and distinct from the shipping business, and is in fact related to various forms of transportation. This brief further indicates that this business exists apart from the actual ownership and operation of ships. Such distinctions are essential. If, for example, this Court should determine that the inland use of cargo containers is not distinguishable from such use of truck trailers, or of railroad cars, and that such containers are put to inland use for a greater

---

(9) Are the contents interchanged among owners, in a manner similar to the practice concerning railroad boxcars?

(10) What percentage of time are containers put to use in inland transportation and other inland commercial activities and in airborne activities, as compared to their time and use on ships?

(11) What is the total number of containers used in connection with international ship operations compared to the total container capacity of cargo container ships used extensively in such commerce?

(12) What state and federal regulatory agencies exercised jurisdiction over the movement and storage of containers, and how is that jurisdiction affected when containers are put to inland use?

(13) To what extent, if any, is the inland use of the containers controlled by admiralty law and jurisdictional concepts?

(14) What percentage of containers may be used indiscriminately in intrastate, interstate and foreign commerce in the United States because they are no longer or were never subject to custom restrictions?

[4]If, for example, the containers in question are similar to those that this Court called "sea vans" in its discussion of the facts in *Michelin Tire Corp. v. Wages,* 432 U.S. 276 (1976), that information certainly would relate to the question at hand. As there indicated: "Some 25% of the tires and tubes are manufactured in and imported from Nova Scotia, and are brought to the United States in tractor-driven, over-the-road trailers packed and sealed at the Nova Scotia factory. The remaining 75% of the imported tires and tubes are brought to the United States by sea from France and Nova Scotia in sea vans packed and sealed at the foreign factories. Sea vans are essentially over-the-road trailers from which the wheels are removed before being loaded aboard ship. Upon arrival of the ship at the United States port of entry, the vans are unloaded, the wheels replaced, and the vans are tractor-hauled to petitioner's distribution warehouse after clearing customs upon payment of a 4% import duty." (432 U.S. 280)

percentage of time than they are used aboard ships, the Court could well determine that they should be classified for tax purposes in the same manner as are over-the-road truck trailers or railroad box cars, which move in either interstate or international commerce.[5]

The following conclusions stand uncontroverted by the record in this case:

1. A substantial portion of the containers in question may be owned by persons that are incorporated under the laws of California and have their principal places of business or commercial domiciles in California, and even in the City and County of Los Angeles. (This is so because the Appellants are owners of only some and lessees of others of the containers taxed by the Appellees, and the record does not disclose either the owners of the leased containers or their domicile.)

2. There is nothing in the record to establish that the "home port doctrine" has been applied by Japan or any other country for *ad valorem* property taxation of containers.

3. There is nothing in the record to establish any "home port doctrine" or other established international policy in regard to ships, let alone regarding cargo containers.

4. There is nothing in the record to establish either the *total* amount of time a container of the Appellants is actually situated in the City and County of Los Angeles during any tax year and/or situated in the United States during any tax year, or the *proportion* of a container year that is so spent. (The record only establishes that the average stay of any containers in California *at any one*

[5]For example, should the over-the-road truck trailers and the sea vans involved in *Michelin, supra,* which were used to transport tires and tubes from Nova Scotia to Georgia, be accorded the same treatment for state *ad valorem* property tax purposes, or should the latter receive preferential treatment because part of their journey took place on a ship? The reasoning this Court employed in *Pullman's Palace Car Co. v. Pennsylvania,* 141 U.S. 18 (1891), in sustaining apportionment of railroad rolling stock is equally applicable here (see *infra* pp. 23-24).

time, is less than three weeks, and that none were in California for as much as six months during the twelve months immediately preceding the tax lien dates.)

5. The record indicates nothing about the movements and treatment of damaged containers except that they are repaired in the United States.

6. There is nothing in the record to establish the basis on which Japan subjects such containers to property taxation. It remains unknown whether the Appellants under Japanese law would be entitled to a tax credit, or whether Japan actually would impose a property tax upon that portion of containers taxed by political subdivisions of the states of the United States, or that the Japanese tax system includes an annual *ad valorem* property tax.

7. There is nothing to indicate whether the property tax of Japan is imposed on ownership or possession or both. Thus, the record does not support the conclusion that the interaction between the California's property tax system and that of Japan produce in practice any double taxation of Appellants' containers.

8. There is nothing in the record to establish that the cargo containers are an integral part of a ship. (In fact, as indicated below, containers are fungible property which can be interchanged between container ships and can be transported by motor carrier, airplane, and railroad car, as well as by ship.)

9. There is nothing in the record to indicate that the Appellee's method of subjecting the cargo containers to *ad valorem* property taxes, as opposed to other methods including the so-called "home port doctrine", in any way interferes with or adversely affects any national or international interest of the United States, and/or its shipping and maritime industry.

10. There is nothing in the record which indicates the extent to which cargo containers may be in the possession, control and use of others than the Appellants while in the United States in connection with their intrastate and interstate movements and in connection with the "stripping" or "stuffing" (i.e. unloading and loading) of

the containers.

11. There is nothing in the record to indicate that the containers in question are not subject to or have not been subject to, United States customs and import duties.

In contrast to the foregoing, the following inferences may be drawn from the record in this cause:

1. Containers are fungible tangible personal property that may end up on any ship of the Appellants, or on some other carrier, and in any port of the United States.

2. Appellants' containers are used extensively in the United States, including California and the City and County of Los Angeles in intrastate and interstate commerce. (That the use is characterized in the agreed statement as a continuation of foreign commerce does not alter this fact.)

3. The containers are not designed for any particular container ship and may enter or leave the United States from any port which can accommodate cargo container ships.

4. The containers may be in the United States for an indefinite and indeterminable amount of time.

5. There are apparently repair facilities in the United States (and presumably in the City and County of Los Angeles) for the maintenance, repair and overhaul of Appellants' cargo containers.

Based on the foregoing, the record does not substantiate the arguments of the Appellants, et al, that the cargo containers are an integral part of a ship, and that the *Hays* case (assuming it is a binding precedent in light of subsequent decisions of this Court), or the "home port doctrine" enunciated therein, is depositive of the issues in this cause. For this reason we submit that the appeal should be dismissed or the judgment of the Supreme Court of California affirmed per curiam.

B. Contrary to the argument of Appellants, et al, cargo containers are not an integral part of cargo ships.

Without revealing to the Court the multiple functions and the way cargo containers are utilized, Appellants, et al, unequivocably assert that cargo containers are an integral part of "ships" and that they should be so classified by this Court in disposition of this case.[6]

To support this conclusion, Appellants, et al, rely upon *Northeast Marine Terminal Co., Inc., et al v. Caputo,* 432 U.S. 249 (1977). In disposing of that case and the companion case of *International Terminal Operating Co., Inc. v. Blundo, et al,* this Court construed the 1972 amendments to the Longshoreman's and Harbor Workmen's Compensation Act, 33 U.S.C., 903 to include an employee "stripping" (unloading) cargo containers on a dock, and an employee loading "stripped" cargo from a dock into a consignee's truck. The Court did so for the reason that the 1972 amendments were adopted by Congress to cover such employees. As noted by the Court in regard to the first employee:

> "His job was to check and mark items of cargo as they were unloaded from a container. This task is clearly an integral part of the unloading process as altered by the advent of containerization and was intended to be reached by the Amendments."
> (432 U.S. 271.)

Inasmuch as the second employee was considered covered because the 1972 amendments were intended "to encompass the waterfront areas where the overall loading and unloading process occurs" (432 U.S. 272), it was not necessary for this Court to decide whether or not containers were a part of cargo ships. The sole question was whether or not the employees in question were engaged in "maritime employment" under the 1972

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[6]As indicated in this brief at pages 17-20, there is every reason to treat the cargo containers different than ships and tax them on the basis of their inland use, comparable to truck trailers, railroad rolling stock, etc. The rationale of the Courts in upholding the apportionment of a railroad rolling stock in *Pullman's Palace Car Co. v. Pennsylvania,* 141 U.S. 18 (1891), while upholding the home port doctrine of the *Hays* case as applied to ships, support taxation of containers by the apportionment formula used by California.

amendments to the Act.

They also rely on *Leather's Best, Inc. v. S.S. Mormaclynx,* 451 F.2d 899 (2d Cir. 1971). This case was confined to resolution of a highly technical point in the Carriage of Goods by Sea Act (COGSA). Section 4(s) of that Act limits the carrier's liability to $500.00 for each "package".

Contrary to their argument here, the carriers there argued that the containers were "packages" and not part of a ship. The Court construed a "package" to be the individual bails of leather in the container for liability purposes. The shipper-plaintiff had included in its suit, Tidewater, Inc., a subsidiary of the defendant. Tidewater operated a storage warehouse on the dock. The Court held that the plaintiff's claim against Tidewater for loss of the contents of the container was not a claim in admiralty, not a maritime claim, but rather a state claim arising under the law of New York.[7]

Thus, *Northeast Marine Terminal Co. v. Caputo, supra,* and *Leathers Best, Inc. v. S.S. Mormaclynx, supra,* have no discernible relation to the question of whether or not cargo containers are integral parts of "ships" for property tax purposes.

While the record in this cause does not describe the diverse business arrangements through which containers are used by different kinds of carriers, even a cursory examination reveals a plethora of problems in the simplicity characterization by Appellants, et al, of containers as integral parts of a ship.

Appellant's case rests in large part on the assertion that the transportation equipment in question is part of a ship, and should be deemed so for local property tax purposes. The Court is told that for this reason, taxing such equipment is equivalent to taxing the ship itself, and runs afoul of all the exemptions and protections accorded

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[7]Other federal courts have held, contrary to the ruling in *Leather Best, Inc., supra,* that containers in some circumstances are indeed "packages" for purposes of the carriage of goods by Sea Act. See *Royal Typewriter v. M/V Kulmerland,* 483 F.2d 643 (1973).

the sea-going vessel.

On this point the factual record in the case is especially scant. Most of the facts presented are done so by stipulation, and these stipulations leave essential questions unanswered. The Court should scrutinize closely the nature of the equipment in question, especially because in other contexts shipping companies have argued characterizations opposite to that argued for here.

This case concerns a special box used for transportation purposes and called, interchangeably, "containers" or "vans".[8]

Such boxes are built to be carried, and in fact are carried, on trucks, trains, ships, airplanes, and usually by two or more of these on the same journey.[9]

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[8]See generally, Schmeltzer and Peavy, "Prospects and Problems of the Container Revolution," 1 Journal of Maritime Law and Commerce, 203 (1970), Simon, "Containers and COGSA: A Look at the Factual and Legislative Background, and a Critique of a New Judicial Formula," 5 Journal of Maritime Law and Commerce 3, (1974); and Simon, "More on the Law of Shipping Containers," 6 Journal of Maritime Law and Commerce 4, 604 (1975).

[9]See the most recent international convention on safe containers, which defines containers as follows:

> "For the purposes of the present convention:
>
> * * *
>
> (c) The term "container" shall mean an article of transport equipment (lift-van, movable tank or other similar structure):
>
> * * *
>
> (iii) specially designed to facilitate the carriage of goods, *by one or more modes of transport,* without intermediate reloading;
>
> (iv) designed for ready handling, particularly when being transferred *from one mode of transport to another,*
>
> * * *
>
> (vi) * * * The term "container" shall *not include vehicles,* accessories, or spare parts of vehicles, or packing." (Emphasis supplied)

Customs Convention on Containers, 1972, Article 1(c), Customs Convention on Containers, 1972, and International Convention for Safe Containers, Senate Executive X, Senate Committee on Foreign Relations, 93d Congress; 1st Sess. (Comm. Print November 15, 1973). See also International Convention for Safe Containers, *ibid,* and "Cargo Container and Road Vehicle Certification for Newport Under Customs Seal," 49 CFR 420.3 (1974). All of these definitions are essentially similar and each relates containers to *any* mode of transportation without even mentioning ships.

These other modes offer or have proposed to offer their customers special joint rates for containerized transportation services a portion of which move by ships.[10] Containerized shipments usually begin and end on trucks. They are regulated by the Interstate Commerce Commission, the Civil Aeronautics Board and the Federal Maritime Commission, reflecting their intermodal nature.[11]

Some "containers" are in reality self-contained truck-trailers, ready to be hooked up to a motorized cab and drawn away. Such "containers" require permits from state motor vehicle authorities.[12] Even when containers do not have such wheels, and must be loaded on flat-bed trailers for hauling, the trucker performing this hauling normally must be licensed by either the Interstate Commerce Commission or the state public utilities commission.[13] "It is very difficult to distinguish between an ordinary trailer and a container on a chassis," a former State Department advisor has written.[14]

Containers are used for temporary storage of goods as well as for transportation.[15] At such times, they serve in place of, and reduce the need for, enclosed warehouse facilities.

Containers often are loaded by the shipper, at the shipper's place of business, and by the shipper's employees, rather than at the port. This is one of the reasons that the use of containers has sparked bitter controversies between the shipping industry and the

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[10]Airlines, for example, have offered special "sea-air" service to their customers. Schemitzer and Peavy, *supra* note 8, at 206.

[11]Ibid, at 204.

[12]Interview, Mr. Carroll Sloan, Washington State Department of Transportation, October 12, 1978.

[13]Ibid.

[14]Simon, "Factual and Legislative Background," *supra* note 8, at 514.

[15]Ibid at 513.

International Longshoreman's Association.[16] Their use is optional for the shipper and carriers offer discount rates as inducements for shippers to containerize their shipments.

"Many shippers construct special purpose containers for their own commodities and tender them to ship lines in accordance with tariff rules and rates," two authors have observed. Apparently, containers are used interchangeably between shipping lines and other interests, such as boxcars are used interchangeably by different railroads.

Carriers have promoted containers to their customers as a way to reduce packing costs. In lawsuits over liability for loss and damages, where liability was limited to a ceiling amount *per package,* shippers (more accurately their insurers), have argued that containers were packages for this purpose.

In sum, containers are an innovation not only for ships, but for the entire transportation industry. They intersect with state and federal laws applying to trucks, airlines. railroads, and freight forwarders, and to the labor unions associated with these, as well as to ships. Even the brief description presented above, a description of an admittedly complex subject, indicates that any attempt to characterize simplistically the boxes in question as part of ships is an exercise in legalism. They are no more a part of ships than they are parts of the trains, trucks, and airplanes which also carry them. They are a thing unto themselves, and the resolution of this controversy must rest on some grounds other than a simplistic genetic connection between containers and ocean-going vessels which sometimes carry them. If this were not so, a need for a special convention to cover their status for customs duties and import taxes would not have been necessary.

The stipulations controlling the facts of this case leave unanswered essential questions concerning the actual nature and use of the containers at issue. These questions are spelled out elsewhere in this brief (see

[16]See for example, "Case Note: 50-Mile Container Jurisdiction Clause in Longshoreman's Contract Does Not Violate Anti-Trust Laws," 2 Journal of Maritime Law and Commerce, at 426 (1971).

footnote 3, *supra*). The stipulations do not provide an adequate grounds for this Court to decide that the containers at issue are an integral part of the Appellants' ships, let alone that all containers should be so treated.

C. No precedent of this Court invalidates the California tax in question. *Hays v. Pacific Mail Steamship Co., supra* and comparable decisions of this Court are not controlling because 1) They did not involve inland instrumentalities of commerce such as the containers; 2) they did not involve commerce with foreign nations; and 3) they were based on taxable situs concepts which have been specifically overruled by this Court as applied to instrumentalities of interstate commerce.

This Court in *Hays v. Pacific Mail Steamship Co., supra,* held that ships engaged in commerce between the City of New York and San Francisco via Panama and between San Franciso and different ports in the then territory of Oregon, did not acquire a taxable situs for *ad valorem* property tax purposes in San Francisco. The ground for that decision was that the ships were taxable by the state and jurisdiction in which they were registered, where the legal and commercial domicile of the corporate owner was located, and where the corporate stockholders resided. While the Court referred to the power of the federal government to regulate commerce with foreign nations and between the states, it rested its decision on property tax situs (jurisdiction) principles. It thus concluded:

> "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." (58 U.S. 628-629).

This case predated the statutory and judicial concept of apportioning *ad valorem* property taxes based on the average presence of movable property within a taxing jurisdiction. Ignoring for the moment the subsequent development of apportionment, the scope of the "home port doctrine" is still questionable. How for example would the Court have applied the "home port doctrine" in *Hays* if the owner had been incorporated in Delaware, the owners of the stock had resided in New Jersey, the ships had been registered in New York, the commercial domicile of the corporation had been in Massachusetts, and the ships were engaged in coastal trade between San Francisco and Los Angeles or Portland, Oregon? Similarly, what would the Court have done if the ships were owned by a subsidiary of a California corporation? Such considerations point to the legal fictions underlying the "home port doctrine." The Court in the *Hays* case recognized that ships may not be present in the "home port" for years at a time. This port was merely the corollary of the legal fiction of the owner's commercial domicile. It was the port closest to this domicile. Thus, if the domicile of the owner is in North Dakota, then the "home port" of any of this owner's ships would be any port nearest to North Dakota. Thus, the "home port doctrine" came to be based upon the twin legal fictions of the owner's commercial domicile and any port nearest to that domicile.

Indeed, this Court has had difficulty in applying the *Hays* doctrine in cases where the elements of registration, enrollment, ownership and domicile were not centered in one state.

For example, in *Old Dominions Steamship Co. v. Virginia,* 198 U.S. 299 (1905), the Court faced a situation in which the ship in question was permanently present in, and its commerce was confined to, a single state different from that of its home port. In this case, the Court found that the home port doctrine was not controlling.

In *Morgan v. Parham,* 16 Wal. 471 (1872), the Court held that a ship registered in New York (where the owner resided) was taxable by New York, even though the ship was enrolled in Mobile, Alabama and was involved only in coastal trade between Mobile and New Orleans. The Court noted that the ship "*was engaged in lawful commerce between the states with its situs at the home port of New York, where it belonged and where its owner was liable to be taxed for its value." (16 Wall. 476-477).

Other early cases such as *Ayer & Lord Tie Co. v. Commonwealth of Kentucky,* 202 U.S. 409 (1906) and *Southern Pacifc Co. v. Kentucky,* 222 U.S. 63 (1911), without alluding to the commerce clause, refined the home port doctrine of the *Hays* case. These cases permitted the taxation of ships only by the state of the domicile of the owner, irrespective of the state of registration or enrollment, and irrespective of the presence of any "port" in the state of domicile.

In *Pullman's Palace Car Co. v. Pennsylvania,* 141 U.S. 18 (1891), the Court made a significant break from the logic of the *Hays* case. In *Pullman,* the Court upheld an *ad valorem* property tax on the rolling stock of a railroad, levied according to an apportionment formula based on operating mileage. The reasoning this Court employed to distinguish *Hays* (ships) from *Pullman* (railroad rolling stock), is important to the case at bar. The Court there held that the legislative power of every state extends to all property within its borders. The Court then noted that the old rule (expressed in the maxim *mobilia sequuntur personam*) by which personal property was regarded as subject to the law of the owner's domicile, grew up in the middle ages, and in modern times has yielded more and more to the law of the place where the property is kept and used (i.e. the *lex situs*). The Court further noted:

> "It is equally well settled that there is nothing in the Constitution or laws of the United States which prevents a State from taxing personal property, employed in interstate or *foreign commerce,* like other personal property within its jurisdiction."

* * * *

> "Between ships and vessels having their situs fixed by act of Congress, and their course over navigable waters, and touching land only incidentally and temporarily; and cars or vehicles of any kind, having no situs so fixed, and traversing the land only, the distinction is obvious."
> 141 U.S. 23.

(Citations omitted, 141 U.S. 23, emphasis added.)

In the present case, the containers in question are apportioned to California on the basis only of their inland use within California. California's property tax is in no way measured by the use of the containers on ocean-going vessels in the sea lanes of the world. *Pullman's Palace Car Co. v. Pennsylvania, supra,* therefore should be depositive of the case at bar. Thus, to sustain the *ad valorem* property tax in question, this Court need not resort to the substantial modern precedent upholding the apportionment of property taxes upon movable, tangible personal property used in interstate and foreign commerce.[17]

For commerce clause purposes, there are no valid grounds for treating containers used by ships differently than railroads, trucks, buses, and other means of inland transportation. The "sea vans" and the "over-the-road" trailers used in international commerce in *Michelin Tire Corp. v. Wages,* 423 U.S. 276 (1976), are essentially similar to the vans at issue here, and the commerce clause requires no separate classification of these.

Are containers distinguishable from the rolling stock of the Canadian Pacific Railway Co., held taxable by the Supreme Court of Washington in *Canadian Pacific Railway Co. v. King County,* 90 Wash. 38 (1960), on authority of *Pullman's Palace Car Co. v. Pennsylvania, supra?*[18] We think not.

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[17]See, for example, such cases as *Ott v. Mississippi,* 336 U.S. 169 (1949); *Braniff Airways, Inc. v. Nebraska,* 347 U.S. 590 (1954); and *Standard Oil Co. v. Peck,* 342 U.S. 382 (1952).

[18]In the *Canadian Pacific* case, the Court distinguished *Hays v. Pacific Mail Steamship Co., supra.* The Supreme Court of Washington

D. There is nothing in the record in this cause or in the materials relied upon by Appellants, their amici curiae, and the Solicitor General, to support their argument that the ad valorem tax in question is unconstitutional under the commerce clause.

1. *The argument that the ad valorem tax in question conflicts with the exclusive authority of the federal government to regulate foreign commerce lacks any factual foundation.*

There is absolutely nothing in the record which supports the proposition that the tax in question conflicts with any established policy anywhere. The Appellants, et al, have attempted to "prove" that there is such a policy by unsubstantiated self-serving hearsay material which is not in the record. This material consists of letters which Appellants obtained from representatives of six foreign countries (Appellants' brief, Exhibits D, E, and F, pp. 15a-17a; Jur. Stat., p. 50a); and a letter the Solicitor General obtained from the Department of State, dated September 7, 1978.[19] (Solicitor General's brief, Ex. C, pp. 14a-20a.) The letters from foreign representatives do not even suggest that there is any established international policy, with the United States or otherwise, concerning *ad valorem* taxation of cargo containers.[20] That six foreign

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there also noted "In Passenger Cases, 7 How. 283, at p. 402, it was said: " 'a state cannot regulate foreign commerce, but it may do many things which more or less affect it. It may tax a ship or other vessel used in commerce the same as any other property owned by its citizens.' " (90 Wash. 43).

[19]While the Appellants and their amici curiae also rely on letters from foreign officials (Appellants' Br., pp. 23a-58a) concerning proposed airline property tax regulations of the California Board of Equalization (Appellants' Br., pp. 18a-22a), it is clear that these letters have nothing to do with this cause. They have not been relied upon by the Solicitor General.

[20]These letters thus stand in sharp contrast to the Solicitor General's argument that the Convention on Containers, which deals

governments have written self-serving letters to the Department of State expressing concern about the tax in question (Solicitor General's brief, page 20), "proves" nothing regarding an established international policy in this matter.

The letter the Solicitor General obtained from the Department of State, written by a deputy legal advisor, is primarily an argument that this Court should apply *Hays* to invalidate the "application of *ad valorem* property taxes to an instrumentality of interstate or foreign commerce by all jurisdictions except for the home or domiciliary of the instrumentality." From this letter the Solicitor General concludes that all nations other than Afghanistan have adhered to the "international custom" of allowing containers as well as vessels and other foreign-owned instruments of foreign commerce, to be introduced for the exclusive purpose of conducting such commerce, free of all custom duties and general taxes, including property taxes. (Solicitor General's brief, p. 15).

The letter of September 7, 1978 is pure hearsay. It contains unsubstantiated conclusions which purportedly reflect the unverified opinion of various foreign officials and private U.S. flag carriers, i.e., parties in interest. Significantly, this letter does not indicate that the federal government, let alone the United States Congress, had established any policy concerning the subject matter. Furthermore, the letter indicates that some embassies have not yet responded because the desired information was not yet available to them. (Solicitor General's brief, App. C, p. 15a).

That the Solicitor General had to make such an inquiry, that the Department of State in turn had to contact "pertinent foreign officials and private U.S. flag carriers" to obtain the information, and that the responses (which have not been made available to this Court or the

with the subject matter of federal customs and import duties, exempts the containers from state *ad valorem* property taxes. These letters do not even suggest that this convention exempts the containers in question from state *ad valorem* property taxes.

parties) are incomplete, in themselves strongly suggest the lack of any established "international custom".

It is not clear that even the presence of any "international custom" would be germane to this case. To the extent that it would be, given the state of the record, the only remaining question is whether or not there is an established custom *of the United States.* Since there is none concerning state and local *ad valorem* property taxation of containers, the Appellants, et al, have no factual support for the argument that the California *ad valorem* tax in question conflicts with any United States policy or custom.

2. *Contrary to the argument of Appellants, their amici curiae, and the Solicitor General, the ad valorem property tax in question does not conflict with any federal statutes, regulations, treaties or conventions.*

In a further effort to bolster the contention that the tax in question infringes on the power of Congress to regulate foreign commerce, the Appellants, et al, rely on the following documents: (1) the customs convention on containers, 20 U.S.T. 301; (2) the convention between the United States of America and Japan concerning income taxes, 20 U.S.T. 967; and (3) customs regulations in 19 C.F.R. 10.41(a).

The income tax convention between the United States and Japan pertains solely to income taxes of the contracting parties (i.e., United States and Japan). It does not apply to taxes of political subdivisions of the United States. Thus, this treaty and any comparable treaties or conventions are not relevant to this case because the states are not "contracting parties" and hence are not covered unless specifically mentioned.

The Solicitor General's reliance on the Customs Convention on Containers, *supra,* is equally unfounded. Obviously, if such a convention did not exist, the containers would be subject to the import duties and import taxes of the federal government and exposed to like taxation by other signatories to the Convention. Absent the Convention, there exists no restrictions on imposition of any taxes on the imported containers. Thus the restrictions in the document can be construed no more broadly than the document itself. In no way did the Convention seek to restrict the taxing powers of the states and their political subdivisions. The import-export clause of the federal Constitution prevents the states from imposing any import or export duty or tax.

> Furthermore, under Article II of the Convention, "each contracting party shall retain their right to withhold these facilities (i.e., deny the duty and tax exemptions contained therein) 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 to provisions of this convention." (12 U.S.T. 304). (Material in parenthesis added.)

The effect of this Article on the containers in question is not revealed in the record in this case nor is it known what containers in question have in fact been used in the United States contrary to the provisions of the Convention and thus have been removed from an exempt status under other terms of the Convention on Containers. Furthermore, there is no evidence in the record as to what portion of the containers in question were not subject to import duties which are applicable only to containers of foreign manufacture. For ought that appears in the record, thus, movement of the containers in question is controlled by 19 C.F.R. 10.41(b) rather than 19 C.F.R. 10.41(a).

In short, in order for the Solicitor General to rely on the Convention on Containers, he would have to provide supporting facts which have not come forward in this case.

Assuming a proper factual basis, still there is no provision of Section 322(a) of the Tariff Act of 1930, (19 U.S.C. 1322(a)) or the Secretary's regulations issued pursuant thereto, 19 C.F.R. 10.41(a), (b), to remove the containers in question form state and local taxation. The Solicitor General asserts:

> "This statute authorizes the Secretary of State to grant the customary exemption from the application of the *customs laws* to vehicles and other instruments of international traffic."
>
> (Solicitor General's brief, p. 24). (Emphasis added.)

Does the Solicitor General argue that California's *ad valorem* property tax is regulated by custom laws of the United States and empowers the Secretary to exempt containers from California's *ad valorem* property tax? Apparently he does.

Based on Section 322(a) of the Tariff Act of 1930 and on the Customs Convention on Containers, coupled with this Court's holding in *McGoldrick v. Gulf Oil Corp.,* 309 U.S. 441 (1940), the Solicitor General concludes, however, that the states are precluded from treating containers as entering into the commerce of the United States, and thus into their jurisdiction. The broad implications of such argument should be noted.

Containers travel the nation's highways, airways, and railroads. They are utilized by various businesses in loading and unloading cargo for import and export. If the United States government itself and the states are required to treat these containers as though they were not physically present in the United States, the regulatory agencies of the state, local and federal governments, and law enforcement officers generally, could not act to protect the general welfare of residents and citizens of the United States. Neither the Convention on Containers nor Section 1322 of the Tariff Act of 1930 authorize or contemplate any such sweeping results.

After concluding that the containers in question are subject to the bonding provisions of 19 C.F.R. 10.41(a) — which is not supported by the record — the Solicitor General concludes that these containers have not entered into the commerce of the United States on authority of *McGoldrick v. Gulf Oil Corp., supra.* The *McGoldrick* case concerned a general sales tax on the sale of oil exported from an "in bond" refining facility for consumption aboard a ship in foreign commerce. There existed express federal legislation which was specifically enacted to protect imported oil and its refined products from taxation in order to help U.S. refiners compete with foreign refiners in selling fuel oil to ships in foreign commerce. Congress has enacted no such comprehensive scheme of exemption for ship containers. In fact, it has enacted no legislation of any kind whatsoever concerning this subject matter.

In fact, the result argued for by Appellants, et al, is the very opposite of that reached in *McGoldrick.* The congressional legislation on which that case turned was enacted to help U.S. refiners match their foreign competitors. The Court feared, justifiably or not, that the sales tax in question would counteract to some unknown degree that congressional purpose. Here, Appellants argue for a result which would *favor* foreign owners of containers over those based in California and elsewhere. The Court should not assume such a federal policy absent specific statutory reference.

Finally, it should be noted that the *McGoldrick* case involved an *item* in commerce, i.e., oil. It did not concern a vehicle in which commerce is conducted. Vehicles invoke a whole realm of regulatory provisions and judicial precedents which are not present in cases concerning items of commerce alone.

The Solicitor general argues that the Customs Convention on Containers "is to preclude these articles from entering into the commerce of the United States." (Solicitor General's brief, p. 25). As we read the Convention, it was intended to do just the opposite, that is to permit the containers to enter into the commerce of the United States free from payment of import duties and taxes. The fact that the containers entered into commerce of the United States and other signatories countries triggered the need for this Convention.

In further reference to the Solicitor General's argument based on 19 C.F.R. 10.41(a), it is important to note that domestic manufactured containers, which are not subject to any import customs or duties are treated comparable under 19 C.F.R. 10.41(b) to containers under 19 C.F.R. 10.41(a). Furthermore, 19 C.F.R. 10.41(a) does not distinguish between domestically or foreign owned containers. Both classes of containers are subject to bond to insure compliance with the Customs regulations. Furthermore, nothing in 19 C.F.R. 10.41(a) limits the application of these regulations to either foreign owned or foreign manufactured containers or containers used aboard ship. Thus, the Solicitor General's argument that containers which are subject to bonding requirements do not enter the commerce of the United States for property tax purposes, would exempt all containers from *ad valorem* property tax, including domestic owned containers involved in foreign commerce and foreign owned containers on which United States custom duties and import taxes have been paid.

Furthermore, the argument of the Solicitor General ignores the fact that the *original* Convention on Containers was replaced by the 1972 Convention (footnote 9, page 17, *supra*). Article 6 of the 1972 Convention removes any bonding requirements provided for in 19 C.F.R. § 10.41 (a) & (b) since it eliminates the furnishing of any form of security.

In *Sea-Land Service, Inc. v. County of Alameda,* 117 Cal. Rptr. 448, 528 P.2d 56 (1974), *Sea-Land* relied on the "home port" doctrine and 19 C.F.R. 10.41(a) in support of its claim of federal preemption of state taxation of containers.

The California Supreme Court disposition of this argument, is equally applicable here. The California Supreme Court there noted:

> "Next Sea-Land refers to evidence of federal regulation of container traffic in international commerce to support a contention that the field is preempted by such involvement. It cites provisions of 19 Code of Federal Regulations section 10.41(a), * * * . These regulations merely exempt the containers from the levy of a customs duty every time the containers arrive in a port. They are inapplicable to a determination of whether the containers are

taxable only at the owner's home port * * * . * * * Nor do the treaties and agreements between the United States and foreign nations relating to the movement of containers in international commerce have any bearing on the issue before us." (117 Cal. Rptr. 458-459.)

We thus submit that the argument of the Solicitor General built on the trilogy of the original Custom Conventions on Containers, custom regulations pursuant to Section 322(a) of the Tariff Act of 1930 (19 C.F.R. 10.41(a)), and this Court's decision in *McGoldrick v. Gulf Oil Corp., supra,* does not establish that Congress has pre-empted the field of state and local *ad valorem* taxation of containers. Neither does this trilogy establish that the *ad valorem* property tax in question interferes with any treaty or supremacy powers of the federal government.[21]

E. The Argument of the Appellants, et al, that the tax in question is invalid under the commerce clause is based on erroneous factual conclusions and a faulty analysis and application of governing constitutional principles.

In order to justify the request that this Court reverse the judgment of the California Supreme Court, and extend the legal fiction of "domicile" of *Hays* to the containers in question, the Appellants, et al, engage in a game of factual and legal semantics which strike at the foundation of our federal system. The purpose of this section of our brief is to examine the basic fallacies on which the Appellants, et al, rest their case.

1. The first fallacy is that the commerce clause of the federal Constitution invalidates any state tax which might

[21]In fact, since the only statutory authority granted by Congress to the United States to enter into the customs convention on containers, is 19 U.S.C., Section 1322(a), and since it provides that "vehicles and other instruments of international traffic, *shall be granted the customary exceptions from the application of the customs laws", there is a serious question of whether Congress ever intended to exempt cargo containers.

include in its base, objects or activities also subjected to some degree of tax in a foreign country. Thus, they argue that since Japan taxes the containers in question to some unknown degree, California has no power to do so, irrespective of the actual nature of the Japanese tax and the burden it actually imposes, and irrespective of whether it conflicts with United States constitutional taxing principles.[22]

Presumably, under this argument, if the "home port" (flag) of the foreign ships are in tax haven countries such as Nigeria, Honduras or Panama, the California tax would be valid. We know of no decision of this Court or any constitutional or international law principle which invalidates any taxes of any nation or their political subdivisions solely on the basis of the taxing systems of other nations. Nevertheless, in support of their argument, Appellants, et al, argue by analogy. They contend first that the commerce clause by itself prevents interstate "double taxation" between states of the United States. Then, they go on to argue that the commerce clause prevents such "double taxation" also at the international level.

This Court has never held that the commerce clause protects interstate businesses from multiple tax burdens. This is attested to by this Court's recent decision in *Moorman Manufacturing Co. v. Bair,* ____ U.S. ____, 57 L.Ed. 2d 197, 98 S.Ct. 2340 (1978).

Moorman upheld, as constitutional under the commerce clause, the Iowa single-sales-factor income tax apportionment formula. The taxpayer (Moorman) there contended that, since its sales into Iowa were of products manufactured in Illinois, and since Illinois apportioned income on the basis of a three-factor (property, payroll and sales) formula, it was exposed to a multiple tax burden on the income from these sales.

While this Court recognized that a uniform code

[22]Our limited examination of the tax system of Japan reveals no general annual *ad valorem* property tax as such in Japan, (Guide to Japanese Taxes 1975-1976 by Taizo Hayashi, published by Ziakei Shō Hō Sha, Tokyo).

would promote the underlying objectives of the commerce clause, it refused to hold that the almost universally used three-factor apportionment formula, used by Illinois, constituted the presumptively valid constitutional standard for the apportionment of income among the states.[23]

In *Moorman,* the Court noted that tax duplication was inevitable in our federal system in the absence of uniformity prescribed by the "legislative power granted to Congress by the commerce clause of the United States Constitution" (Slip Op. 12). It specifically held that "the Constitution is neutral with respect to the contents of any uniform rule" (Slip Op. 12). It refused to determine the validity of the Iowa single factor formula by comparison of the Iowa formula with the generally accepted three factor formula used by Illinois. Thus, the fact that California's *ad valorem* property tax allegedly produces some multiple taxation at the international level due to the interaction of the tax system of California and that of Japan, does not invalidate the California tax under the commerce clause.[24]

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[23]The constitutional requirements for a valid state tax on any multistate-multinational business was set forth by this Court in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977), in which it rejected and overruled the legal formalism dictated by its prior decision in *Spector Motor Service v. O'Connor,* 340 U.S. 602 (1951). Commenting on its previous commerce clause decisions in this area, this Court noted:

> "These decisions have considered not the formal language of the tax statute, but rather its practical effects, and have sustained a tax against commerce clause challenge, when the tax is applied to an activity with a substantial nexus within the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state."

This Court used the term "discriminate" in the above quote in the context of a single state's tax system, and not in the context of the tax systems of the fifty states. A single state's tax does not result in unconstitutional "discrimination" because it results in some tax duplication when compared with the tax of other states.

[24]The Solicitor General cites *Moorman* on pp. 21-22 of his brief, and on p. 22 he quotes language of the case out of context. The full context is as follows:

> "While the freedom of the States to formulate independent policy in this area may have to yield to an overriding national interest in

Furthermore, any allegation of "double taxation" is clearly theoretical without specific information about the tax statutes and their effect on any particular taxpayer. For example, if Japan were to offer credit for taxes paid in the United States, that would negate the possibility of any "double taxation".

2. The second fallacy in the commerce clause argument of the Appellants, et al, is that if the California tax in question is inconsistent with the exclusive authority of the *federal government* to regulate foreign commerce, it is invalid. (Solicitor General's brief, p. 24, emphasis added.) As we understand this argument, if the *federal government* decides to adopt a certain policy, such as the exemption of containers from customs and import duties, this action of the federal government impliedly invalidates any state tax law which the *federal government* (not the Congress) determines "conflicts with the spirit and design of the federal scheme" (Solicitor General's brief, p. 39).

This argument presupposes that the sovereign taxing powers of the states are impliedly restricted by any action of the federal government, deemed by that government (we are not informed who does the deeming), as inconsistent with the federal government's exclusive "power" to regulate foreign commerce.

This new constitutional standard is implemented as did the Solicitor General in the instant case. You contact the State Department and ask for a survey of the tax practices of other nations throughout the world concerning container taxation, and solicit the State Department's views concerning how this Court should rule on the container question. If a legal advisor of the State Department concludes, after contacting various unknown

uniformity, the content of any uniform rules to which they must subscribe should be determined only after due consideration is given to the interests of all affected States. It is clear that the legislative power granted to Congress by the Commerce Clause of the Constitution would amply justify the enactment of legislation requiring all States to adhere to uniform rules for the division of income. It is to that body, and not this Court, that the Constitution has committed such policy decisions." (Slip Op. p. 12).

officials and U.S. shipping interests, that most do not subject the containers of foreign domiciliary owners to *ad valorem* property taxes, and also concludes that the states of the United States should likewise exempt the containers from property taxes, you have laid the legal and factual foundation to invalidate a state *ad valorem* property tax on containers as being "inconsistent with the exclusive authority of the federal government to regulate foreign commerce" because it is contrary to the purported practice of other nations. If in your search you can uncover a Customs Convention which exempts containers which are used in connection with international commerce from customs duties and import taxes, you have additional support for your argument. If possible, you should also equip yourself with letters from foreign embassies that they view the state taxing policy with some apprehension. Based on these self-serving letters, you can further support your argument that a state *ad valorem* tax on containers is inconsistent with the federal government's exclusive power to regulate foreign commerce because such letters imply the possibility of retaliatory measures that will destroy the international practice and custom you found existed by your initial communication with the State Department. You are now well-armed to argue that any state or local tax on containers is invalid under the commerce clause.

This approach to commerce clause issues ignores the fact that the Congress is given the power under the Constitution to regulate both interstate and foreign commerce. The Appellants, et al, substitution of "the federal government" for "the Congress" is of fundamental significance in this case. Nowhere in their argument have they shown that the California property tax in question collides with any act of the Congress.

3. A third fallacy in their argument is the assumption that the states have no power at all concerning international commerce. The Appellants are undoubtedly subjected to many state and local regulations which are all valid and appropriate if they do not conflict with express

congressional enactments. This Court in *Bob-Lo Excursion Co. v. Michigan,* 333 U.S. 28, upheld a state regulation prohibiting racial discrimination on a ship plying international waters. In so doing, it stated:

> "It is far too late to maintain that the states possess no regulatory power over such (foreign) commerce. From the first meeting of the Congress, they have regulated important phases of both foreign and interstate commerce, particularly in relation to tranportation by water, with Congress' express consent. And without such consent for nearly one hundred years they have exercised like power under the local diversity branch of the formula announced in *Cooley v. Board of Wardens,* 12 How. 299. (Authorities omitted.) Indeed the *Cooley* criterion has been applied so frequently in cases concerning only commerce among the several states, it is often forgotten that that historic decision dealt indiscriminately with such commerce and foreign commerce." (333 U.S. 37-38; material in parenthesis added, footnotes omitted.)

In the recent case of *Ray v. Atlantic Richfield Co.,* 435 U.S. 151 (1978), this Court upheld the power of the State of Washington to regulate oil tanker traffic in Puget Sound to the extent such regulation was not specifically in conflict with preemptive federal legislation.

4. A fourth fallacy in the argument of the Appellants, et al, is that the commerce clause must be interpreted differently in regard to foreign commerce than in regard to interstate commerce. No decision of this Court so holds. There is no reason why the commerce clause, of its own force and effect, should require the State of California to apportion its property taxes on instrumentalities of interstate commerce,[25] and be prevented from doing so on instrumentalities of foreign commerce. If an even-handed and consistent interpretation of the commerce clause by this Court works adversely to the national interest in foreign commerce or in relations with foreign nations, as

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[25] *Ott v. Mississippi Barge Lines,* 336 U.S. 169 (1948); *Braniff Airways, Inc. v. Nebraska State Board,* 347 U.S. 590 (1954); and *Standard Oil Co. v. Peck,* 342 U.S. 382 (1952).

claimed by the Appellants, et al, Congress has full authority to address the problems and prescribe solutions which it believes to be in the national interest. In doing so, it could consider in depth all aspects of the problem, including the legitimate concerns of all modes of commerce (whether interstate or international) and the interests of the federal government, the states and their political subdivisions, and foreign nations.

Notwithstanding the foregoing, by reliance on *Standard Oil Co. v. Peck,* 342 U.S. 382 (1952), the Appellants, et al, argue that the commerce clause as interpreted and applied by this Court eliminates multiple taxation on property on the national level. They thus conclude that the inability of this Court to do so on the international level requires a different interpretation of the commerce clause as applied to foreign commerce. This argument is not valid for the reasons heretofore stated in this brief.

Furthermore, in conformity with the apportionment requirements of *Standard Oil Co. v. Peck, supra,* and other *ad valorem* property tax decisions of this Court, different states can and do employ different valuation standards and criteria, different valuation ratios, different apportionment formulas, and assess properties within their jurisdiction at different rates. Obviously, such differences, none of which are invalid under the commerce clause, do not produce a uniform system of property taxation among the fifty states on instrumentalities of interstate commerce.

Furthermore, based on the record in this cause, there is no way of ascertaining the combined burden of the California and Japanese property tax on the Appellants' containers in question. It is not known whether such burden is greater than or less than the *ad valorem* property taxes which are imposed by the political subdivisions of the United States in accordance with apportionment rules or the *lex situs* rule.

In fact, such a tax comparison even between two states has never been undertaken by this Court to resolve any state tax questions under the commerce clause or any other provisions of the United States Constitution.

There are also two other dimensions to the discrimination issue raised by the Appellants, et al, which should be considered by this Court.

First, if the states and their political subdivisions are required by the commerce clause to apportion *ad valorem* property taxes on movable tangible personal property on interstate instrumentalities, and are also required to impose the same tax on the same property of foreign instrumentalities on the basis of some other conflicting rule ("legal domicile" of the owner or "home port" for examples), they are constitutionally required to discriminate against either interstate instrumentalities or foreign instrumentalities of commerce. Any such discriminatory *ad valorem* property tax system, clearly violates the *ad valorem* property tax uniformity requirements contained in state constitutions, raises equal protection questions, and would impose impossible administrative burdens on local assessors. Application of the "home port" doctrine is tantamount to total exemption of containers from state *ad valorem* property taxes.[26]

[26]For example, if a local assessor must apply one standard to "domestic" containers (apportionment) and another standard to "foreign" containers (the "home port" rule), he is not permitted to assess all containers on the basis of physical presence (actual situs) in his taxing district. He must sort out the containers which are "owned" by persons domiciled in the United States from those that are owned by persons domiciled elsewhere. He cannot assess a tax on the possessory interests of the users of the containers in his district. He must then determine which containers are used in "foreign" and which are used in "domestic" commerce. He is also required to determine whether or not there are containers which are not physically present in his jurisdiction that he should tax. To determine this, he must ascertain the existence of unknown containers throughout the world. When he finds such containers, he must then determine whether they are owned by a person with a "home port" in his taxing jurisdiction. (Since legal domicile for corporations is on a state by state basis, he has no basis for concluding that any container owned by a corporation is taxable in his district.) Then he must determine whether they are used by that person in "domestic" or "foreign" commerce. If he is a local assessor in Montana (which could be the "home port" of containers used in foreign commerce), he probably won't even be aware of his "containers—tax" responsibilities.

Furthermore, any such dual interpretation of the commerce clause completely ignores the fact that many instrumentalities of commerce engage in interstate and international commerce. This alone would suggest a compelling need to apply the commerce clause in a uniform manner to both interstate and foreign commerce. As a matter of actual use, the containers in question are so used.

Secondly, Appellants, their amici curiae, and the Solicitor General would require this Court to impose a constitutionally prescribed standard for the taxation of movable tangible property of instrumentalities of foreign commerce not used in inland commerce of the United States. They do not reveal exactly what that standard would be, except to assert that this Court should affirm *Hays v. Pacific Mail Steamship Co., supra,* and the "home port" doctrine.[27]

As indicated at pages 20-23 of this brief, this Court had difficulty in applying the *Hays* case to factual patterns different than that involved in *Hays.* As there indicated, subsequent decisions of this Court apparently settled on the "home port" nearest the domicile of the owner, as a taxable situs for ships as required for federal registration purposes. None of these cases involve commerce with foreign nations, although in *Hays,* the ships operated in coastal trade including Portland which necessitated the use of inland waterways. Given the types of issues that are raised by modern shipping practices, including the container business as an adjunct to various modes of transportation and the current international problems facing the American maritime industry, as well as that of traditional maritime nations, in our judgment, this Court's affirmance of *Hays* coupled with the

[27] *Hays,* as heretofore indicated, was premised on the following facts: The legal and commercial domicile of the owner of the ships, a corporation, and its stockholders were all in New York. Also, the ships were registered in New York as the "home port" and New York was the "home port" of the ships in a physical sense. Furthermore, the ships there involved were engaged in commerce between New York, San Francisco, and Portland, Oregon.

extension of *Hays* to the ship container industry, will not provide a workable or even an ascertainable standard for taxation of containers used by various nations let alone the political subdivisions of the United States.[28]

Appellants do not assert and the record does not disclose what standard was in fact employed to subject the containers in question to taxation by Japan.[29]

What constitutes a "home port" under the laws of other nations is not revealed in any argument in this cause. Apparently, what the Appellants, et al, are asking this Court to do is to exempt containers which are used by foreign flag vessels from state and local *ad valorem* property taxes because allegedly containers which are used by American flag vessels abroad are not taxed by other nations. Also, apparently they are requesting this Court to require containers used in connection with American flag

[28]For example, would this Court's affirmance of *Hays* as contended for by the Appellants, et al, require all the conditions in *Hays* to be present to trigger *ad valorem* tax jurisdiction? If not, does the country where the ship is "registered" control? Does the technical legal domicile of the owner control rather than the commercial domicile? If the ships are physically present in the United States engaged in coastal trade, for example, oil tankers transporting oil from the Alaska oil fields to other West Coast ports, are such shipping operations controlled by *Ott v. Mississippi, supra*; or by *Hays*? If these ships are to be subject to tax anywhere (which probably is not the case because of the use of "flags of convenience" which are a modern outgrowth of the "home port doctrine"), logic dictates they should be taxable on an apportionment basis by the states in which the ships are used and state resources and benefits are made available to them.

If by the *Hays* doctrine the "domicile" of the owner controls, if the ships are in fact owned by United States residents in economic substance (parents or stockholders for example of a Panamanian "registered" tankers of subsidiary corporations), should the substance of ownership control over the form?

[29]The best that the Appellants could assert, based on paragraph 25 of the Agreed Statement, is that Japan applies the equivalent of home port doctrine. (Appellants' brief, p. 9.) In the Solicitor General's source for the so-called international custom of taxation of ships and containers (State Department letter, Solicitor General's brief p. 14a), there is no statement of the standard which is utilized by other nations to exempt foreign flag vessels or containers. It may be that many countries do not even impose any *ad valorem* taxes on ships or containers — whether of domestic or foreign "registry" or ownership.

vessels (as well as the vessels themselves and other instrumentalities of the shipping industry which are not permanently located in any one state) to be taxed at the "home port" of the ship unless the ship operates in inland waters. Under the *Hays* "home port" doctrine as modified by *Ott v. Mississippi, supra,* this is the result. As stated by the Solicitor General at p. 10 of his brief:

> "We believe that *Hays* continues to state a sound principle which rests on the uniform practice of nations and protects the federal interests in the regulation of sea-borne commerce, particularly in commerce with foreign nations, and in speaking with one voice in matters affecting our foreign relations."

Since containers do not have a "home port" and are not used in connection with any particular ship, and Appellants do not own all the containers in question, the Appellants, et al, are requesting this Court to hold that all containers used in connection with foreign flag ships are exempt from all state property taxes. The question at issue then, is whether or not this Court is going to interpret the commerce clause of the United States Constitution as requiring this result. In spite of the many unanswered questions in application of the *Hays* doctrine since containers move in international and internal commerce apart from ships, this Court is asked to set a constitutional rule of taxation for containers and the container industry. Since in *Moorman* it refused to do so in regard to interstate taxation, because it concluded that this was a subject matter of congressional concern, there is no constitutional basis for it doing so in the instant case.

5. The fifth fallacy of the argument of Appellants, et al, is the proposition that apportioned *ad valorem* property taxes on tangible movable property cannot be properly apportioned on instrumentalities of international commerce. They have advanced no reason whatsoever that would support this argument except that decisions of this Court are not binding on foreign nations. This argument completely overlooks the fact that uniform and fair apportionment of taxes imposed by all nations on ships

and other means of international commerce, can be accomplished by the nations which desire to do so. This Court can take judicial notice of the fact that the Congress has enacted legislation and that the federal government has entered into innumerable tax treaties and conventions with other nations for the purpose of effectuating equitable and reasonable international tax policies. Thus, this Court is not required, as insisted upon by the Appellants, et al, to adopt a hollow meaningless fiction for state taxation of instrumentalities of international commerce — which is tantamount to their complete exemption — in order for that commerce to be subject to equitable and reasonable taxation at the international level.

6. The sixth fallacy in the argument of the Appellants, et al, is the implied assumption that appropriate international policy of the United States is not required to take into consideration the legitimate revenue needs and tax policies of the fifty states. In interpreting the federal Constitution, this Court has always done so. Yet in his argument to the Court, the Solicitor General has not taken those needs into consideration or discussed the merit of *Hays* as applied to state taxation.

The Supreme Court of California in *Sea-Land Service, Inc. v. County of Alameda, supra,* was generous in its characterization when it characterized the "home port" doctrine as "anachronistic" (117 Cal. Rptr. 458) as applied to the states' taxing powers in light of modern business practices.

The home port doctrine, as we understand its evolution in this Court, is based upon the twin legal fictions of legal domicile of the owner and registration of the ship.[30] Apparently, domicile of the legal owner as used

[30]Section 17 of Chapter 2 of 46 U.S.C. provides:

"Every vessel, not enrolled or licensed, shall be registered by the collector of that collection district which includes the port to which such vessel shall belong at the time of her registry; which port shall be deemed to be that at or nearest to which the owner, if there be therein, refers to technical legal ownership and not ownership in any substantive sense. Therefore, under the home port doctrine, major United States oil companies may form subsidiaries in "flag of convenience" nations, such as Nigeria or Panama, under the technical ownership of a subsidiary (if necessary for registration of the ship under a foreign flag) and ply ships between Alaska and Washington without incurring any tax liability to either of these states and their political subdivisions. This led the United States Congress to realize that it was necessary to reach some type of international agreement on tanker safety standards because 85 percent of the ships using United States ports were of foreign registry (See *Ray v. Atlantic Richfield Co.,* 435 U.S. 151, 167 (1978), footnote 17.)[31]

Irrespective of the general merit or demerit of the home port doctrine at the national level for either taxation or general regulatory purposes, we submit that it is a totally unworkable doctrine as applied to the states in relationship to their taxing powers. The position of the

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> but one or if more than one, the husband or acting and managing owner of such vessel, usually resides."

Section 18 provides:

> "For the purposes of the navigation laws of the United States and of sections 911, 923-927, 941, 961-964, 971-975, and 981-984 of this Title, every vessel of the United States shall have a "home port" in the United States, including Puerto Rico, which port the owner of such vessel, subject to the approval of the Commissioner of Customs, shall specifically fix and determine, and subject to such approval may from time to time change. Such home port shall be shown in the register, enrollment, and license, or license of such vessel, which documents, respectively are referred to as the vessel's document. The home port shown in the document of any vessel of the United States in force on February 16, 1925, shall be deemed to have been fixed and determined in accordance with the provisions herein. Section 17 of this title is amended to conform herewith."

[31]As noted in footnote 17 of *Ray v. Atlantic Richfield Co.:*

"The Senate report notes that eliminating foreign vessels from title 2 would be 'ineffective, and possibly self-defeating,' because approximately 85% of the vessels in the navigable waters of the United States are foreign registry."

Appellants, et al, is that state taxing power is zero if the "home port" is in a foreign country. If, however, you have a domestic flag vessel, it and the cargo containers which it uses, are subject to taxation only at "home port" in the United States.

This simply means that any major United States corporation can select any state in the United States nearest the "legal domicile" of the paper owner (see 46 U.S.C. §§ 17-18, footnote 30, *infra*) as "home port" and confer on that state exclusive taxing powers over such corporation's instrumentalities of shipping commerce (except those used exclusively in inland waters). This is true even if a state has no "port" within the substantive meaning of that term. Thus, any inland state, such as North Dakota, could tax all the ships and containers of such a corporation at full value, though the ship and containers are never physically present in the state. Under these circumstances, any "home port state" that attempted to assert taxing jurisdiction over such ships and their containers would find such taxes quickly invalidated by their own courts or find that they no longer had any thriving shipping industry attributable to them by the "home port" doctrine. In other words, the technical legal domicile of the owner of ships engaged in trade in international waters, places mere form over substance and is a completely unworkable standard for state taxation purposes.

Because of the inability of states to impose and administer their property taxes on the basis of legal fictions, particularly as applied to movable tangible personal property which may have no actual presence in the taxing jurisdiction, it is a mockery for the Appellants, et al, to premise their arguments in this case on questions of tax equity, double taxation, and threats of tax retaliation by other nations.

It is submitted that such national dilemmas, with all due respect to the Appellants, et al's praise of the home port doctrine, is attributable to the application of the home port doctrine and particularly to the subject matter of taxation.

We thus respectfully submit that when the states' interests are weighed in the balance, there is no overriding national policy which requires the home port doctrine to be extended to containers.[32] Thus, irrespective of the merits of the home port doctrine at the national level, it should not be mandated by this Court as a constitutional standard for state *ad valorem* property taxes.

7. A seventh fallacy of the argument of the Appellants, et al, is that the decision of the Supreme Court of California might trigger retaliatory taxes in other countries against United States shipping and container industries and that the imposition of such retaliatory taxes would then subject such industries to duplicate taxation in conflict with the national interest. Such argument is predicated on the proposition, the validity of which we do not here question, that all nations impose *ad valorem* property taxes on the full value of the containers under the home port doctrine.

Accepting this proposition, (which is the cornerstone of the adverse effect of possible retaliatory taxes), the

[32]A book entitled "Flags of Convenience", an international legal study by Boleslaw Adam Boczek (Harvard University Press, Cambridge, Massachusetts, 1962) contains an interesting well-documented analysis of the international shipping problems which are an outgrowth of the home port doctrine. In discussing the advantages of flags of convenience, the author noted at p. 58:

> "A further advantage, and perhaps the greatest of all, offered by the flag-of-convenience countries to foreign shipowners, is that, besides the registration fees and annual taxes (and a few other negligible administrative dues), no other taxes are payable by shipowners in these countries. In Panama the law expressly exempts from taxation any income derived from vessels registered in Panama and engaged in international maritime commerce, even if transportation contracts are signed within Panama. Moreover, in 1941, by executive agreement, the Panamanian and the United States governments agreed to exempt the revenues of shipping companies incorporated under each other's laws from income taxation." (Footnotes omitted.)

The author further states at p. 61:

> "In the eyes of American maritime unions, the avoidance of taxation is the primary reason why American businessmen operate ships under flags of convenience, high seamen's wages being, according to the unions, only a minor reason." (Footnote omitted.)

United States based shipping and container industry would gain a substantial tax advantage over their foreign competitors, even though all the nations in which American shipping interests carried on activities imposed apportioned retaliatory *ad valorem* property taxes. This follows from the elementary proposition that a greater percentage of the value of containers which is attributed overseas by an apportionment formula such as California's, would escape taxation by the states and political subdivisions of the United States than could jurisdictionally be imposed by any retaliatory taxes of foreign nations.

For example, by applying the industry rule of thumb that such containers spend approximately one-third of each year in their home port country or other overseas locations, one-third on the seas, and one-third at some coastal or inland location in the United States (as estimated by CENSA in footnote 5 on page 8 of their brief), if all the political subdivisions in the United States in which the containers were ever present IMPOSED A TAX (even though clearly in transit), these political subdivisions could tax only one-third of the value of the containers and only one-third could be taxable by foreign nations on the basis of any apportionable presence or situs in those nations. This would relieve United States shipping interests and container interests of one-third of any overall tax liability than would be the case under the home port method (assuming comparable rates, valuations, standards, etc. for *ad valorem* property tax purposes).

There is thus no basis for the argument advanced by the Appellants, et al, that American shipping interests will be adversely affected if this Court interprets the commerce clause to permit taxation of their movable tangible property on the basis of its actual *situs* within the taxing jurisdiction irrespective of the technical legal domicile or "home port" of the owner and irrespective of how the property is characterized for purposes of commerce.

8. The eighth fallacy of the argument of the Appellants, et al, is the underlying assumption that California, in imposing an *ad valorem* property tax on Appellants, is somehow engaged in the subject matter of international relations with foreign governments which is under the exclusive control of the federal government. This is not so. California is dealing only with the subject matter of state taxation of multinational corporations that have chosen to do business within its borders. While the United States and foreign shipping interests may view with alarm any taxation of the Appellants' properties by California, their concern and interests are not the same as the interests of the federal government. While the Solicitor General argues that the *Hays* "home port" doctrine should be applied to the containers in question by this Court because it is purportedly the international practice, he has not demonstrated to this Court why this is either in the national interest or in the best interests of the American shipping and container industry for it to do so.

As heretofore indicated, the threat of retaliatory tax measures by foreign governments on U.S. shipper and container industries, could not injure such industries even if such threats became an actuality because the states would be surrendering more taxing power cumulatively in a constitutional sense than they would gain by a physical presence apportionment rule. If what is really at issue in this case, which has been candidly referred to on p. 7 of the brief of the Institute of International Container Lessors, Ltd. as a "concept of complete exclusion of ships from taxation" (which may be attributable to the international practice resulting from technical application of some form of the "home port" principle), it should be articulated and defended as a legitimate overriding national policy which requires invalidation of the California tax in question.

Also, if overriding national concern requires the defense of the *Hays* principle of taxation as contrasted to apportionment on the basis of actual situs, its merit should be defended by the federal government before it asks this Court to incorporate it in the United States Constitution as a rule of law for the taxation of instrumentalities of foreign commerce by the states of the United States and their political subdivisions.[33]

F. The ad valorem property tax in question is not invalid under the import-export clause of the United States Constitution because it is not a tax on imports or exports, and does not conflict with the purposes of that clause.

This Court in *Michelin Tire Corp. v. Wages, supra,* 423 U.S. 276 (1976), expressly held that an *ad valorem* property tax was neither a tax on imports or exports. It further held that it was not the type of tax that interfered with the basic purposes of the import-export clause. Notwithstanding these express holdings, the Appellants, et al, argue that the tax in question is invalid within the

[33]From the states' point of view, it lacks substance because it is unworkable at the state level and apparently has resulted in little or no state taxation of cargo containers. Furthermore, if the states were capable administratively of taxing cargo containers involved in international trade at the domicile of the technical legal owner or the "home port" nearest that domicile, it would completely divorce tax benefits from tax consequences and should be invalidated by this Court by reference to the benefits principle which has been extensively argued by the Appellants in their brief. As indicated by this Court in *Southern Pacific Co. v. Commonwealth of Kentucky,* 222 U.S. 63 (1911), taxation of ships at their "home port" has little relationship to the tax benefits principle. In *Southern Pacific,* this Court rightly noted: "The legality of a tax is not to be measured by the benefit received by the taxpayer, although equality of burdens be the general standard sought to be attained." (222 U.S. 76 (1911)). It further noted that the "home port" state there involved had conferred substantial benefits on the corporate owner that maintained both its legal and commercial domicile in the state, even though the ships were never in the state. However, the application of the benefit principle becomes quite tenuous when the legal owner may be a shell subsidiary of a large international oil company. In this connection, it seems incongruous to us that the Appellants advance the benefit principle to urge this Court to adopt the situs concept of *Hays* for *ad valorem* property taxation of their containers, which is much more tenuously related to taxpayer benefits than the apportionment principle applied by California to Appellants in the instant case.

purview of the import-export clause. The Solicitor General in footnote 23 of his brief, on pages 31-32, indicates that the tax in question violates this constitutional provision, because it "could disrupt the foreign relations of the United States; and "it frustrates the ability of the national government to conduct trade with foreign nations." Further he there urges that "the state tax intrudes in an area where the United States 'must speak with one voice.' ".

For reasons heretofore indicated in this brief, this argument lacks substance. It does illustrate the sweeping federal power claims of the Solicitor General of the United States. This is of primary concern to the Commission and the amici curiae states which have joined in this brief (which undoubtedly reflects the concerns of all the fifty states).

CONCLUSION

For the reasons stated herein, the Amicus Multistate Tax Commission and the amici curiae states respectfully urge this Court to either dismiss this appeal for lack of a properly presented substantial federal question or alternatively, to affirm the decision of the Court below.

Respectfully submitted,

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