

**LESSOR HIT WITH GREATER TAX: *ITEL*
CONTAINERS INTERNATIONAL CORP. V.
HUDDLESTON**

INTRODUCTION

Congress has the exclusive power “[t]o regulate Commerce with foreign Nations, and among the several States.”¹ Thus, states cannot regulate commerce in a way that interferes with the free flow of commerce.² Any State tax that interferes with Congress’ power or impedes the free flow of commerce will be held unconstitutional.³ In addition, States cannot, without Congress’ consent, impose duties or taxes on imports to or exports from the United States.⁴ Any State tax on imports or exports will be held to be unconstitutional unless Congress has given the State permission to levy the tax or the tax is necessary for executing a State’s inspection laws.⁵

In *Itel Containers International Corp. v. Huddleston*,⁶ the United States Supreme Court recently addressed the constitutionality of a Tennessee tax as it applied to domestic-owned cargo containers used exclusively in international commerce.⁷ In *Itel*, the Tennessee tax was claimed to have violated the Supremacy Clause, the Commerce Clause, and the Import-Export Clause of the United States Constitution.⁸ The Supreme Court, however, upheld the validity of the tax.⁹

This Note discusses the Supreme Court’s reasons for upholding the Tennessee tax.¹⁰ This Note then explores the history and application of the Supremacy, Commerce, and Import-Export Clauses.¹¹ This

1. U.S. CONST. art. I, § 8, cl. 3. The Commerce Clause provides in pertinent part, that “[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States.” *Id.*

2. *Freeman v. Hewit*, 329 U.S. 249, 252 (1946).

3. *Id.*

4. U.S. CONST. art. I, § 10, cl. 2. The Import-Export Clause provides, in pertinent part, that “[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it’s [sic] inspection Laws.” *Id.*

5. *See infra* note 268 and accompanying text.

6. 113 S. Ct. 1095 (1993).

7. *Itel Containers Int’l Corp. v. Huddleston*, 113 S. Ct. 1095, 1098 (1993).

8. *Id.* at 1098-99, 1106. The Supremacy Clause provides, in pertinent part, that “all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2.

9. *Itel*, 113 S. Ct. at 1106.

10. *See infra* notes 28-113 and accompanying text.

11. *See infra* notes 126-303 and accompanying text.

Note also discusses the inconsistent application of precedent by the Court in *Itel*.¹² Finally, this Note presents alternatives to several of the Court's holdings.¹³

FACTS AND HOLDING

Itel Containers International Corporation ("Itel"), a Delaware corporation with its principal place of business in California, leases cargo containers for use in international commerce.¹⁴ Itel's marketing offices across the United States solicit and negotiate leases for cargo containers.¹⁵ Itel delivers the leased containers to lessees or their agents in nearly every State, including Tennessee.¹⁶ Each lease restricts the use of the containers to international commerce.¹⁷

Itel delivered leased containers in Tennessee from January 1983 through November 1986, without paying taxes on the proceeds from the leases.¹⁸ The Tennessee Department of Revenue, in December 1986, assessed \$382,465 against Itel for unpaid sales tax, penalties, and interest.¹⁹ Under protest, Itel paid the assessment and promptly filed an action for a refund.²⁰ Itel challenged the constitutionality of the Tennessee tax under the Supremacy Clause, the Commerce Clause, and the Import-Export Clause.²¹ The Tennessee Chancery

12. See *infra* notes 304-413 and accompanying text.

13. See *infra* notes 305-413 and accompanying text.

14. *Itel Containers Int'l Corp. v. Huddleston*, 113 S. Ct. 1095, 1098 (1993).

15. *Id.* at 1098.

16. *Id.*

17. Brief of Petitioner, *Itel Containers Int'l Corp. v. Huddleston*, 113 S. Ct. 1095 (1993) (No. 91-321) [hereinafter Brief of Petitioner].

18. *Itel*, 113 S. Ct. at 1098.

19. *Id.* The applicable Tennessee statutes for sales and use taxes provide in pertinent part: "'Sale' means any transfer of title or possession, or both, exchange, barter, lease or rental, conditional, or otherwise, in any manner or by any means whatsoever of tangible personal property for a consideration." TENN. CODE ANN. 67-6-102(23)(A) (1989).

In order to prevent actual multistate taxation of the acts and privileges subject to tax under this chapter, any taxpayer, upon proof acceptable to the commissioner being submitted that the taxpayer has properly paid sales and use tax in another state on such acts and privileges, shall be allowed a credit against the tax imposed by this chapter to the extent of the amount of such tax properly due and paid in another state.

TENN. CODE ANN. 67-6-313(f) (1989).

If the dealer can show by reasonable proof that the dealer has paid any Tennessee sales or use tax to a vendor on personal property or taxable service which such dealer has subsequently sold without collecting tax on the resale of the personal property or taxable service, then the dealer shall be given credit for any such payment in computing any liability to the department for sales or use tax. Reasonable proof can be supplied by invoices and other records which the dealer may obtain from the vendors from which the dealer has made purchases.

TENN. CODE ANN. 67-6-507(b) (1990).

20. *Itel*, 113 S. Ct. at 1098.

21. *Id.*; see Brief of Petitioner, *supra* note 17.

Court rejected Itel's constitutional claims but reduced the amount of the assessment to \$158,012 based upon state law provisions.²²

On its appeal to the Supreme Court of Tennessee, Itel again challenged the Tennessee tax on grounds that it violated the Supremacy Clause, the Commerce Clause, and the Import-Export Clause.²³ The court concluded that the Tennessee statute allowed the state to tax the transfer of Itel's containers and that the imposition of such tax was not unconstitutional.²⁴ Consequently, the Supreme Court of Tennessee affirmed the Chancellor's judgment.²⁵

Itel submitted a petition for certiorari, and the United States Supreme Court granted the petition.²⁶ Itel again challenged the validity of the Tennessee tax based upon its three constitutional arguments.²⁷

ITEL'S SUPREMACY CLAUSE CHALLENGE

In its Supremacy Clause challenge, Itel asserted that the Tennessee tax was proscribed by the 1956 and 1972 Customs Conventions on Containers ("Container Conventions") and that the tax was preempted by the Container Conventions and their implementing federal regulations.²⁸ The Container Conventions expressly prohibit all taxes collected "by reason of" or "in connexion [sic] with" the importation of containers.²⁹ Itel asserted that the Tennessee tax was in connection

22. *Itel*, 113 S. Ct. at 1098.

23. *Itel Containers Int'l Corp. v. Cardwell*, 814 S.W.2d 29, 31 (Tenn. 1991).

24. *Id.* at 38.

25. *Id.*

26. *Itel Containers Int'l Corp. v. Huddleston*, 112 S. Ct. 1158 (1992).

27. Brief of Petitioner, *supra* note 17.

28. *Id.*, *supra* note 17.

29. Customs Convention on Containers, *opened for signature* Dec. 2, 1972, art. 1, 988 U.N.T.S. 44, 44; Customs Convention on Containers, *opened for signature* May 18, 1956, arts. 1, 2, 20 U.S.T. 303, 304. The 1972 Container Convention provides in pertinent part:

Article 1. For the purposes of the present Convention:

(a) The term "import duties and taxes" shall mean Customs duties and all other duties, taxes, fees and other charges which are collected on, or in connexion with, the importation of goods, but not including fees and charges limited in amount to the approximate cost of services rendered;

(b) The term "temporary admission" shall mean temporary importation, subject to re-exportation, free of import duties and taxes and free of import prohibitions and restrictions.

Customs Convention on Containers, *opened for signature* Dec. 2, 1972, art. 1, 988 U.N.T.S. 44, 44 The 1956 Container Convention provides in pertinent part:

Article 1

For the purpose of this Convention:

(a) The term "import duties and import taxes" shall mean not only Customs duties but also all duties and taxes whatsoever chargeable by reason of importation.

Article 2

with importation.³⁰ As support, *Itel* cited the fiction of "temporary admission" as defined in Article 1(b) of the 1972 Container Convention.³¹ *Itel* argued that, under the "temporary admission" fiction, "the containers remain[ed] temporarily imported throughout their stay in the United States."³² *Itel* asserted that the tax was triggered by the container entering into the taxing jurisdiction of Tennessee and is thus a tax levied by reason of or in connection with importation, within the meaning of the Container Conventions.³³ Accordingly, *Itel* asserted that the Container Conventions prohibit the Tennessee tax.³⁴

The United States Supreme Court concluded that the Container Conventions only prevent taxation of the "act of importation" itself, not *all* taxes on international cargo containers.³⁵ The Court stated that *Itel's* interpretation would eliminate all taxes on qualified containers because every container covered by the Container Conventions is, by definition, temporarily in the United States as a result of its importation.³⁶ The Court stated that this interpretation of the Container Conventions would undermine the qualifying language: "by reason of" and "in connexion [sic] with" importation.³⁷

Itel also argued that the "actual, reasonably harmonious practice adopted by the United States and other signatories to the Conventions" is evidence of how the Container Conventions should be interpreted.³⁸ *Itel* cited amicus curiae briefs, submitted on its behalf, which stated that none of the signatory nations to the Container Conventions impose sales taxes or "equivalent taxes" on leases of cargo containers used exclusively in international commerce.³⁹ Specifically, *Itel* pointed to the United Kingdom's amicus brief, which stated that

Each of the Contracting Parties shall grant temporary admission free of import duties and import taxes and free of import prohibitions and restrictions, subject to re-exportation and to the other conditions laid down . . . below, to containers when they are imported loaded to be re-exported either empty or loaded, or imported empty to be re-exported loaded.

Customs Convention on Containers, *opened for signature* May 18, 1956, arts. 1, 2, 20 U.S.T. 303, 304.

30. Brief of Petitioner, *supra* note 17.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Itel*, 113 S. Ct. at 1099.

35. *Id.* at 1098, 1100. Justice Antonin Scalia filed an opinion concurring in part and concurring in the judgment. *Id.* at 1106-09. Justice Harry Blackmun filed a dissenting opinion. *Id.* at 1109-11.

36. *Itel*, 113 S. Ct. at 1100.

37. *Id.*

38. *Id.*; Brief of Petitioner, *supra* note 17 (citing *Trans World Airlines, Inc. v. Franklin Mint Corp.*, 466 U.S. 243, 259 (1984)).

39. *Itel*, 113 S. Ct. at 1100-01; Brief of Petitioner, *supra* note 17.

under the European Value Added Tax ("VAT") system, no direct tax is levied on the value of international container leases.⁴⁰

The Court concluded that *Itel* overstated the probative value of the other nations' practices concerning container taxation.⁴¹ The Court stated that the meaning that the signatory nations gave to the phrase "equivalent taxes" was not clear.⁴² The Court then compared the Tennessee tax with that of the European VAT system.⁴³ The Court stated that, for the purposes of deciding if a tax is one based upon importation, the VAT system is equivalent to the Tennessee tax.⁴⁴ The Court noted that, like the Tennessee tax, the VAT system imposes a tax, albeit indirect, on the value of the container leases.⁴⁵ The Court then stated that the Container Conventions prohibit imposition of both direct and indirect taxes based on container importation but allow them when based on some other ground.⁴⁶ According to the Court, neither the Tennessee tax nor the European VAT system are based on the act of importation.⁴⁷ Thus, the Court held that the Tennessee tax was not pre-empted by the Container Conventions.⁴⁸ *Itel* further argued that Tennessee's tax is inconsistent with the objectives of the Container Conventions and in contravention of the Supreme Court's holding in a prior case.⁴⁹ *Itel* contended that the Container Convention signatories desired to lower the cost of shipping containers in international traffic through duty and tax prohibition.⁵⁰ Specifically, *Itel* cited the reasons the United States consented to the 1956 Container Convention: facilitating the movement of goods in international commerce and directly benefitting American business interests.⁵¹ *Itel* also cited the United States' additional reasons for entering the 1972 Container Convention, which were "to facilitate the use of United States-owned and operated containers in international traffic by ensuring that they receive treatment in the territories of the Parties to the Convention similar to that which is afforded to foreign-owned containers in the United States."⁵² *Itel* then quoted *Japan*

40. *Itel*, 113 S. Ct. at 1100.

41. *Id.*

42. *Id.* at 1101.

43. *Id.* at 1100-01.

44. *Id.* at 1101.

45. *Id.* at 1100.

46. *Id.*

47. *Id.* at 1101.

48. *Id.*

49. *Id.*; Brief of Petitioner, *supra* note 17.

50. Brief of Petitioner, *supra* note 17.

51. *Id.* (citing S. REP. No. 1618, 90th Cong., 2d Sess. 2 (1968)).

52. Brief of Petitioner, *supra* note 17 (quoting Message from the President of the United States Transmitting the Customs Convention on Containers, 1972, and the In-

Line, Ltd. v. County of Los Angeles,⁵³ in which the Court concluded that the "[1956 Container] Convention reflects a national policy to remove impediments to the use of containers as instruments of international traffic."⁵⁴ In *Japan Line*, the Court determined that a State tax on containers would frustrate the federal objective of the Container Conventions and therefore conflict with the federal regulatory system.⁵⁵

The Court rejected ITEL's assertions, stating that the 1956 Container Convention did not seek to proscribe *all* domestic taxes on cargo containers used in international commerce.⁵⁶ Rather, only those taxes assessed on the importation of such containers are proscribed.⁵⁷ The Court then concluded that the Tennessee tax is a general sales tax that does not bear any relation to importation and is applied to domestic and foreign goods without differentiation.⁵⁸

Finally, ITEL argued that the Tennessee tax is pre-empted by the container regulatory system formulated by the Container Conventions and their federal implementing regulations.⁵⁹ ITEL claimed that the Tennessee tax was pre-empted because it undermined the principal objectives of the Container Conventions' federal regulatory system.⁶⁰ ITEL analogized the federal regulatory system governing cargo containers to the system governing customs-bonded warehouses because the Court had previously determined that the customs-bonded warehouse regulatory system pre-empted most state taxes.⁶¹ ITEL asserted that the customs-bonded warehouse statutes were enacted to stimulate business for American industry by encouraging the use of American ports through waiver of import duties.⁶²

ITEL contended that similar benefits were envisioned by enacting the Container Conventions because they were enacted to facilitate the use of containers through waiver of customs duties.⁶³ ITEL asserted

ternational Convention for Safe Containers, both signed at Geneva on Dec. 5, 1972; EXEC. X, 93rd Cong., 1st Sess. vi (1973); EXEC. REP. NO. 94-33, at 1).

53. 441 U.S. 434 (1979).

54. Brief of Petitioner, *supra* Note 17 (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 453 (1979)).

55. *Japan Line*, 441 U.S. at 453.

56. *ITEL*, 113 S. Ct. at 1101.

57. *Id.*

58. *Id.* at 1101, 1103.

59. *Id.* at 1101.

60. *Id.*

61. *Id.* at 1101-02. The Court stated, "Congress created a system for bonded warehouses where imports could be stored free of federal customs duties while under the continuous supervision of local customs officials 'in order to encourage merchants here and abroad to make use of American ports.'" *Id.* at 1102 (quoting *Xerox Corp. v. County of Harris*, 459 U.S. 145, 151 (1982)).

62. Brief of Petitioner, *supra* note 17.

63. *Id.*

that the Tennessee tax on containers, much like taxes on warehoused goods, would frustrate the underlying federal purposes behind the Container Conventions' regulatory system and thus should be pre-empted.⁶⁴ *Itel* further maintained that the federal regulatory system for cargo containers, like that of customs-bonded warehouses, was so pervasive that it demonstrated congressional intent to occupy the entire area of commerce.⁶⁵ *Itel* contended that such pervasiveness is evidenced by the elaborate requirements for admission, operation, and design of the containers found in the Container Conventions, which is similar to the requirements found in the customs-bonded warehouse statutes.⁶⁶

The Supreme Court determined that neither the Container Conventions nor their federal implementing regulations pre-empt all domestic taxation of containers used exclusively in foreign commerce.⁶⁷ First, the Court stated that there exists no evidence of congressional intent to exempt such containers from most domestic taxation.⁶⁸ Second, the Court asserted that it had not previously held that the 1956 Container Convention and its federal regulatory system created "a national policy to exempt [the] containers from *all* domestic taxation."⁶⁹ Third, the Court stated that the Conventions' federal regulatory system was not as pervasive as that of the customs-bonded warehouse system.⁷⁰ Fourth, the Court stated that it had specifically held that the customs-bonded warehouse statutes and regulations did not evidence a congressional intent to occupy the area.⁷¹ Finally, the Court similarly determined that it could not conclude that Congress intended to occupy the entire field of container regulation.⁷² Therefore, the Supreme Court held that the Tennessee sales tax is not pre-empted by the 1956 or 1972 Container Convention.⁷³

64. *Id.*

65. *Itel*, 113 S. Ct. at 1102.

66. Brief of Petitioner, *supra* note 17.

67. *Itel*, 113 S. Ct. at 1102.

68. *Id.*

69. *Id.* (emphasis added).

70. *Id.* The Court stated that the bonded warehouse statutes provide more extensive federal control of the warehouses, strict bonding requirements, and specific rules for taxation, whereas the federal regulatory scheme for containers is limited to the general certification and taxation of containers. *Id.*

71. *Itel*, 113 S. Ct. at 1102.

72. *Id.*

73. *Id.* at 1103.

ITEL'S FOREIGN COMMERCE CLAUSE CHALLENGE

Itel next challenged the Tennessee tax on Foreign Commerce Clause grounds.⁷⁴ To determine the validity of Itel's challenge, the Supreme Court applied a six-part Foreign Commerce Clause test.⁷⁵ The Court stated that a state tax does not violate the Foreign Commerce Clause if it: 1) "is applied to an activity with a substantial nexus with the taxing State"; 2) "is fairly apportioned"; 3) "does not discriminate against interstate commerce"; 4) "is fairly related to the services provided by the State"; 5) does not create "a substantial risk of international multiple taxation"; and 6) does not prevent the Federal Government from "speaking with one voice when regulating commercial relations with foreign governments."⁷⁶

Itel accepted the conclusion of the Supreme Court of Tennessee that the Tennessee tax meets the first four elements of this test.⁷⁷ However, Itel argued that the tax violated the final two elements of the Foreign Commerce Clause test.⁷⁸

Itel contended that the Tennessee sales tax invites multiple taxation of its container leases.⁷⁹ Itel argued that Tennessee's only nexus with the leases was the transfer of the containers within the state.⁸⁰ Itel claimed that allowing such a tax would encourage foreign nations to impose taxes on any incidents of container leases occurring within their borders, especially those involving containers leased or owned by American companies.⁸¹ In this way, Itel contended, allowing the Tennessee tax to stand would invite multiple international taxation.⁸²

The Court, however, concluded that the Tennessee tax creates no substantial risk of international multiple taxation.⁸³ The Court stated that the Foreign Commerce Clause does not prevent a state from taxing a business transaction that *potentially* may be taxed by a foreign nation.⁸⁴ In fact, the Court determined that the Tennessee tax provisions actually reduce, if not extinguish, the risk of multiple taxation.⁸⁵ The Court, accepting Tennessee's interpretation of its revenue

74. *Id.* The Commerce Clause provides in pertinent part, that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States." U.S. CONSR. art. I, § 8, cl. 3.

75. *Itel*, 113 S. Ct. at 1103-05.

76. *Id.* at 1103-04 (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *Japan Line*, 441 U.S. at 451).

77. *Itel*, 113 S. Ct. at 1104.

78. *Id.*

79. *Id.*

80. Brief of Petitioner, *supra* note 17.

81. *Id.*

82. *Itel*, 113 S. Ct. at 1104.

83. *Id.*

84. *Id.*

85. *Id.*

code, noted that Tennessee allows a credit against its tax for any tax previously paid in another jurisdiction on the same transaction.⁸⁶ Thus, the Court concluded that because it is a carefully apportioned tax on a business transaction within the State, the tax does not implicate the Foreign Commerce Clause.⁸⁷

Itel next argued that the Tennessee tax violates the sixth element of the Foreign Commerce Clause test by inhibiting the United States' ability to "speak with one voice" in foreign trade regulation.⁸⁸ Itel claimed that the Tennessee tax "violates a clear federal directive."⁸⁹ Itel contended that the Container Conventions created a clear federal directive to facilitate the use of containers in international traffic by removing impediments to their use as instruments of international traffic, and that the Tennessee tax violated that clear federal directive.⁹⁰

Itel also argued that the Tennessee tax "implicates foreign policy issues which must be left to the Federal Government."⁹¹ Itel asserted that the Tennessee tax creates an asymmetry within the international tax structure and invites retaliation from other nations.⁹² In support of this assertion, Itel cited the United Kingdom's amicus brief, which stated that if the United States now interprets the Container Conventions in any manner other than that "in which it has been uniformly implemented for decades, the United Kingdom and other nations of similar persuasion are not likely to tolerate a situation in which they refrain from imposing taxes while U.S. political subdivisions impose theirs."⁹³

The Court determined that the Tennessee tax does not prevent the Federal Government from "speaking with one voice" while regulating commercial relations with foreign governments.⁹⁴ The Court

86. *Id.* The Tennessee statute provides:

In order to prevent actual multistate taxation of the acts and privileges subject to tax under this chapter, any taxpayer, upon proof acceptable to the commissioner being submitted that the taxpayer has properly paid sales and use tax in another state on such acts and privileges, shall be allowed a credit against the tax imposed by this chapter to the extent of the amount of such tax properly due and paid in another state.

TENN. CODE ANN. 67-6-313(f) (1989).

87. *Itel*, 113 S. Ct. at 1104.

88. *Id.* at 1104-05.

89. Brief of Petitioner, *supra* note 17 (quoting *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983)).

90. *Id.*

91. *Id.* (quoting *Container Corp.*, 463 U.S. at 194).

92. *Id.*

93. *Id.* (quoting Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioner, *Itel Containers Int'l Corp. v. Huddleston*, 113 S. Ct. 1095 (1993) (No. 91-321)).

94. *Itel*, 113 S. Ct. at 1105.

again stated that because the Tennessee tax is not collected in connection with container importation, it does not violate the federal directives of the Container Conventions or of any other federal convention, statute, or regulation.⁹⁵ The Court cited the United States' amicus brief defending Tennessee's tax as evidence that the Tennessee tax does not prevent the Federal Government from "speaking with one voice" on foreign commerce issues.⁹⁶ Thus, the Supreme Court concluded that the Tennessee sales tax does not violate the Foreign Commerce Clause.⁹⁷

ITEL'S IMPORT-EXPORT CHALLENGE

In its final argument, Itel claimed that the Tennessee tax, as applied to leases for containers used exclusively in international commerce, violated the Import-Export Clause of the United States Constitution.⁹⁸ Itel maintained that the Import-Export Clause prohibits states from levying imposts or duties on imports or exports, and that its cargo containers, traveling in international commerce in accordance with the Container Conventions, have characteristics of both imports and exports.⁹⁹ Thus, Itel asserted that imposing a tax on its containers is irreconcilable with the Import-Export Clause.¹⁰⁰

Itel also argued that Tennessee's tax was identical to a California tax that the United States Supreme Court had previously invalidated as a general state sales tax on the transfer of goods that were sent abroad.¹⁰¹ Itel supported its argument by asserting that its containers simply pass through Tennessee and that their delivery to a common carrier in Tennessee is simply the first step of the containers' export journey.¹⁰² Itel claimed that Tennessee used its favorable geographic location as the transfer spot for Itel's containers in order to tax goods that merely flow through the state.¹⁰³ Finally, Itel argued that the Federal Government is unable to "speak with one voice" when regulating foreign commercial relations, thus violating the Import-Export Clause.¹⁰⁴

95. *Id.*

96. *Id.*

97. *Id.* at 1106.

98. *Id.* at 1105; The Import-Export Clause provides, in pertinent part, that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's [sic] inspection Laws." U.S. CONST. art. I, § 10, cl. 2.

99. Brief of Petitioner, *supra* note 17.

100. *Id.* (citing *Japan Line*, 441 U.S. at 445-46).

101. *Id.*; see *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69 (1946).

102. Brief of Petitioner, *supra* note 17.

103. *Id.*

104. *Id.* (citing *Japan Line*, 441 U.S. at 449 n.14).

The Supreme Court rejected *Itel's* Import-Export Clause challenge by reiterating and applying its Import-Export Clause test, as first announced in *Michelin Tire Corp. v. Wages*.¹⁰⁵ This test, consisting of three parts, requires that the tax not: 1) prohibit the Federal Government from "speaking with one voice" when regulating foreign commerce; 2) divert import revenues from the Federal Government; or 3) disturb the harmony of commerce among the states.¹⁰⁶ The Court dispensed with the first component because it had already undertaken the identical "speaking with one voice" inquiry as a part of its Foreign Commerce Clause analysis.¹⁰⁷ The Court found that the Tennessee tax does not prevent the Federal Government from speaking with one voice on issues of foreign commerce.¹⁰⁸ Similarly, the Court dispensed with the third component because it paralleled the first four requirements of the Foreign Commerce Clause test, with which the Court had already stated the Tennessee tax complied.¹⁰⁹

Thus, the Court needed only to determine whether the Tennessee tax diverted import revenues from the Federal Government.¹¹⁰ The Court determined that the Tennessee tax is neither assessed on importation or imported goods nor a direct tax on imports or exports in transit.¹¹¹ Rather, the Court stated that the tax is "a tax on a business transaction occurring within the taxing State. . . [and] does not draw revenue from the importation process and so does not divert import revenue from the Federal Government."¹¹² In so concluding, the Court affirmed the Supreme Court of Tennessee's judgment by holding that the Tennessee tax, as it applies to *Itel's* leases, does not violate the Supremacy, Commerce, or Import-Export Clauses of the United States Constitution.¹¹³

Justice Harry Blackmun wrote a dissenting opinion in which he asserted that:

"[A] treaty should generally be 'construe[d] . . . liberally to give effect to the purpose which animates it' and that '[e]ven where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may

105. *Itel*, 113 S. Ct. at 1105-06; *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285-86 (1976).

106. *Itel*, 113 S. Ct. at 1105.

107. *Id.*

108. *Id.* at 1105-06.

109. *Id.*

110. *Id.* at 1106.

111. *Id.*

112. *Id.*

113. *Id.*

be claimed under it, the more liberal interpretation is to be preferred.'¹¹⁴

Justice Blackmun also asserted that the Court has recognized that the Container Conventions establish "a national policy to remove impediments to the use of containers as instruments of international traffic."¹¹⁵ Justice Blackmun concluded that the Tennessee tax creates such an impediment, clearly frustrating that national policy.¹¹⁶

Justice Blackmun's analysis next turned to the realities of container leasing.¹¹⁷ Justice Blackmun stated that *Itel's* containers are used in international commerce and do not spend more than three months in any one jurisdiction.¹¹⁸ Justice Blackmun noted that the containers are constantly being transferred under new leasing agreements at the end of their journeys and that any tax creating substantial impediments to these transfers is prohibited by the Container Conventions.¹¹⁹ Justice Blackmun supported this by noting that other signatory nations, unlike Tennessee, do not directly tax the container leases themselves.¹²⁰

Finally, Justice Blackmun asserted that the Tennessee tax violates the Foreign Commerce Clause because it "prevent[s] the United States from 'speaking with one voice' with respect to the taxation of containers used in international commerce."¹²¹ Justice Blackmun stated that the Tennessee tax frustrates the uniform treatment of containers exclusively used in foreign commerce.¹²² Next, Justice Blackmun stated that Congress and the President share constitutional power over foreign affairs but that foreign commerce regulation is specifically delegated to Congress.¹²³ Thus, Justice Blackmun asserted that the amicus brief filed by the Executive Branch is not dispositive

114. *Id.* at 1109 (Blackmun, J., dissenting) (quoting *United States v. Stuart*, 489 U.S. 353, 368, (1989)).

115. *Itel*, 113 S. Ct. at 1109 (Blackmun, J., dissenting) (quoting *Japan Line*, 441 U.S. at 453).

116. *Itel*, 113 S. Ct. at 1109 (Blackmun, J., dissenting).

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* Justice Blackmun stated that the European VAT tax, which the majority attempts to equate with the Tennessee tax, is a tax on *goods* as opposed to Tennessee's tax on *containers*. *Id.* at 1109-10 (Blackmun, J., dissenting) (emphasis added).

121. *Itel*, 113 S. Ct. at 1110 (Blackmun, J., dissenting) (quoting *Container Corp.*, 463 U.S. at 193).

122. *Itel*, 113 S. Ct. at 1110 (Blackmun, J., dissenting).

123. *Itel*, 113 S. Ct. at 1110 (Blackmun, J., dissenting) (citing U.S. CONST., Art. I, § 8, cl. 11 ("The Congress shall have power . . . [t]o declare war."); Art. II, § 2, cl. 2 ("The president shall . . . have power, by and with the advice and consent of the senate, to make treaties."); Art. II, § 3 (The president "shall receive ambassadors and other public ministers."); Art. I, § 8, cl. 3 ("The Congress shall have power . . . [t]o regulate commerce with foreign nations, and among the several states.")).

of authorizing foreign commerce regulation by a State.¹²⁴ Finally, Justice Blackmun stated that the majority's narrow reading of the Container Conventions "invites States that are constantly in need of new revenue to impose new taxes on containers."¹²⁵

BACKGROUND

THE SUPREMACY CLAUSE

The Supremacy Clause of the United States Constitution provides that "all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."¹²⁶ This clause allows the provisions of a treaty to pre-empt any state law.¹²⁷ Thus, where the national government acts and a state undertakes to act on the identical subject, the act or treaty of the Federal Government is supreme "and the law of the state, though enacted in the exercise of powers not controverted, must yield to [the federal act or treaty]."¹²⁸ Also, "where the federal government . . . has enacted a complete scheme of regulation and has therein provided a standard . . . states cannot . . . conflict or interfere with, curtail or complement, the federal law, or enforce additional or auxiliary regulations."¹²⁹ The United States Supreme Court has stated that our system of government imperatively requires that the Federal Government's foreign relations power be entirely free from State interference.¹³⁰

GENERAL TREATY INTERPRETATION

The United States Supreme Court, in *Factor v. Laubheimer*,¹³¹ addressed the issue of treaty interpretation.¹³² In *Factor*, John Factor was being held for extradition to England pursuant to the Webster-Ashburton Treaty of 1842 ("Webster-Ashburton Treaty").¹³³ Under the Webster-Ashburton Treaty, the United States and Great Britain sought to facilitate the extradition process between the two nations.¹³⁴ Each country was to "deliver up to justice all persons who, being charged with [any of seven named crimes] committed within the

124. *Id.*, 113 S. Ct. at 1110 (Blackmun, J., dissenting).

125. *Id.*

126. U.S. CONST. art. VI, cl. 2.

127. See *Hines v. Davidowitz*, 312 U.S. 52, 62-63 (1941) (holding that a Pennsylvania Alien Registration Act was pre-empted by the federal Alien Registration Act).

128. *Id.* at 66 (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824)).

129. *Id.* at 67.

130. *Id.* at 63.

131. 290 U.S. 276.

132. *Factor v. Laubheimer*, 290 U.S. 276, 286-304 (1933).

133. *Id.* at 276, 286.

134. Webster-Ashburton Treaty of 1842, Aug. 9, 1842, U.S.-G.B., preamble, 8 Stat. 572.

jurisdiction of either, shall seek an asylum, or shall be found, within the territories of the other."¹³⁵ The Webster-Ashburton Treaty further provided that extradition would be carried out only if the offense charged was criminal in the jurisdiction where the fugitive was found.¹³⁶

The extradition was based on the allegation that Factor had received money that he knew was obtained fraudulently.¹³⁷ Factor applied for writ of habeas corpus.¹³⁸ An Illinois district court ordered his release, stating that the conduct charged was not covered by the Webster-Ashburton Treaty because the offense was not a crime under Illinois law.¹³⁹ Subsequently, the United States Court of Appeals for the Seventh Circuit reversed the district court's judgment.¹⁴⁰

The United States Supreme Court then granted certiorari upon Factor's petition.¹⁴¹ The Supreme Court determined that the treaty gave no clear indication that extradition would depend on the offense being defined as criminal in the jurisdiction where the fugitive was apprehended.¹⁴² The Court held that the language of the treaty referred to the extradition procedure to be followed, not to whether the offense was a crime in the jurisdiction where the fugitive was apprehended.¹⁴³ In so holding, the Court stated that a liberal treaty construction is preferred and that a narrow restricted interpretation is to be avoided.¹⁴⁴ The Court adopted this approach in order to fulfill the apparent intentions of the parties to the treaty.¹⁴⁵ Therefore, the Court affirmed the Court of Appeals' judgment requiring Factor to be extradited to Great Britain.¹⁴⁶

In *United States v. Stuart*,¹⁴⁷ the Supreme Court authorized the use of sources outside the treaty language itself when determining a treaty's meaning.¹⁴⁸ In *Stuart*, the Canadian Department of National Revenue ("Revenue Canada") requested the United States Internal Revenue Service ("IRS") to provide pertinent bank records, pursuant

135. *Id.* at art. X, 8 Stat. 572.

136. *Id.* Article X provided, in pertinent part that extradition would "only be done upon such evidence of criminality as, according to the laws of the place where the fugitive or person so charged shall be found, would justify his apprehension and commitment for trial, if the crime or offence had there been committed." *Id.*

137. *Factor*, 290 U.S. at 286.

138. *Id.*

139. *Id.*

140. *Laubenheimer v. Factor*, 61 F.2d 626, 633 (7th Cir. 1932).

141. *Factor v. Laubenheimer*, 289 U.S. 713 (1933) (granting certiorari).

142. *Factor*, 290 U.S. at 290.

143. *Id.* at 290-91.

144. *Id.* at 293-94.

145. *Id.* at 293.

146. *Id.* at 304.

147. 489 U.S. 353 (1989).

148. *United States v. Stuart*, 489 U.S. 353 (1989).

to Articles XIX and XXI of the 1942 Convention Respecting Double Taxation ("Double Taxation Convention") between the United States and Canada.¹⁴⁹ The Double Taxation Convention required the United States to provide information to Canadian authorities to aid the authorities in determining the income tax liability of Canadian taxpayers.¹⁵⁰ The IRS determined that Revenue Canada's request was within the Convention's scope and served Northwestern Commercial Bank with administrative summonses for information regarding bank accounts held by certain Canadian taxpayers.¹⁵¹ At the request of the account holders, the bank refused to comply with the summonses.¹⁵² The account holders then petitioned the United States District Court to quash the summonses, contending that United States law prevented the use of a summons to obtain bank account information to aid Canadian authorities in a criminal investigation.¹⁵³ The district court determined that the account holders had failed to sustain their burden of establishing that the investigation by Canadian authorities was criminal and ordered the bank to provide the requested information.¹⁵⁴ On appeal by the account holders, the United States Court of Appeals for the Ninth Circuit reversed the district court's judgment, holding that the summonses would be enforced only if issued in good faith.¹⁵⁵

149. *Id.* at 356. Articles XIX and XXI of the Convention between the United States and Canada Respecting Double Taxation provides in relevant part:

ARTICLE XIX

With a view to the prevention of fiscal evasion, each of the contracting States undertakes to furnish to the other contracting State [with] the information which its competent authorities have at their disposal or are in a position to obtain under its revenue laws in so far as such information may be of use to the authorities of the other contracting State in the assessment of the taxes to which this Convention relates.

The information to be furnished under the first paragraph of this Article, whether in the ordinary course of business or on request, may be exchanged directly between the competent authorities or the two contracting States.

ARTICLE XXI

1. If the Minister in the determination of the income tax liability of any person under any of the revenue laws of Canada deem it necessary to secure the cooperation of the Commission, the Commissioner may, upon request, furnish the Minister such information bearing upon the matter as the Commissioner is entitled to obtain under the revenue laws of the United States of America.

Convention between the United States and Canada Respecting Double Taxation, Mar. 4, 1942, U.S.-Can., art. XIX, XXI, 56 Stat. 1405-06, T.S. No. 983.

150. Convention between the United States and Canada Respecting Double Taxation, Mar. 4, 1942, U.S.-Can., art. XIX, XXI, 56 Stat. 1405-06, T.S. No. 983.

151. *Stuart*, 489 U.S. at 356-57.

152. *Id.* at 357.

153. *Id.*

154. *Id.* at 357-58.

155. *Stuart v. United States*, 813 F.2d 243, 249, 251 (9th Cir. 1987).

The United States Supreme Court granted certiorari upon petition by Stuart.¹⁵⁶ The Court stated that "[t]he clear import of treaty language controls unless application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories."¹⁵⁷ The Court further stated that the practice of treaty signatories is evidence of the proper interpretation of the treaty, because such conduct generally evinces the understanding of the agreement signed.¹⁵⁸ Therefore, the Court held that the IRS' summonses would be enforced if the IRS acted in good faith and complied with applicable statutes.¹⁵⁹

CUSTOMS CONVENTIONS ON CONTAINERS

The 1956 Customs Convention on Containers ("1956 Convention") allowed for the temporary importation of containers free of import duties, taxes, prohibitions and restrictions.¹⁶⁰ The term "import duties and taxes" was defined to include customs duties as well as all duties and taxes "chargeable by reason of importation."¹⁶¹ The 1956 Convention allowed cargo containers to enter a signatory country duty-free, provided the containers were exported within three months.¹⁶²

The 1972 Customs Convention on Containers ("1972 Convention") terminated and replaced the 1956 Convention for those parties, including the United States, that participated in both Container Conventions.¹⁶³ Much like its predecessor, the 1972 Convention convened "to develop and facilitate international carriage by container."¹⁶⁴ The 1972 Convention, similar to the 1956 Convention, required cargo containers to be temporarily admitted into the signatory nations without taxation, provided the containers were exported within three months.¹⁶⁵ Differing slightly from the 1956 Convention, the 1972 Convention defined the term "import duties and taxes" as "[c]ustoms duties and all other duties, taxes, fees and other charges which are collected on, or in connexion with, the importation of goods."¹⁶⁶ In short, both "Container Conventions reflect a 'national policy to remove

156. *United States v. Stuart*, 485 U.S. 1033 (1988) (granting certiorari).

157. *Stuart*, 489 U.S. at 365-66 (quoting *Sumitomo Shoji America, Inc. v. Avagliano*, 457 U.S. 176, 180 (1982)).

158. *Id.* at 369.

159. *Id.* at 370.

160. Customs Convention on Containers, *opened for signature* May 18, 1956, ch. I, art. 1 and ch. II, art. 2, 20 U.S.T. at 304.

161. *Id.* at ch. I, art. 1(a), 20 U.S.T. at 304.

162. *Id.* at ch. II, art. 2, 3, 20 U.S.T. at 304.

163. Customs Convention on Containers, *opened for signature* Dec. 2, 1972, ch. VI, art. 20(1), 988 U.N.T.S. at 48.

164. *Id.* at 44.

165. *Id.* at ch. I, art. 1(b), ch. II(a), art. 4(1), 988 U.N.T.S. at 44-45.

166. *Id.* at ch. I, art. 1(a), 988 U.N.T.S. at 44.

impediments to the use of containers as instruments of international traffic.’¹⁶⁷

TREATMENT OF CONVENTIONS BY OTHER SIGNATORY NATIONS

The United States implements its “container relations with foreign governments . . . through a comprehensive network of treaties and federal statutes and regulations.”¹⁶⁸ Pursuant to the Container Conventions, all other signatory nations do not impose sales taxes on cargo container leases.¹⁶⁹ The purpose of the Conventions, according to these signatories, was to thwart any such burdens on containers as instrumentalities of international commerce.¹⁷⁰ The United Kingdom has interpreted the Conventions to prohibit a tax on the leases of containers that are only temporarily imported into the United Kingdom.¹⁷¹ Although the United Kingdom does apply a Value Added Tax (“VAT”) to most goods and services, it has implemented the Convention to relieve containers used in international commerce from the VAT.¹⁷² “[O]ther signatories . . . do not impose a national sales, use, VAT or similar tax on international container leases.”¹⁷³

CONGRESSIONAL PRE-EMPTION THROUGH THE CUSTOMS-BONDED WAREHOUSE SYSTEM

The Supremacy Clause of the United States Constitution establishes that laws passed by Congress pursuant to the Constitution will pre-empt conflicting state law.¹⁷⁴ In *Xerox Corp. v. County of Harris*,¹⁷⁵ the United States Supreme Court discussed invocation of this pre-emptive power.¹⁷⁶ Congress had established a system of customs-bonded warehouses where imports could be stored for a prescribed period free from federal customs taxes and duties.¹⁷⁷

167. *Itel Containers Int’l Corp. v. Huddleston*, 113 S. Ct. 1095, 1109 (1993) (Blackmun, J., dissenting) (quoting *Japan Line*, 441 U.S. at 453).

168. Brief of the Institute of International Container Lessors, *Itel Containers Int’l Corp. v. Huddleston*, 113 S. Ct. 1095 (1993) (No. 91-321).

169. Appendix to the Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioner, *Itel Containers Int’l Corp. v. Huddleston*, 113 S. Ct. 1095 (1993) (No. 91-321).

170. *Id.*

171. Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioner, *Itel Containers Int’l Corp. v. Huddleston*, 113 S. Ct. 1095 (1993) (No. 91-321).

172. *Id.*

173. *Id.*

174. U.S. CONST. art. VI, cl. 2.

175. 459 U.S. 145 (1982).

176. *Xerox Corp. v. County of Harris*, 459 U.S. 145, 150-54 (1982).

177. *Id.* at 150. The relevant provisions of the bonded warehouse statutes provide: [B]uildings or parts of buildings and other enclosures may be designated by the Secretary of the Treasury as bonded warehouses. . . . for the storage of im-

Congress created such a system to encourage both foreign and domestic merchants to use American ports thus "stimulat[ing] business for American industry."¹⁷⁸ In *Xerox Corp.*, Harris County, Texas, assessed an ad valorem personal property tax on Xerox's copiers stored in customs-bonded warehouses in Houston.¹⁷⁹ Xerox challenged the constitutionality of the tax, asserting that it violated the Import-Export and Commerce Clauses of the United States Constitution because the copiers were bound for foreign markets.¹⁸⁰ The trial court, agreeing with Xerox's contentions, granted judgment for Xerox.¹⁸¹ Subsequently, the Texas Court of Civil Appeals reversed the trial court finding, and the Texas Supreme Court denied Xerox's writ of error application.¹⁸²

Upon Xerox's petition, the United States Supreme Court granted certiorari.¹⁸³ The Court discussed whether Congress intended, through this customs-bonded warehouse system, to pre-empt state taxation of imported goods that are stored in customs-bonded warehouses.¹⁸⁴ The Court looked to the holding in *McGoldrick v. Gulf Oil Corp.*,¹⁸⁵ which stated that a New York tax on imported petroleum

ported merchandise generally and be known as public bonded warehouses. Before any imported merchandise . . . shall be stored in any such premises, the owner or lessee thereof shall give a bond . . . to secure the Government against any loss or expense connected with or arising from the deposit, storage, or manipulation of merchandise in such warehouses. . . . [B]onded warehouses shall be used solely for the storage of imported merchandise and shall be placed in charge of a proper officer of the customs.

19 U.S.C. § 1555(a) (1988).

Any merchandise subject to duty, with the exception of perishable articles and explosive substances other than firecrackers, may be entered for warehousing and be deposited in a bonded warehouse at the expense and risk of the owner purchaser, importer, or consignee. Such merchandise may be withdrawn, at any time within 5 years from the date of importation, for consumption upon payment of the duties and charges accruing thereon . . . or may be withdrawn for exportation or for transportation and exportation to a foreign country . . . without the payment of duties thereon.

19 U.S.C. § 1557(a) (1988).

Merchandise upon which any duties or charges are unpaid, remaining in bonded warehouse beyond 5 years from the date of importation, shall be regarded as abandoned to the Government and shall be sold . . . [with] the proceeds of sale paid into the Treasury.

19 U.S.C. § 1559 (1988).

178. *Xerox Corp.*, 459 U.S. at 151.

179. *Id.* at 148.

180. *Id.* at 148-49.

181. *Id.*

182. *County of Harris v. Xerox Corp.*, 619 S.W.2d 402, 408 (Tex. Civ. App. 1981); *Xerox Corp.*, 459 U.S. at 149.

183. *Xerox Corp. v. County of Harris*, 456 U.S. 913 (1982).

184. *Xerox Corp.*, 459 U.S. at 150-54.

185. 309 U.S. 414 (1940).

was pre-empted by the congressional customs-bonded warehouse system.¹⁸⁶ The Court in *McGoldrick* determined that:

[T]he purpose of the Congressional regulation of the commerce would fail if the state were free at any stage of the transaction to impose a tax which would lessen the competitive advantage conferred on the importer by Congress. . . . The Congressional regulation, read in the light of its purpose, is tantamount to a declaration that in order to accomplish constitutionally permissible ends, the imported merchandise shall not become a part of the common mass of taxable property within the state . . . and shall not become subject to the state taxing power.¹⁸⁷

In *Xerox Corp.*, the Court stated that the analysis in *McGoldrick* was controlling.¹⁸⁸ The Court articulated that Congress intended to promote American industry by excusing taxes and duties normally imposed.¹⁸⁹ Finally, the Court found that state property taxes assessed on goods stored in customs-bonded warehouses "are pre-empted by Congress' comprehensive regulation of customs duties."¹⁹⁰ Thus, the Court held that the Texas tax was pre-empted because it interfered with the very benefits Congress aimed to establish by remitting the duty.¹⁹¹

The Court again examined congressional pre-emptive powers in *R.J. Reynolds Tobacco Co. v. Durham County*.¹⁹² In *R.J. Reynolds*, Durham County, North Carolina levied an ad valorem property tax on tobacco owned by R.J. Reynolds Tobacco Company ("R.J. Reynolds") and stored in customs-bonded warehouses in the county.¹⁹³ Relying on the United States Supreme Court's holding in *Xerox Corp.*, R.J. Reynolds challenged the tax claiming that its tobacco, stored in customs-bonded warehouses, was exempt from taxation.¹⁹⁴ The North Carolina Property Tax Commission, distinguishing *Xerox Corp.*, upheld the ad valorem tax, stating that the tobacco was destined for domestic markets, not foreign markets as in *Xerox Corp.*¹⁹⁵ Subsequently, the North Carolina Court of Appeals affirmed this decision, and R.J. Reynolds appealed to the North Carolina Supreme

186. *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 429 (1940).

187. *Id.* at 429.

188. *Xerox Corp.*, 459 U.S. at 153.

189. *Id.*

190. *Id.* at 154.

191. *Id.* at 153.

192. 479 U.S. 130, 132-52 (1986).

193. *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 133-34 (1986).

194. *Id.* at 134.

195. *Id.* at 135.

Court, which dismissed the case for want of a substantial constitutional question.¹⁹⁶

The United States Supreme Court agreed to review the decision of the North Carolina Supreme Court.¹⁹⁷ R.J. Reynolds, relying on the Court's holding in *Xerox Corp.*, asserted that Congress had exercised its pre-emptive power to exempt goods in customs-bonded warehouses from taxation.¹⁹⁸ The Court stated that when deciding whether Congress has invoked its pre-emptive power, the Court attempts to ascertain congressional intent.¹⁹⁹ The Court further stated that such intent is manifest "where Congress has legislated so comprehensively that it has left no room for supplementary state legislation. . . . [or] where state legislation would impede the purposes and objectives of Congress."²⁰⁰ The Court held that the North Carolina tax does not impede the congressional purposes behind the customs-bonded warehouse system.²⁰¹ The Court also held that States may levy a nondiscriminatory ad valorem property tax on customs-bonded warehouse goods that are destined for domestic markets.²⁰²

THE FOREIGN COMMERCE CLAUSE

The Commerce Clause of the United States Constitution provides Congress with the power "[t]o regulate Commerce with foreign Nations, and among the several States."²⁰³ Commerce Clause analysis is often implicated by taxation on imports.²⁰⁴ The issues of import taxation and its impact on commerce were addressed by the United States Supreme Court in *McGoldrick v. Gulf Oil Corp.*²⁰⁵ In *McGoldrick*, Gulf Oil Corporation ("Gulf Oil") had imported crude petroleum and stored it in its own warehouse pursuant to its Proprietor's Manufacturing Warehouse Bond.²⁰⁶ This bond, issued by the United States, allowed Gulf Oil to import crude petroleum into the United States, manufacture it into fuel oil and withdraw the fuel for use or export without paying any import duty.²⁰⁷ A New York sales tax was levied on fuel oil that Gulf Oil had imported and manufactured pursuant to

196. *In re R.J. Reynolds Tobacco Co.*, 326 S.E.2d 911, 919 (N.C. Ct. App. 1985); *In re R.J. Reynolds Tobacco Co.*, 335 S.E.2d 21 (N.C. 1985).

197. *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 139 (1986).

198. *Id.* at 143.

199. *Id.* at 140.

200. *Id.*

201. *Id.* at 144-51.

202. *Id.* at 152.

203. U.S. CONST. art. I, § 8, cl. 3.

204. See *Itel Containers Int'l Corp. v. Huddleston*, 113 S. Ct. 1095 (1993); *Japan Line*, 441 U.S. at 434; *McGoldrick*, 309 U.S. at 414.

205. 309 U.S. 414, 420 (1940).

206. *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 414, 422 (1940).

207. *Id.*

this bond agreement.²⁰⁸ New York City's Comptroller upheld the tax, but the Appellate Division of the New York Supreme Court reversed that decision.²⁰⁹ The Appellate Division determined that the tax infringed on Congress' power to regulate foreign commerce, because Congress had exercised its foreign commerce power by regulating the imported oil through the warehouse bond.²¹⁰ Subsequently, the New York Court of Appeals affirmed this decision without opinion.²¹¹

The United States Supreme Court, upon petition by McGoldrick, granted certiorari.²¹² The Court stated that the congressional imposition of a duty on imports or the exemption of imports from a duty constituted an exercise of Congress' foreign commerce regulation.²¹³ Thus, the Court determined that where Congress had exercised its power to regulate commerce, any state tax interfering with such regulation must fail as an unconstitutional infringement on congressional power in violation of the Foreign Commerce Clause.²¹⁴ Therefore, the Court held that the New York tax infringed on Congress' foreign commerce regulation power.²¹⁵

The modern Foreign Commerce Clause test consists of six parts.²¹⁶ The first four parts of this test are identical to the Domestic Commerce Clause test.²¹⁷ The Domestic Commerce Clause test was first applied by the United States Supreme Court in *Complete Auto Transit, Inc. v. Brady*.²¹⁸ The Supreme Court laid out the final two parts of the Foreign Commerce Clause test in *Japan Line, Ltd. v. County of Los Angeles*.²¹⁹

In *Complete Auto*, the United States Supreme Court considered the validity of a state tax on interstate commerce.²²⁰ The State of Mississippi levied a tax on Complete Auto Transit, Inc.'s ("Complete

208. *Id.* at 421-22.

209. *Id.* at 420; *Gulf Oil Corp. v. McGoldrick*, 9 N.Y.S.2d 544, 549 (N.Y. App. Div. 1939).

210. *Gulf Oil Corp.*, 9 N.Y.S.2d at 548.

211. *Gulf Oil Corp. v. McGoldrick*, 22 N.E.2d 480 (N.Y. 1939).

212. *McGoldrick v. Gulf Oil Corp.*, 308 U.S. 545 (1939) (granting certiorari).

213. *McGoldrick*, 309 U.S. at 428.

214. *Id.* at 429.

215. *Id.*

216. *See Japan Line*, 441 U.S. at 444-54.

217. *Compare Japan Line*, 441 U.S. at 446 (stating that when a state seeks to regulate foreign commerce, the Commerce Clause considerations found in *Complete Auto* are to be analyzed along with two additional considerations) *with Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977) (noting that a state tax will be sustained against Commerce Clause challenges when the state taxes an activity having a substantial nexus with the state, the tax is fairly apportioned, interstate commerce is not discriminated against, and the tax is fairly related to state-provided services).

218. 430 U.S. 274, 277-78 (1977).

219. 441 U.S. 434, 446-51 (1979).

220. *Complete Auto*, 430 U.S. at 274.

Auto") transportation of automobiles within Mississippi as a tax "for the privilege of doing business" in Mississippi.²²¹ Complete Auto challenged the tax, claiming that its transportation services were but one step in the interstate movement of the automobiles and that the tax was an unconstitutional tax on interstate commerce.²²² The Mississippi Chancery Court upheld the tax.²²³ The Mississippi Supreme Court affirmed this decision, holding that Complete Auto received the benefits of state police protection and other state-provided services and should be required to pay its fair share for such services.²²⁴

Upon petition by Complete Auto, the United States Supreme Court noted probable jurisdiction.²²⁵ To resolve the interstate commerce taxation problem, the Court announced a four-part Domestic Commerce Clause test.²²⁶ The first element of the test analyzes whether the activity in question has a sufficient nexus with the taxing State.²²⁷ The second element determines whether the tax is fairly apportioned.²²⁸ The third element examines whether "the tax discriminates against interstate commerce."²²⁹ The fourth element assesses the relation between the State tax and the services provided by that State.²³⁰ The Court upheld the Mississippi tax, noting that "state tax[es] on the 'privilege of doing business'" are not *per se* unconstitutional as applied to interstate commerce.²³¹

In *Japan Line*, the Supreme Court added two elements to the *Complete Auto* test for use in cases involving foreign commerce.²³² Six Japanese shipping companies operated vessels that carried cargo con-

221. *Id.* at 277-78; Miss. CODE ANN. § 10105 (1942), amended by Miss. CODE ANN., § 27-65-13 (1972). The Mississippi tax provides:

There is hereby levied and assessed, and shall be collected, privilege taxes for the privilege of engaging or continuing in business or doing business within this state to be determined by the application of rates against gross proceeds of sales or gross income or values, as the case may be, as provided in the following sections.

Miss. CODE ANN., § 27-65-13 (1972).

222. *Complete Auto*, 430 U.S. at 277.

223. *Id.*

224. *Complete Auto Transit, Inc. v. Brady*, 330 So. 2d 268, 272 (Miss. 1976).

225. *Complete Auto Transit, Inc. v. Brady*, 429 U.S. 813 (1976) (noting probable jurisdiction).

226. *Complete Auto*, 430 U.S. at 277-78.

227. *Id.* at 279. A tax must have a sufficient nexus with the taxing state to be deemed constitutional. *Id.*

228. *Complete Auto*, 430 U.S. at 279. To be constitutional, a tax must be fairly apportioned. *Id.*

229. *Complete Auto*, 430 U.S. at 279. A tax that discriminates against interstate commerce will be held to be unconstitutional. *Id.*

230. *Complete Auto*, 430 U.S. at 279. The tax must be fairly related to the services provided by the taxing state. *Id.*

231. *Complete Auto*, 430 U.S. at 288-89.

232. *Japan Line*, 441 U.S. at 446.

tainers.²³³ The cargo containers were used exclusively in foreign commerce and were subject to property tax in Japan.²³⁴ Los Angeles County imposed an ad valorem property tax on any containers present in the county on March 1 of each year.²³⁵ The containers' average stay in California was less than three weeks; the containers were not used in interstate transportation; and any container movement or nonmovement was essential to "the containers' efficient use as instrumentalities of foreign commerce."²³⁶ The six Japanese shipping companies challenged Los Angeles County's ad valorem property tax, claiming that it violated the Foreign Commerce Clause of the United States Constitution.²³⁷ A Los Angeles Superior Court awarded the shipping companies a refund on the tax, finding that the containers were "instrumentalities of foreign commerce" subject to tax only in their home port of Japan.²³⁸ The California Court of Appeal subsequently reversed this decision.²³⁹ The California Supreme Court also reversed the decision of the Superior Court, holding that the California tax did not violate the Foreign Commerce Clause.²⁴⁰

On petition from the six Japanese companies, the United States Supreme Court agreed to review the decision of the California Supreme Court.²⁴¹ The Court, under the Foreign Commerce Clause analysis, first noted that the California tax satisfied the four-part

233. *Id.* at 436.

234. *Id.*

235. *Id.* at 437. The California tax provides in part:

"Lien date" is the time when taxes for any fiscal year become a lien on property.

CAL. REV. & TAX. CODE ANN. § 117 (West 1994).

(a) Annually, the assessor shall assess all the taxable property in his county, except state-assessed property, to the persons owning, claiming, possessing, or controlling it on the lien date. The assessor may assess the property on the secured roll to the person owning, claiming, possessing or controlling it for the ensuing fiscal year.

(b) The assessor may assess all taxable property in his county on the unsecured roll jointly to both the lessee and lessor of such property.

(c) Notices of assessment and tax bills relating to jointly assessed property on the unsecured roll shall be mailed to both the lessee and the lessor at their latest addresses known to the assessor.

CAL. REV. & TAX. CODE ANN. § 405 (West 1994).

Except as otherwise specifically provided, all tax liens attach annually as of 12:01 a.m. on the first day of March preceding the fiscal year for which the taxes are levied.

CAL. REV. & TAX. CODE ANN. § 2192 (West 1994).

236. *Japan Line*, 441 U.S. at 437.

237. *Id.* at 440.

238. *Id.* at 437.

239. *Japan Line, Ltd. v. County of Los Angeles*, 132 Cal. Rptr. 531, 535 (Cal. Ct. App. 1976), *vacated by* 571 P.2d 254 (Cal. 1977).

240. *Japan Line, Ltd. v. County of Los Angeles*, 571 P.2d 254, 258-59, 260 (Cal. 1977).

241. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 441 (1978).

Complete Auto Domestic Commerce Clause test.²⁴² The Court then declared that two additional considerations need to be addressed when a state attempts to tax instrumentalities of foreign commerce.²⁴³ The first additional consideration is whether the tax "creates a substantial risk of international multiple taxation."²⁴⁴ The second consideration is whether the tax impairs the Federal Government's ability to "speak with one voice" when regulating foreign commercial relations.²⁴⁵

The Court concluded that California's tax could not withstand scrutiny under the two additional Foreign Commerce Clause considerations.²⁴⁶ Specifically, the Court determined that if the California tax was upheld, the containers would be taxed twice because they had already been taxed in Japan.²⁴⁷ The Court also concluded that the Federal Government was unable to "speak with one voice" under the California tax because it violated the purpose of the 1956 Container Convention.²⁴⁸ The 1956 Convention provided that containers temporarily imported are allowed to enter signatory nations free from all taxes and duties levied in connection with their importation.²⁴⁹ The Court stated that this Container Convention "reflect[ed] a national policy to remove impediments to the use of containers as instruments of international traffic."²⁵⁰ The Court noted that the California tax would frustrate federal uniformity because it created an asymmetry in taxation to Japan's disadvantage.²⁵¹ The Court held that if other states adopted taxes similar to the California tax, "speaking with one voice" would be impossible because foreign-owned containers would be exposed to various degrees of multiple taxation.²⁵²

The Court again assessed the effect of a state tax on the ability of the Federal Government to "speak with one voice" in *Container Corp.*

242. *Id.* at 444-46.

243. *Id.* at 445-46.

244. *Id.* at 451. The Court stated that multiple taxation of interstate commerce may violate the Commerce Clause. *Id.*

245. *Japan Line*, 441 U.S. at 451. The Court cited several ways a tax may frustrate federal uniformity: 1) a State-imposed apportioned tax may create an international dispute over the apportionment formulae employed; 2) "a novel state tax [may create] an asymmetry in the international tax structure," and the disadvantaged foreign nations may "retaliate against American-owned instrumentalities present in their jurisdiction;" and 3) other States may adopt the taxing State's example, creating many and varied taxing schemes leading to multiple taxation and preventing the Federal Government from "speaking with one voice." *Id.* at 450-51.

246. *Japan Line*, 441 U.S. at 451.

247. *Id.* at 451-52.

248. *Id.* at 452-53.

249. *Id.*

250. *Id.* at 453.

251. *Id.*

252. *Id.*

of *America v. Franchise Tax Bd.*²⁵³ In *Container Corp.*, California imposed a corporate franchise tax on Container Corporation of America ("Container Corporation").²⁵⁴ Container Corporation challenged the validity of the California tax on Foreign Commerce Clause grounds.²⁵⁵ A California Superior Court upheld the tax and the California Court of Appeal affirmed.²⁵⁶ The California Supreme Court refused to hear the case on appeal.²⁵⁷

The United States Supreme Court noted probable jurisdiction upon petition by Container Corporation.²⁵⁸ Assessing the validity of California's tax, the Court employed the *Japan Line* Foreign Commerce Clause test.²⁵⁹ The Court primarily focused on the final two components of the test: 1) the "substantial risk of international multiple taxation" and 2) the Federal Government's ability to "speak with one voice" in matters of foreign commerce.²⁶⁰

The Court determined that double taxation was created in the present case.²⁶¹ The Court noted, however, that the double taxation is not an inevitable result of California's taxing scheme because it only occurs in certain circumstances.²⁶² With respect to the "one voice" component, the Court stated that a State tax "will violate the 'one voice' standard if it *either* implicates foreign policy issues which must be left to the Federal Government *or* violates a clear federal directive."²⁶³ The Court stated that the most evident foreign policy issue was the risk of significant foreign retaliation.²⁶⁴ The Court, however, could not conclude that such retaliation would occur or that current United States foreign policy would be compromised.²⁶⁵ The Court also concluded that the California tax did not violate any clear federal directive concerning tax regulation of foreign commerce.²⁶⁶ As a result

253. 463 U.S. 159 (1983).

254. *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 162-63 (1983). The corporate franchise tax was levied on companies conducting business in California, based on total income from all operations connected with California by the company itself or its subsidiaries. *Container Corp.*, 463 U.S. at 173-75.

255. *Container Corp.*, 463 U.S. at 162. Container Corporation also challenged the validity of the tax on Due Process grounds. *Id.*

256. *Container Corp.*, 463 U.S. at 175; *Container Corp. of America v. Franchise Tax Bd.*, 173 Cal. Rptr. 121, 133 (Cal. Ct. App. 1981).

257. *Container Corp.*, 463 U.S. at 175.

258. *Container Corp. of America v. Franchise Tax Bd.*, 456 U.S. 960 (1982) (noting probable jurisdiction).

259. *Container Corp.*, 463 U.S. at 185-96.

260. *Id.* at 189-96.

261. *Id.* at 187.

262. *Id.* at 188.

263. *Id.* at 194.

264. *Id.*

265. *Id.* at 195-96.

266. *Id.* at 196-97. The Court concluded that: 1) no claim was made regarding the pre-emptive force of any federal tax statutes; 2) the tax treaties to which the United

of this analysis, the Court concluded that the California tax satisfied the *Japan Line* Foreign Commerce Clause test.²⁶⁷

THE IMPORT-EXPORT CLAUSE

The Import-Export Clause of the United States Constitution provides in pertinent part that "[n]o State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports."²⁶⁸ The Supreme Court addressed, in detail, the interpretation of this clause in *Richfield Oil Corp. v. State Bd. of Equalization*.²⁶⁹ In *Richfield*, the New Zealand government contracted to purchase oil from Richfield Oil Corporation ("Richfield").²⁷⁰ Richfield transported the oil from its refinery in California to storage tanks at a port on the California coast.²⁷¹ Richfield then pumped the oil from the storage tanks into a New Zealand-owned tanker.²⁷² The oil was then transported to New Zealand, with none of the oil being used in the United States.²⁷³ California levied a retail sales tax against Richfield, based on the gross receipts from this sale.²⁷⁴ Richfield paid under protest and challenged the tax claiming that it violated the Import-Export Clause of the United States Constitution.²⁷⁵ The Superior Court granted a refund to Richfield.²⁷⁶ The California Supreme Court originally granted Richfield a refund on the tax but upon later rehearing reversed its decision, holding that the California tax was not unconstitutional.²⁷⁷

Upon appeal by Richfield, the United States Supreme Court stated that the Import-Export Clause "prohibits every State from laying 'any' tax on imports or exports without the consent of Congress," with an exception for taxes necessary for executing State inspection

States is a party do not encompass the contracting nation's taxation of its own domestic corporations, nor do these treaties cover the taxing activities of the individual states; and 3) Congress has discussed, but not enacted, legislation regulating state taxation of income. *Id.*

267. *Container Corp.*, 463 U.S. at 197.

268. U.S. CONST. art. I, § 10, cl. 2. The clause provides an exception for such a tax in the event it "may be absolutely necessary for executing [the state's] inspection Laws." *Id.* However, even if the State tax is allowed, the net proceeds are to be paid into the federal treasury. *Id.*

269. 329 U.S. 69, 75-86 (1946).

270. *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 71 (1946).

271. *Id.* at 71.

272. *Id.*

273. *Id.*

274. *Id.* at 71-72.

275. *Id.* at 72.

276. *Richfield Oil Corp. v. State Bd. of Equalization*, 155 P.2d 1, 2 (Cal. 1944), *vacated by* 163 P.2d 1 (Cal. 1945).

277. *Richfield Oil*, 155 P.2d at 5; *Richfield Oil Corp. v. State Bd. of Equalization*, 163 P.2d 1, 5 (Cal. 1945), *rev'd* 329 U.S. 69 (1946).

laws.²⁷⁸ The Court further stated that qualifications cannot be inferred when interpreting the United States Constitution, and therefore the Import-Export Clause precludes "any" tax, not just "any discriminatory" tax.²⁷⁹

The Court in *Richfield* also broadly defined the term "export" in order to determine when goods are protected from taxation under the Import-Export Clause.²⁸⁰ The Court stated that where a general tax applies to all property, the tax cannot be considered as a duty on exports simply because the goods, not then intended to be exported, happen to be exported after the tax was levied.²⁸¹ The Court further stated that the tax exemption provision of the Import-Export Clause attaches to an *export*, not to an article before exportation.²⁸² The Court stated that goods intended for exportation and in the process of actual exportation would be defined as an "export."²⁸³ Finally, the Court concluded that whether additional acts were to be performed before the goods reached the sea is irrelevant as long as these acts were merely the regular steps in the exportation of the goods.²⁸⁴ In general, the Court asserted that immunity from taxation under the Import-Export Clause is extended to goods in "the process of exportation and to the transactions and documents embraced in that process."²⁸⁵ The Court held that the California tax was assessed against an export and thus violated the Import-Export Clause.²⁸⁶

The United States Supreme Court, in *Michelin Tire Corp. v. Wages*,²⁸⁷ established a test for determining the validity of a state tax on imports and/or exports.²⁸⁸ In *Michelin*, Gwinnett County, Georgia, levied an ad valorem property tax on tires and tubes imported by Michelin Tire Corp. ("Michelin") and stored in its warehouses in the county.²⁸⁹ Michelin challenged the tax, alleging that it was levied on imported goods in violation of the Import-Export Clause.²⁹⁰ A Georgia Superior Court agreed with Michelin and granted its requested re-

278. *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 76 (1946).

279. *Id.* at 76-77.

280. *Id.* at 78-86.

281. *Id.* at 78-79.

282. *Id.* at 80.

283. *Id.* at 81.

284. *Id.*

285. *Id.* at 81-82 (quoting *Willcuts v. Bunn*, 282 U.S. 216, 228 (1931) (stating that the constitutional prohibition against State taxation of imports extends not only to the act of importation, but also to the goods imported)).

286. *Richfield Oil*, 329 U.S. at 86.

287. 423 U.S. 276 (1976).

288. *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 285-86 (1976).

289. *Id.* at 278.

290. *Id.* at 278-79.

lief.²⁹¹ On appeal, the Supreme Court of Georgia agreed that certain unpackaged tubes were immune from taxation but that the tires were subject to taxation because they were commingled with other tires and were thus indistinguishable.²⁹²

The United States Supreme Court, upon petition of Michelin, granted certiorari.²⁹³ The Court set forth a test to follow when assessing the constitutionality of a State tax on imports and exports.²⁹⁴ This three-part Import-Export Clause test was articulated as follows:

The Framers of the Constitution . . . sought to alleviate three main concerns by committing sole power to lay imposts and duties on imports in the Federal Government, with no concurrent state power: [1] the Federal Government must speak with one voice when regulating commercial relations with foreign governments, and tariffs, which might affect foreign relations, could not be implemented by the States consistently with that exclusive power; [2] import revenues were to be the major source of revenue of the Federal Government and should not be diverted to the States; and [3] harmony among the States might be disturbed unless seaboard States, with their crucial ports of entry, were prohibited from levying taxes on citizens of other States by taxing goods merely flowing through their ports to the other States not situated as favorably geographically.²⁹⁵

The Import-Export Clause "one voice" component mirrors the foreign commerce clause "one voice" component used in *Japan Line* and *Container Corp.*²⁹⁶ The second component states that import revenues cannot be diverted from the Federal Government because such revenues are a major income source.²⁹⁷ Although a nondiscriminatory State ad valorem tax may diminish federal impost revenue, such a tax is not forbidden merely because of this incidental effect.²⁹⁸ The Court in *Michelin* reasoned that "[t]here is no reason why an importer should not bear his share of [the cost of state-funded services] along with his competitors handling only domestic goods."²⁹⁹ Cases subsequent to *Michelin* have used the *Complete Auto* test to analyze the third component.³⁰⁰ The Import-Export Clause was intended to pre-

291. *Id.* at 279.

292. *Wages v. Michelin Tire Corp.*, 214 S.E.2d 349, 355 (Ga. 1979).

293. *Michelin Tire Corp. v. Wages*, 422 U.S. 1040 (1975) (granting certiorari).

294. *Michelin*, 423 U.S. at 285-86.

295. *Id.* at 285-86.

296. *Itel Containers Int'l Corp. v. Huddleston*, 113 S. Ct. 1095, 1105 (1993).

297. *Michelin*, 423 U.S. at 285.

298. *Id.* at 286.

299. *Id.* at 287.

300. *Dept. of Revenue of Washington v. Ass'n of Washington Stevedoring Cos.*, 435 U.S. 734, 754-55 (1978) (stating that the third element of the Import-Export Clause

vent the taxation of goods from being a mere "transit fee [for] the privilege of moving through a State."³⁰¹

ANALYSIS

THE SUPREMACY CLAUSE

In *Itel Containers International Corp. v. Huddleston*,³⁰² the United States Supreme Court held that the 1972 and 1956 Customs Conventions on Containers ("Container Conventions") did not preempt a Tennessee sales tax.³⁰³ The Court, upon reviewing the text of the Container Conventions, stated that the Container Conventions do not preclude *all* taxes on containers, but only those collected in connection with the act of importation.³⁰⁴ The Court then found that Tennessee's sales tax had no relation to the containers' importation, but rather was based on the proceeds from Itel's lease agreements.³⁰⁵ Thus, the Court held that the sales tax was not barred by the Container Conventions.³⁰⁶

The Court in *Itel* incorrectly interpreted the Container Conventions.³⁰⁷ Treaties, such as the Container Conventions, are to be construed liberally so as to effect the intentions of the parties to the treaties.³⁰⁸ A narrow interpretation is to be avoided because such a construction may not fully encompass the meaning sought by the signatory nations.³⁰⁹

For example, in *Factor v. Laubheimer*,³¹⁰ the United States Supreme Court analyzed the Webster-Ashburton Treaty of 1842, which was intended to facilitate the criminal extradition process between the United States and Great Britain.³¹¹ The Court concluded that this treaty's language did not command extradition *only* when the offense was a crime in the jurisdiction where the person was apprehended.³¹² The Court stated that it could not limit extradition to

analysis is satisfied if the taxpayer has a sufficient nexus to the taxing State, the tax is properly apportioned, the tax is not discriminatory, and the tax has a reasonable relation to state-provided services); *Itel*, 113 S. Ct. at 1105-06.

301. *Michelin*, 423 U.S. at 290.

302. 113 S. Ct. 1095 (1993).

303. *Itel Containers Int'l Corp. v. Huddleston*, 113 S. Ct. 1095, 1101 (1993).

304. *Id.* at 1100.

305. *Id.* at 1101.

306. *Id.*

307. See *infra* notes 308-23 and accompanying text.

308. See *supra* notes 131-46 and accompanying text.

309. *Factor v. Laubheimer*, 290 U.S. 276, 293-94 (1933).

310. 290 U.S. 276 (1933).

311. *Id.* at 287-301, 287-88 n.1.

312. *Id.* at 290.

this circumstance because to do so would undermine the intentions of the parties by impeding the extradition process.³¹³

Similarly, in *Itel*, the clear intention of the signatories to the Container Conventions was to facilitate the international carriage of goods in containers by removing impediments to the use of such containers.³¹⁴ The Tennessee tax represents an impediment to the use of *Itel*'s containers because it makes their use more expensive.³¹⁵ Thus, the Court in *Itel* should have construed the Container Conventions so as to proscribe the Tennessee tax, thereby removing an impediment to the use of *Itel*'s containers and effecting the intentions of the parties to the Conventions.³¹⁶

Had the Court in *Itel* applied the liberal theory of construction, it would have found that the Tennessee tax was indeed a tax levied on containers in international commerce in violation of the Container Conventions.³¹⁷ The Tennessee tax is levied in connection with *Itel*'s lease agreements, which provide for the containers' exclusive use in international commerce.³¹⁸ *Itel*'s leased containers necessarily must be delivered within a State in order to be exported.³¹⁹ The expected and accomplished effect of such delivery into Tennessee is to commence the export process.³²⁰ The certainty that *Itel*'s containers are headed to sea and that the exportation process has begun is evidenced by the fact that *Itel*'s leases provide for exclusive use in international commerce.³²¹ Therefore, the delivery of *Itel*'s containers into Tennessee begins their exportation as instrumentalities of foreign commerce.³²² The Tennessee tax impedes the use of *Itel*'s containers in international commerce, because it is levied on containers after they have entered the stream of foreign commerce.³²³

The Court also failed to properly consider the practices of other signatories to the Container Conventions.³²⁴ These signatories do not directly tax leases of containers used in commerce among the signatory nations.³²⁵ The Court rejected *Itel*'s argument that these prac-

313. *Id.* at 290, 300.

314. *See supra* notes 160-67 and accompanying text.

315. *Itel*, 113 S. Ct. at 1109 (Blackmun, J., dissenting).

316. *See supra* notes 308-15 and accompanying text.

317. *See infra* notes 318-22 and accompanying text.

318. *Itel*, 113 S. Ct. at 1098, 1101.

319. *Id.* at 1109 (Blackmun, J., dissenting).

320. *See Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 81 (1946).

321. *See Richfield*, 329 U.S. at 82; *Itel*, 113 S. Ct. at 1098.

322. *See supra* notes 318-21 and accompanying text.

323. *Itel*, 113 S. Ct. at 1109 (Blackmun, J., dissenting).

324. *See infra* notes 325-37 and accompanying text.

325. *Itel*, 113 S. Ct. at 1100-01.

tices indicate that the Tennessee tax is prohibited by the Container Conventions.³²⁶

When attempting to derive the meaning and intent of a treaty, it is proper to consider the practices of the other parties to the treaty.³²⁷ In fact, the practices of other signatory nations are persuasive evidence of such meaning and intent.³²⁸ For example, in *United States v. Stuart*,³²⁹ the Court stated that the United States had regularly complied with the provisions of the 1942 Convention Respecting Double Taxation ("Double Taxation Convention").³³⁰ Pursuant to Articles XIX and XXI of this Double Taxation Convention, the United States had granted Canadian authorities' requests for tax information without inquiry into its use.³³¹ The Court found this regular compliance by the United States to indicate that both parties to the Double Taxation Convention intended to provide tax information without inquiry as to its use.³³² Thus, the Court looked to the parties' intent to assist in interpreting the Double Taxation Convention.³³³

The Court in *Itel* should have given the practices of other signatory nations greater weight when construing the Conventions.³³⁴ The practices of these other nations has been to free container leases from any direct taxes while the containers are within their borders.³³⁵ Tennessee's direct tax on the proceeds from *Itel*'s container leases impedes the use of the containers in international commerce.³³⁶ Thus, the Court should have found that the tax is proscribed by the Container Conventions, because the practices of the other signatories evidence the parties' intent to facilitate the use of containers in international commerce.³³⁷

Finally, the Court's determination that the Tennessee tax is not pre-empted by the Conventions is inconsistent with prior holdings of the Court.³³⁸ The Court rejected *Itel*'s argument that the federal system for container regulation parallels that of the customs-bonded warehouse system.³³⁹ The Court specifically held that the container regulatory system is not as pervasive as the regulatory system for cus-

326. *Id.*

327. *United States v. Stuart*, 489 U.S. 353, 369 (1989).

328. *Id.* at 369.

329. 489 U.S. 353 (1989).

330. *Id.* at 369.

331. *Id.*

332. *Id.*

333. *See supra* notes 329-32 and accompanying text.

334. *See infra* notes 335-37 and accompanying text.

335. *See supra* notes 168-73 and accompanying text.

336. *Itel*, 113 S. Ct. at 1109 (Blackmun, J., dissenting).

337. *See supra* notes 335-36 and accompanying text.

338. *See infra* notes 339-53 and accompanying text.

339. *Itel*, 113 S. Ct. at 1102.

toms-bonded warehouses.³⁴⁰ The Court stated that even if the container regulatory system was as pervasive, the Court has "not held that state taxation of goods in bonded warehouses is pre-empted by Congress' intent to occupy the field of customs-bonded warehouse regulation."³⁴¹

In *R.J. Reynolds Tobacco Co. v. Durham County*,³⁴² the United States Supreme Court stated that pre-emption would exist either where Congress so comprehensively legislates that States cannot regulate, or where the State regulation substantially impedes congressional intent.³⁴³ The Court in *Itel* found that Congress, in adopting the Container Conventions, did not intend to preclude State taxation of cargo containers.³⁴⁴ This determination complies with the first pre-emption test found in *R.J. Reynolds*. However, the Court in *Itel*, without further analysis, simply concluded that the tax did not impede federal objectives.³⁴⁵ Had the Court undertaken the second test in the pre-emption analysis, the Court would have found that the Tennessee tax substantially offset the benefits Congress intended and that the Tennessee tax is pre-empted by the Container Conventions.³⁴⁶

For example, the Court in *Xerox Corp. v. County of Harris*³⁴⁷ determined that Congress intended to promote American industry by proscribing State taxes on goods in customs-bonded warehouses.³⁴⁸ The Court then found that a Texas tax substantially interfered with this intended congressional benefit and held that the Texas tax was pre-empted.³⁴⁹ This scenario is analogous to the facts in *Itel*.³⁵⁰ In *Itel*, the Court stated that the Container Conventions "reflect[ed] a national policy to remove impediments to the use of containers."³⁵¹ The Tennessee tax, like the Texas tax in *Xerox Corp.*, "clearly frustrates that policy," substantially offsetting the congressional purpose of "remov[ing] impediments to the use of containers."³⁵² Therefore, the

340. *Id.*

341. *Id.*

342. 479 U.S. 130 (1986).

343. *R.J. Reynolds Tobacco Co. v. Durham County*, 479 U.S. 130, 140 (1986).

344. *Itel*, 113 S. Ct. at 1102.

345. *Id.* at 1103.

346. *See R.J. Reynolds*, 479 U.S. at 140.

347. 459 U.S. 145 (1982).

348. *Xerox Corp v. Harris County*, 459 U.S. 145, 151-53 (1982).

349. *Id.* at 153-54.

350. *See infra* notes 351-52 and accompanying text.

351. *Itel*, 113 S. Ct. at 1102 (quoting *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 453 (1979)).

352. *Itel*, 113 S. Ct. at 1109 (Blackmun, J., dissenting) (quoting *Japan Line*, 441 U.S. at 453).

tax violates the second test of the pre-emption analysis as set forth in *R.J. Reynolds* and should be pre-empted.³⁵³

THE FOREIGN COMMERCE CLAUSE

The Court in *Itel* incorrectly applied the current Foreign Commerce Clause test set forth in *Japan Line*.³⁵⁴ *Itel* did not challenge the Tennessee tax based on the first four parts of the Foreign Commerce Clause test.³⁵⁵ Hence, the Court did not retrace the finding of the Supreme Court of Tennessee on this matter.³⁵⁶ Thus, the Court proceeded to assess whether the tax created a substantial risk of international multiple taxation or prevented the Federal Government from "speaking with one voice," the final two components of the Foreign Commerce Clause test.³⁵⁷

First, the Court in *Itel* found that the Tennessee tax did not create a substantial risk of international multiple taxation.³⁵⁸ *Itel* had argued that the Tennessee tax invited foreign taxation on their container leases.³⁵⁹ *Itel* maintained that numerous nations had a sufficient nexus with the leases to impose taxes similar to that of Tennessee's tax, creating multiple taxation of the leases.³⁶⁰

In light of the Court's previous holdings, *Itel's* argument cannot be valid.³⁶¹ The Foreign Commerce Clause cannot be interpreted to require a state to refrain from taxing any transaction that may also potentially be subject to foreign taxation.³⁶² The Tennessee tax applies only to those transfers of containers that occur within Tennessee.³⁶³ In addition, Tennessee credits any previous tax paid on the same transaction in another jurisdiction against its own tax.³⁶⁴ With this tax credit, the Tennessee tax actually reduces the risk of multiple taxation.³⁶⁵ Thus, Tennessee's tax on a discrete business transaction will not create a substantial risk of international multiple taxation.³⁶⁶

353. See *supra* notes 342-52 and accompanying text.

354. See *infra* notes 355-95 and accompanying text.

355. *Itel*, 113 S. Ct. at 1104.

356. *Id.*

357. *Id.*

358. See *supra* notes 79-87 and accompanying text.

359. *Itel*, 113 S. Ct. at 1104.

360. *Id.*

361. See *infra* notes 362-67 and accompanying text.

362. *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 193 (1983).

363. *Itel*, 113 S. Ct. at 1104.

364. See TENN. CODE ANN. § 67-6-313(f) (1989); see *supra* note 19 (setting forth the provisions of § 67-6-313(f)).

365. *Itel*, 113 S. Ct. at 1104.

366. *Id.*

Therefore, the Court correctly concluded that the Tennessee tax did not create a potential risk of international multiple taxation.³⁶⁷

Second, however, the Court incorrectly determined that Tennessee's tax did not prevent the Federal Government from "speaking with one voice" on foreign commerce matters.³⁶⁸ *Itel* asserted that allowing the Tennessee tax would also enable other States to tax container leases, creating various degrees of multiple domestic taxation.³⁶⁹ *Itel* argued that this multiple domestic taxation would result in retaliatory foreign taxation.³⁷⁰ *Itel's* arguments are strongly supported by prior Supreme Court decisions.³⁷¹

The Court, in *Container Corp. of America v. Franchise Tax Bd.*,³⁷² held that a state tax violates the "one voice" component of the Foreign Commerce Clause if it violates a clear federal directive.³⁷³ In signing the 1972 Convention, the Federal Government sought to establish a clear federal directive for the "uniform treatment of cargo containers used exclusively in foreign commerce."³⁷⁴ In effect, this 1972 Convention evidenced a national policy to remove impediments to the use of such containers.³⁷⁵

In *Japan Line, Ltd. v. County of Los Angeles*,³⁷⁶ a case factually similar to *Itel*, the Court determined that a California ad valorem property tax violated the "one voice" component of the Foreign Commerce Clause test.³⁷⁷ The Court held that the California tax frustrated the uniformity sought by the 1956 Customs Convention on Containers.³⁷⁸ The Court stated that California's tax on Japanese containers created an asymmetry in taxation, because American-owned containers were not taxed in Japan.³⁷⁹ The Court further found that this disadvantage to Japan created an acute risk of retaliation.³⁸⁰

367. See *supra* notes 359-66 and accompanying text.

368. See *infra* notes 369-95 and accompanying text.

369. *Itel*, 113 S. Ct. at 1104-05.

370. *Id.* at 1105.

371. See *infra* notes 372-95 and accompanying text.

372. 463 U.S. 159 (1983).

373. *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 194 (1983).

374. Message from the President of the United States Transmitting the Customs Convention on Containers, 1972, and the International Convention for Safe Containers, both signed at Geneva on Dec. 5, 1972; EXEC. X, 93rd Cong., 1st Sess. vi (1973); EXEC. REP. No. 94-33, at 1; *Japan Line*, 441 U.S. at 452.

375. *Itel*, 113 S. Ct. at 1109 (Blackmun, J., dissenting).

376. 441 U.S. 434 (1979).

377. *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 437 (1979).

378. *Id.* at 453.

379. *Id.*

380. *Id.*

Similarly, the Tennessee tax is an impediment to the use of Itel's containers and thus frustrates the uniformity sought by the Federal Government.³⁸¹ First, other Container Convention signatories have specifically stated that they do not impose a tax similar to Tennessee's on container leases.³⁸² Allowing the Tennessee tax will disadvantage the other signatories and will lead to an acute risk of retaliation.³⁸³ In fact, Great Britain specifically threatened to tax containers imported from the United States if the Tennessee tax was upheld.³⁸⁴ Second, the Container Conventions provide the necessary pre-emptive force because they prohibit the imposition of a tax "in connection with" or "by reason of" the importation of Itel's containers.³⁸⁵ Finally, as a signatory nation, the United States must adhere to the Container Conventions' provisions.³⁸⁶ Tennessee, as a political subdivision of the United States, must also adhere to the Container Conventions' provisions.³⁸⁷ Should Tennessee not comply with the Container Conventions' tax and duty prohibitions, the other signatory nations would not continue their restraint on taxation of containers imported from the United States.³⁸⁸

In addition, the Court's reliance on the amicus brief of the United States was erroneous.³⁸⁹ This brief stated that the United States is able to "speak with one voice" despite Tennessee's tax because international custom allows the taxation of domestically-owned containers.³⁹⁰ This position taken by the United States should not be viewed as dispositive.³⁹¹ The power to regulate and govern matters of foreign commerce belongs exclusively to Congress.³⁹² The Executive Branch cannot authorize regulation of foreign commerce by filing an amicus brief.³⁹³

381. *Itel*, 113 S. Ct. at 1109 (Blackmun, J., dissenting).

382. Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioner and attached Appendix, *Itel Containers Int'l Corp. v. Huddleston*, 113 S. Ct. 1095 (1993) (No. 91-321).

383. *Id.*

384. *Id.*

385. Customs Convention on Containers, *opened for signature* Dec. 2, 1972, art. 1, 988 U.N.T.S. 44, 44; Customs Convention on Containers, *opened for signature* May 18, 1956, art. 1 and 2, 20 U.S.T. 303, 304.

386. *See* U.S. CONST. art. VI, cl. 2 (stating that treaties are the supreme law of the land).

387. *Id.*

388. Brief of the United Kingdom of Great Britain and Northern Ireland as Amicus Curiae in Support of Petitioner, *Itel Containers Int'l Corp. v. Huddleston*, 113 S. Ct. 1095 (1993) (No. 91-321).

389. *See infra* notes 390-93 and accompanying text.

390. Brief for the United States as Amicus Curiae Supporting Respondent, *Itel Containers Int'l Corp. v. Huddleston*, 113 S. Ct. 1095 (1993) (No. 91-321).

391. *Itel*, 113 S. Ct. at 1110 (Blackmun, J., dissenting).

392. U.S. CONST. art. I, § 8, cl.3.

393. *Itel*, 113 S. Ct. at 1110 (Blackmun, J., dissenting).

Tennessee's tax on Itel's containers prevents the Federal Government from "speaking with one voice" regarding the taxation of containers utilized in international commerce.³⁹⁴ Therefore, the Tennessee tax violates the Foreign Commerce Clause and is necessarily unconstitutional.³⁹⁵

THE IMPORT-EXPORT CLAUSE

The Supreme Court in *Itel* also erroneously concluded that the Tennessee tax does not violate the Import-Export Clause.³⁹⁶ The Court employed the three-part test found in *Michelin Tire Corp. v. Wages*.³⁹⁷ First, the Court again concluded that the Tennessee tax did not prevent the Federal Government from "speaking with one voice" in foreign commerce regulation.³⁹⁸ As discussed above, the Tennessee tax does prevent the Federal Government from "speaking with one voice" concerning Itel's containers because it impedes the use of Itel's containers, frustrates the uniform treatment of containers, and disadvantages other signatories, creating an acute risk of retaliation.³⁹⁹ Therefore, the Tennessee tax violates the first element of the Import-Export Clause test and is necessarily unconstitutional.⁴⁰⁰

Next, the Court in *Itel* determined that the Tennessee tax did not disturb the harmony of commerce among the States.⁴⁰¹ The Court noted that this part of the Import-Export Clause test is similar to the four-part Domestic Commerce Clause test articulated in *Complete Auto Transit, Inc. v. Brady*.⁴⁰² Because the Court had already concluded that this four-part test was met in the Foreign Commerce Clause analysis, the Court simply reiterated that conclusion here.⁴⁰³

Finally, the Court concluded that the Tennessee tax did not divert import revenues from the Federal Government.⁴⁰⁴ The Court stated that the tax was not a tax on imported goods or importation, but rather on a discrete business transaction occurring within Tennessee.⁴⁰⁵ The Import-Export Clause prevents States from imposing duties or taxes on imports or exports.⁴⁰⁶ Thus, the questions become

394. *Id.*

395. *Id.*

396. *See infra* notes 397-411 and accompanying text.

397. 423 U.S. 276, 285 (1976); *Itel*, 113 S. Ct. at 1105-06; *see supra* notes 98-112 and accompanying text.

398. *Itel*, 113 S. Ct. at 1105-06.

399. *See supra* notes 368-95 and accompanying text.

400. *See supra* note 399 and accompanying text.

401. *Itel*, 113 S. Ct. at 1105-06.

402. 430 U.S. 274, 279 (1977); *Itel*, 113 S. Ct. at 1105-06.

403. *Itel*, 113 S. Ct. at 1106.

404. *Id.*

405. *Id.*

406. U.S. CONST. art. I, § 10, cl. 2.

whether Itel's containers are imports and, if so, whether the Tennessee tax was a prohibited tax upon them.⁴⁰⁷

The Tennessee tax is levied against the proceeds from Itel's business transactions within Tennessee, not on its containers as imports.⁴⁰⁸ Thus, since the tax is not a tax on imports, import revenue is not diverted from the Federal Government.⁴⁰⁹ In summary, the Tennessee tax satisfies two of the three requirements of the *Michelin* test.⁴¹⁰ However, the tax is unconstitutional under the first requirement of the test because it prevents the Federal Government from "speaking with one voice," in violation of the Import-Export Clause.⁴¹¹

CONCLUSION

The Court in *Itel Containers International Corp. v. Huddleston*⁴¹² considered the validity of a Tennessee state tax on cargo container leases.⁴¹³ The Court held that the Tennessee tax was not unconstitutional as against Supremacy, Commerce, and Import-Export Clause challenges.⁴¹⁴ However, in reaching this conclusion, the Court misapplied previously settled principles.⁴¹⁵

Under the Supremacy Clause analysis, the Court should have employed a liberal theory of construction when interpreting the Container Conventions.⁴¹⁶ Such a liberal construction would have led the Court to find that the Tennessee tax impeded the use of Itel's containers.⁴¹⁷ In addition, the Court should have given the practices of other signatory nations greater weight when construing the Container Conventions.⁴¹⁸ The practice of not taxing container leases should have led the Court to conclude that the Tennessee tax was contrary to the intent of the signatories to the Container Conventions.⁴¹⁹ The Court also should have undertaken further pre-emption analysis and found that the Congressional intent to remove impediments to container use was undermined by the Tennessee tax.⁴²⁰

407. See *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 78 (1946) (stating the analysis to be followed when analyzing a tax under the Import-Export Clause).

408. *Itel*, 113 S. Ct. at 1106.

409. *Id.*

410. See *supra* notes 396-409 and accompanying text.

411. See *supra* notes 399-400 and accompanying text.

412. 113 S. Ct. 1095 (1993).

413. *Itel Containers Int'l Corp. v. Huddleston*, 113 S. Ct. 1095, 1099-1106 (1993).

414. *Id.* at 1106.

415. See *supra* notes 302-411 and accompanying text.

416. See *supra* notes 308-16 and accompanying text.

417. See *supra* notes 318-22 and accompanying text.

418. See *supra* notes 327-37 and accompanying text.

419. See *supra* notes 334-37 and accompanying text.

420. See *supra* notes 342-53 and accompanying text.

Under the Commerce and Import-Export Clause analyses, the Court erroneously concluded that the Tennessee tax did not prevent the Federal Government from "speaking with one voice."⁴²¹ The Tennessee tax is an impediment to the use of ITEL's containers, frustrating the uniform treatment of containers sought by the Federal Government.⁴²² Also, the Tennessee tax disadvantages other signatories and will lead to an acute risk of retaliatory taxation.⁴²³

The misapplication of previously settled issues by the Court will likely lead to confusion in the future with respect to the taxation of cargo containers used exclusively in international commerce. By allowing such a tax, the Court "invites States that are constantly in need of new revenue to impose new taxes on containers. The result . . . will be a patchwork of state taxes that will burden international commerce and frustrate the purposes of the Container Conventions."⁴²⁴

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421. See *supra* notes 368-88, 399-400 and accompanying text.

422. *Itel*, 113 S. Ct. at 1109 (Blackmun, J., dissenting).

423. See *supra* notes 399-400 and accompanying text.

424. *Itel*, 113 S. Ct. at 1110-11 (Blackmun, J., dissenting).