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Container Corporation of America v. Franchise Tax Board: California's Three-Factor Apportionment Formula for Taxing U.S. Corporations' Foreign Subsidiaries Held Constitutional

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NOTE

Container Corporation of America v. Franchise Tax Board: California’s Three-Factor Apportionment Formula for Taxing U.S. Corporations’ Foreign Subsidiaries Held Constitutional

In Container Corporation of America v. Franchise Tax Board, the United States Supreme Court upheld the constitutionality of California’s corporate franchise tax, which utilizes a three-factor apportionment formula of payroll, property, and sales, along with the unitary business principle, to tax the income of U.S. corporations’ fully-integrated foreign subsidiaries.

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2 The tax was attacked for due process and commerce clause violations.

3 Cal. Revenue and Taxation Code § 25101 (West 1979) provides as follows:

Derivation from domestic and foreign sources; measure of tax; apportionment

When the income of a taxpayer subject to the tax imposed under this part is derived from or attributable to sources both within and without the state the tax shall be measured by the net income derived from or attributable to sources within this state in accordance with the provisions of Article 2 (commencing with Section 25210 of this chapter); provided, however, that any method of apportionment shall take into account as income derived from or attributable to sources without the state, income derived from or attributable to transportation by sea or air without the state, whether or not such transportation is located in or subject to the jurisdiction of any other state, the United States or any foreign country.

If the Franchise Tax Board reapportions net income upon its examination of any return, it shall, upon the written request of the taxpayer, disclose to it the basis upon which its reapportionment has been made.

Other relevant statutes are as follows:

Property factor

The property factor is a fraction, the numerator of which is the average value of the taxpayer’s real and tangible personal property owned or rented and used in this state during the income year and the denominator of which is the average value of all the taxpayer’s real and tangible personal property owned or rented and used during the income year. Id. § 25129.

Payroll factor

The payroll factor is a fraction, the numerator of which is the total amount paid in this state during the income year by the taxpayer for compensation, and the denominator of which is the total compensation paid everywhere during the income year. Id. § 25129.

Sales factor

The sales factor is a fraction, the numerator of which is the total sales of the taxpayer in this state during the income year, and the denominator of which is the total sales of the taxpayer everywhere during the income year. Id. § 25129.

4 See infra notes 120-55 and accompanying text.

5 A fully-integrated business is one that does not look to outside sources for supplies,
aries. The formula was upheld despite the fact that it resulted in multiple taxation. The decision, although necessitated by the dearth of uniform legislation in this area, may not only result in a state taxing and receiving more than its fair share of revenue, but it also ignores the fact that foreign governments are concerned about the divergence in state taxing formulas affecting foreign commerce and may take retaliatory measures.

Container, a Delaware corporation headquartered in Chicago, Illinois, is engaged in the production and distribution of paperboard packaging materials. Its operations include producing paperboard out of raw timber and wastepaper, and converting the paperboard into finished products. During the 1963, 1964 and 1965 tax years, Container controlled twenty foreign subsidiaries located in Latin America and Western Europe. Its interest in the subsidiaries ranged from 66.75 percent to 100 percent, with the percentage not owned by Container owned by local nationals. All of the subsidiaries, except one, were engaged in the paperboard packaging business.

Container and its subsidiaries were fully integrated except for some outside purchasing of paperboard and other products. Container purchased no materials from the subsidiaries and did not engage in joint marketing efforts with them. Purchases of materials from Container by the subsidiaries accounted for about one percent of the subsidiaries' total purchases. The subsidiaries were essentially managed in the same manner as Container's U.S. operations. Container operated under a policy of decentralization using regional vice-presidents. Each of the foreign subsidiaries employed a senior vice-president and four officers from the local citizenry. If this arrangement was unfeasible, Container assigned personnel to the subsidiaries. Container's employees had no formal training but some of the foreign employees spent two to six weeks in

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6 California's formula taxed Container on income that had already been taxed to Container's subsidiaries by the foreign governments where the subsidiaries were located.

7 See infra notes 156-80 and accompanying text.

8 See infra notes 207-08 and accompanying text.

9 103 S. Ct. at 2943.

10 Id.

11 Id.

12 Id.

13 One of these subsidiaries was inactive.

14 This subsidiary acted as a holding company.

15 103 S. Ct. at 2943.

16 Id.

17 Id.

18 Id. at 2944. Container's first foreign subsidiary was established in Columbia in 1944.

19 Id.

20 Id. Container encouraged self-reliance by its subsidiaries and practiced a "hands-off attitude" toward the management of the subsidiaries because they sought to emphasize local responsibility and accountability, to appeal to local customers and governments, and to take
the United States familiarizing themselves with the U.S. operations. These trips were financed by the foreign subsidiaries.

Day-to-day management of the subsidiaries was handled by the local executives, although any important decisions were reviewed by Container's management. Container was represented on the board of directors of most of the subsidiaries, and provided the subsidiaries with technical advice concerning manufacturing techniques, engineering, design, architecture, insurance, and cost accounting. On occasion, Container also sold used equipment to the subsidiaries, or employed its purchasing department to act as an agent for the subsidiaries.

During the years in question, Container made loans to the subsidiaries of $7,704,987, $7,155,714, and $3,223,371. The subsidiaries furnished Container with budget information and financial data on a regular basis, and although their tax returns were prepared locally, the same accounting firm used by Container for its audits also audited most of the subsidiaries.

Container filed California franchise tax returns for the years at issue but did not include any of the subsidiaries' income. It calculated the portion of its payroll, property, and sales taxable under California's statutory three-factor formula, but omitted any of the payroll, property, or sales of its subsidiaries.

The Franchise Tax Board (FTB) issued notices of deficiency to Container, alleging that its foreign subsidiaries were part of its unitary advantage of the fact that the packaging industry is highly sensitive to the differing consumer habits of different nations. 103 S. Ct. at 2944 & n.8.

During the years at issue, 38 of Container's 13,400 employees were assigned to foreign subsidiaries. These employees were maintained on Container's payroll. Some employees were transferred to the foreign subsidiaries and placed on the payroll of the foreign subsidiary. Some transferred employees continued to draw some pay and fringe benefits from Container.


21 103 S. Ct. at 2944.
22 Id.
23 Id.
24 Id.
25 Id. This advice was given either informally, or by entering into technical service agreements.
26 Id.
27 Id. Container also guaranteed one-third of the subsidiaries' loans from outside sources.
28 Id.
29 Id.
30 Id.
31 California's statutory formula is detailed supra at note 3.
32 Container's calculations of its income were as follows: 1963 1964 1965

<table>
<thead>
<tr>
<th></th>
<th>1963</th>
<th>1964</th>
<th>1965</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total income of unitary business</td>
<td>$26,870,427.00</td>
<td>$28,774,320.48</td>
<td>$32,280,842.00</td>
</tr>
<tr>
<td>Percentage attributed to Calif.</td>
<td>11.041%</td>
<td>10.6422%</td>
<td>9.8%</td>
</tr>
<tr>
<td>Amount attributed to Calif.</td>
<td>2,966,763.85</td>
<td>3,062,220.73</td>
<td>3,174,368.00</td>
</tr>
<tr>
<td>Tax (5.5%)</td>
<td>163,172.01</td>
<td>168,422.14</td>
<td>174,590.00</td>
</tr>
</tbody>
</table>

103 S. Ct. at 2945 & n.11.

The Franchise Tax Board alleged that Container's actual tax liability was as follows:
business and not a passive investment. According to the FTB, Container had neglected to report its subsidiaries' income, which wrongly decreased the portion of its income attributable to California. Container paid the deficiency under protest and sued in California Superior Court for a refund. The court upheld the assessment, and the decision was affirmed on appeal.

Before the United States Supreme Court, Container argued that the California Court of Appeals utilized a different legal standard in its analysis than the standard that had been articulated by the Supreme Court. Container contended that the state court improperly relied upon Container's "mere potential" to control its subsidiaries as a crucial factor in its determination that it constituted a unitary business. It further argued that the state court erred in presuming that subsidiary corporations involved in the same line of business constitute a unitary business. Container argued that a prerequisite to finding that a corporation is a unitary business is a finding that a substantial flow of goods exists between the corporate entities. Moreover, according to Container, California's three-factor apportionment formula was distorted due to lower costs of production in the foreign countries where Container's subsidiaries were located, which resulted in an unfair apportionment of income to California, a violation of due process. Finally, Container alleged that California's tax was violative of the Commerce Clause because it resulted in multiple taxation in fact, taxing income from sub-

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Income of Unitary Business</th>
<th>Percentage Attributed to Calif.</th>
<th>Amount Attributed to Calif.</th>
<th>Tax (5.5%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1963</td>
<td>$37,348,183.00</td>
<td>8.6886%</td>
<td>3,245,034.23</td>
<td>178,476.88</td>
</tr>
<tr>
<td>1964</td>
<td>$44,245,879.00</td>
<td>8.3135%</td>
<td>3,673,381.15</td>
<td>202,310.95</td>
</tr>
<tr>
<td>1965</td>
<td>$46,884,966.00</td>
<td>7.65%</td>
<td>3,588,012.00</td>
<td>197,340.00</td>
</tr>
</tbody>
</table>

32 103 S. Ct. at 2945. If a subsidiary is held by a corporation as a passive investment then it is not part of the corporation's unitary business. See Keesling and Warren, The Unitary Concept In the Allocation of Income, 12 Hastings L.J. 42 (1960).

33 Id.

34 The California Supreme Court refused to grant discretionary review. The United States Supreme Court noted probable jurisdiction. Container Corp. v. Franchise Tax Board, 456 U.S. 960 (1982).

35 103 S. Ct. at 2946.

36 Id. Container's argument here is taken from F.W. Woolworth Co. v. Taxation and Revenue Dept. of New Mexico, 458 U.S. 355, 363 (1982). See infra notes 141-53 and accompanying text. In that case, the Supreme Court rejected a state court's finding that a corporation was a unitary business. The Court said that the state court's decision was based upon the taxpayer's potential relationship with its subsidiaries, and not upon actual facts that demonstrated interdependence between the parent corporation and its subsidiaries.

37 103 S. Ct. at 2946.

38 Id. at 2947.

39 Id.

40 Id. at 2948. Container presented evidence that wage rates and other production costs were lower in the foreign countries. Brief for Appellant 12. Container also presented evidence that its subsidiaries operated under a greater profit margin than it did. Brief for Appellant 14.

41 Brief for Appellant 21-26. This is in contrast to the mere threat of multiple taxation which the Supreme Court is more apt to tolerate. See Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 451-52 (1979).
sidiaries that was also taxed by foreign governments, and because it prevented the U.S. Government from acting uniformly in matters affecting international affairs.\(^{42}\)

The Court summarily rejected Container's contention that an improper legal standard was applied by the state court, asserting that the state court relied principally on evidence detailing the management relationship between Container and its subsidiaries in reaching its decision.\(^{43}\)

The Court also quickly dismissed Container's argument that the state court erred in its presumption that corporations engaged in the same line of business constitute a unitary business,\(^ {44}\) although it hastened to point out that this presumption\(^ {45}\) was only one of many factors which prompted the state court's decision.\(^ {46}\) The Court was similarly unreceptive to Container's premise that a flow of goods was needed for the state court to find a unitary business.\(^ {47}\) The proper prerequisite to a finding of a unitary business was *not* a flow of goods, admonished the Court, but a flow of value — meaning goods, or any number of items representing value.\(^ {48}\)

The Court addressed Container's constitutional challenges to California's three-factor formula in greater detail.\(^ {49}\) It rejected Container's argument that California's formula violated due process by distorting the true allocation of income between Container and its subsidiaries, resulting in a misallocation of income to California.\(^ {50}\) The Court criticized Container's use of arms-length, separate accounting principles to arrive at this argument, reasoning that separate accounting fails to account for benefits received by Container as a unitary business.\(^ {51}\)

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\(^{42}\) Brief for Appellant 27.

\(^{43}\) 103 S. Ct. at 2946.

\(^{44}\) Id. at 2947.

\(^{45}\) However, the Court argued that this presumption was a "reasonable" one since a corporation that enlists subsidiaries in its same line of business is "likely to make better use — either through economies of scale or through operational integration or sharing of expertise — of the parent's existing business-related resources."

\(^{46}\) Id. The state court was presented with detailed evidence of the interaction between Container and its subsidiaries including loans, loan guarantees, assistance in obtaining new and used equipment, assistance in filling personnel needs, and other technical assistance. See the Court's discussion, 103 S. Ct. at 2947, and the factual summary *infra* at notes 15-28 and accompanying text.

\(^{47}\) 103 S. Ct. at 2947.

\(^{48}\) Id. The Court sought evidence of the interdependence among the parent and its subsidiaries. This interdependence was represented by functional integration, economies of scale, and centralization of management. These factors contributed to Container's income and could not be sourced to any one corporation. F.W. Woolworth Co. v. Taxation and Revenue Dept. of New Mexico, 458 U.S. 355 (1982). The Court noted that some scholars have suggested that a flow of goods would be a proper test for a unitary business. 103 S. Ct. at 2947 n.17 and material cited therein. But the Court rejected this viewpoint.

\(^{49}\) The Court prefaced its discussion at this point with a reminder that the taxpayer carries the burden of proving that the income attributed to the state does not bear a rational relationship to the interstate value of the corporation. 103 S. Ct. at 2948.

\(^{50}\) Id.

\(^{51}\) Id. at 2948-49. The Court argued that separate accounting was theoretically weak and was not useful with a unitary business because the benefits received from functional integration,
its approval of formula apportionment over separate accounting based upon the wide acceptance that formula apportionment has received from state taxing authorities, and noted its belief that California's formula of "payroll, property, and sales appear in combination to reflect a very large share of the activities by which value is generated."52

Finally, in addressing Container's allegations that California's tax scheme violated the Commerce Clause, the Court compared the instant case to an earlier tax case involving foreign commerce, Japan Line, Ltd. v. County of Los Angeles.53 In Japan Line, the Court rejected California's attempts to place a fairly apportioned, nondiscriminatory ad valorem54 property tax on cargo containers temporarily present55 in California,56 holding that the tax was unconstitutional because it resulted in multiple taxation of instrumentalities engaged in foreign commerce57 and because it violated the policy of the U.S. Government to speak with one voice in regulating foreign trade.58 The Court admitted that Container, like the taxpayer in Japan Line, was subject to double taxation,59 and that the double tax in both cases was due to the divergence of the California tax-

52 103 S. Ct. at 2949. The Court admitted that formula apportionment had its imperfections in that the weight given to the various factors was arbitrary. Id. at n.20. It reasoned, however, that the margin of error in formula apportionment was not so great compared to Container's result using separate accounting as to require the court to force California to adopt a different method of taxation. Id. at 2949-50. The California method represented only a 14% increase over the amount arrived at by separate accounting (or about $72,000). Id. at 2950 and tables at 2945 & nn. 11-12. The Court stated that this was a "far cry" from the 250% difference that prompted them to strike down the state tax in Han Rees' Sons, Inc. v. North Carolina, 283 U.S. 123 (1931). 103 S. Ct. at 2950.


54 An ad valorem property tax is a tax of a fixed percentage of the value of the property to be taxed. BLACK'S LAW DICTIONARY 48 (5th ed. 1981).

55 The containers averaged a stay in California of less than three weeks. Agreed Statement in Lieu of Clerk's and Reporters Transcripts 29, Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434 (1979).

56 Id.

57 The Court in Container said Japan Line left open the question of the taxation of "domestically owned instrumentalities engaged in foreign commerce," 103 S. Ct. at 2952 (quoting Japan Line, 441 U.S. at 444 n.7), which the Court felt included the situation in Container.

58 441 U.S. at 453-54.

59 103 S. Ct. at 2951.
ing scheme and that of foreign taxing authorities. Moreover, there was evidence that the method of taxation adopted by the foreign authorities was consistent with accepted international practice, as it had been in Japan Line. The Court argued, however, that there were several important distinctions between Japan Line and Container. Unlike the taxpayer in Japan Line, Container was being taxed on income, not property. Also, the Court viewed the multiple taxation of Container as not an inevitable result of California's taxing scheme, while in Japan Line there was of necessity double taxation.

As to whether their decision would have an impact on federal uniformity, or damage U.S. international trade relations, the Court found no threat of danger. It noted that Container involved the taxation of a corporation domiciled and headquartered in the United States, while Japan Line involved a direct tax on an instrumentality of foreign commerce owned by foreign merchants. Hence, the Court stated, the real impact of the tax would be felt by Container as a domestic corporation and not by the foreign corporations. Also, according to the Court, there were no other indications that the tax on Container was offensive to U.S. foreign policy. Thus, the judgment of the California Court of Appeals was affirmed.

The right to levy taxes upon their constituents is reserved to the

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60 Id. at 2951-52.
61 Id. at 2952.
62 Id. The Court stated that the reasons for careful allocation to the proper situs carried less weight with income than with property tax. Id. (citing Mobil Oil, 445 U.S. at 445). The Court analogized the allocation of income to the proper situs to "slicing a shadow" and refused to force California to adopt a method of taxation that might also lead to double taxation. 103 S. Ct. at 2954.
63 The Court said multiple taxation was inevitable in Japan Line because Japan claimed the right to tax the container in full, while California claimed the right to tax the container in part.
64 103 S. Ct. at 2952.
65 Id. at 2955-57.
66 Id. at 2952.
67 Id. at 2955-56. The Court did not view retaliation by foreign nations through the creation of taxation schemes detrimental to U.S. corporations as a real threat.
68 The Court considered the fact that the Solicitor General did not file an amicus curiae brief in opposition to the tax to be an important factor. It also noted that the Solicitor General did submit a brief opposing worldwide formula apportionment in Chicago Bridge & Iron Co. v. Caterpillar Tractor Co., No. 81-349 (pending before the Court at that time). 103 S. Ct. at 2956 & n.33. The Court declined to speculate as to why no brief was submitted and stated that it had received no indication that the views in Chicago Bridge still reflected the views of the Government, or that the brief in that case was applicable to Container. Chicago Bridge was subsequently dismissed for want of a substantial federal question. 104 S. Ct. 542 (1984). Federal preemption concerns, or concerns of conflict with international tax treaties were dismissed on the ground that each nation is to formulate its own method of taxing domestic corporations. Furthermore, Container was viewed as a taxation matter of local, not international concern. 103 S. Ct. at 2956. In regard to matters of state taxation, the Court noted that Congress had declined to enact uniform taxation. Id. at 2956 & n.32.
69 103 S. Ct. at 2956. The Court commented that even if foreign nations had an interest in reducing the tax burden of domestic corporations, the fact remained that Container did owe California some tax.
states by the tenth amendment.\textsuperscript{70} This power is limited, however, by the due process clause of the fourteenth amendment.\textsuperscript{71} A state tax on interstate commerce must thus undergo a due process analysis. It must "[be] applied to an activity with a substantial nexus with the taxing state, [be] fairly apportioned, . . . not discriminate against interstate commerce, and [be] fairly related to the services provided by the state."\textsuperscript{72} In addition, when a state tax is upon instrumentalities of foreign commerce, there are several constitutional considerations under the Commerce Clause, including the need for federal uniformity in international affairs and the avoidance of multiple taxation.\textsuperscript{73} The tax in Container was attacked as both a violation of the Commerce Clause\textsuperscript{74} and as a violation of due process.\textsuperscript{75}

I. Commerce Clause

The Commerce Clause provides that "Congress shall have Power . . . To regulate Commerce with foreign Nations and among the several States . . . ."\textsuperscript{76} Thus, it has been held that if a state tax "creates a substantial risk of international multiple taxation, [or] prevents the Federal Government from 'speaking with one voice when regulating commercial relations with foreign governments,'" it violates the Commerce Clause.\textsuperscript{77}

A. Multiple Taxation

Taxation is the price paid by those engaged in interstate and foreign commerce for benefits received from the taxing state.\textsuperscript{78} Multiple taxation is deemed unfair, however, because it creates a burden on interstate commerce\textsuperscript{79} to the advantage of intrastate commerce.\textsuperscript{80} While multiple

\textsuperscript{70} "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U. S. CONST. amend. X.

\textsuperscript{71} "[N]or shall any State deprive any persons of life, liberty, or property, without due process of law . . . ." U. S. Const. amend. XIV, § 1.


\textsuperscript{73} Japan Line, 441 U.S. at 446.

\textsuperscript{74} Container, 103 S. Ct. at 2939-43.

\textsuperscript{75} Id.

\textsuperscript{76} U.S. CONST. art. I, § 8, cl. 3.

\textsuperscript{77} Japan Line, 441 U.S. at 451.

\textsuperscript{78} Norfolk and Western Railway Co. v. Missouri State Tax Commission, 390 U.S. 317 (1968); Wisconsin v. J.C. Penney, 311 U.S. 435 (1940).


taxation is not per se violative of the Commerce Clause, a state's tax is unconstitutional if it exacts more than its "fair share" of tax revenue.

The Supreme Court has granted certiorari in several cases where the tax at issue involved foreign commerce. In *Japan Line* for example, the Court held that California's ad valorem property tax on Japanese cargo containers was unconstitutional under the Commerce Clause because it represented multiple taxation in fact and because it prevented the U.S. Government from speaking with one voice in its relations with foreign countries. Multiple taxation existed in *Japan Line* because Japan rightfully taxed the containers in full and California then taxed the containers in part. *Japan Line* was the first case to declare a state tax unconstitutional because of the multiple tax burden it created on foreign commerce.

Other cases in foreign commerce have involved the question of whether the taxation by a state of dividends received by a parent corporation from its foreign subsidiary subjected the parent to multiple taxation. In each of these cases, the Court focused on whether a unitary business existed. If a corporation and its subsidiaries constitute a unitary business (assuming that the state tax passes all other constitutional hurdles) then there exists a presumption that the state tax is accurate and it may be applied to a proportionate share of the business income.


83 The Supreme Court has admonished that interstate and foreign commerce must "pay their own way," subject to the consideration that taxes bear a "fair relation" to benefits conferred. *Braniff Airways, Inc. v. Nebraska*, 347 U.S. 590, 600 (1954).

84 The Supreme Court in *Japan Line* appeared to set out a clear policy that if a state tax results in multiple taxation of foreign commerce, it violates the commerce clause. *Id* at 446-52. But the majority in *Container* stepped back from this clear policy to say that the tax in *Container* was proper because it was not inevitable multiple taxation, as was the tax in *Japan Line*. *Id* at 2952. The Court also noted that forcing California to change its taxing scheme would possibly not eliminate double taxation. *Id* at 2954.

85 *Id*. at 452. The Court said that there was multiple taxation in fact, in contrast to the risk of multiple taxation, because Japan had the right to tax the containers in full.

86 *Id*.

87 The containers were rightfully taxed in Japan because that was where they were owned, registered, and based, and they were used exclusively in international commerce. *Id* at 451-52.


90 *See infra* notes 120-55 and accompanying text.

91 This reference is to hurdles under the due process clause. *See supra* notes 71-72 and accompanying text.

92 *See* discussion in Note, infra note 107, at 126 & n.183.
If, however, a corporation is found not to be a unitary business, then a state tax on income of a corporation earned outside the state's borders is unconstitutional. 93

B. Federal Uniformity

The concern for federal uniformity, or that the federal government "speak with one voice" when regulating areas that have foreign policy implications 94 is a crucial one. In the area of foreign commerce, 95 "[e]ven a slight overlapping of tax — a problem that might be deemed de minimis in a domestic context — assumes importance when sensitive matters of foreign relations and national sovereignty are concerned." 96 Uniformity is crucial because of the disruption that a lack of uniformity could cause in international relations, 97 and because of the possibility that a nation could retaliate in a manner detrimental to U.S. interests. 98

In light of the importance of federal uniformity in matters affecting foreign affairs, the Supreme Court has continued to maintain strict control over any state action that could hinder foreign relations. 99 For example, in Zschernig v. Miller, 100 an Oregon probate statute which

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93 See, e.g., Mobil, 445 U.S. 425.
95 The Supreme Court has followed the philosophy that the framers of the Constitution intended for the scope of foreign commerce power to be greater than that of interstate commerce. Japan Line, 441 U.S. at 448 & n.13, and cases cited therein. For a discussion of this philosophy, see Note, State Taxation of International Air Carriers, 57 Nw. U.L. Rev. 92, 101 and n.42 (1962); Abel, The Commerce Clause in the Constitutional Convention and in Contemporary Comment, 25 Minn. L. Rev. 432, 465-75 (1941).
96 Japan Line, 441 U.S. at 456.
97 See discussion in Note, Japan Line, Ltd v. County of Los Angeles, The Foreign Commerce Clause: An Economic Approach to the Negative Effects of State Taxation, 13 J. Mar. L. Rev. 793, 810 (1980). Nonuniformity in apportionment methods could create international disputes where there is no authoritative tribunal to resolve them. Id.
98 Retaliation by foreign nations disadvantaged by state actions is a concern expressed frequently by the Solicitor General. See Amicus Curiae Brief of the Solicitor General in Chicago Bridge & Iron Co. v. Caterpillar Tractor Co., No. 81-349 at 16 (citing Chy Lung v. Freeman, 92 U.S. 275 (1876)). In Chy Lung, the Court stated that without a policy of federal uniformity, "a single state [could], at her pleasure embroil us in disastrous quarrels with other nations." 92 U.S. at 279.

There is also the concern that countries will retaliate by enacting tax laws harmful to U.S. interests because many nations grant exemptions from taxation on the basis of reciprocity. See discussion in Note, Japan Line, Ltd v. County of Los Angeles, The Foreign Commerce Clause: An Economic Approach to the Negative Effects of State Taxation, 13 J. Mar. L. Rev. 753, 810-11 & nn. 120, 121 (1980).
100 389 U.S. 429 (1968).
provided that property would escheat when claimed by a nonresident alien unless certain requirements were met was invalidated.101 According to the Court, the requirements of the statute involved Oregon in foreign affairs “which the Constitution entrusts to the President and Congress.”102 In United States v. Belmont,103 the Court upheld an international compact entered into between the U.S. and Soviet Governments against contradictory interests held by a banker in New York. A Soviet corporation had deposited money in a bank in New York and was subsequently dissolved by the Soviet Government which appropriated all of its assets.104 Thereafter, the United States established diplomatic relations with the Soviet Government and agreed to turn over the corporation’s funds to the Soviets. The Court upheld the actions of the U.S. Government, stating that “no state policy could prevail against the international compact.”105 State laws and policies were viewed as irrelevant to the “effective operation of a federal constitutional power.”106

The decision in Japan Line was also based in large part on a need for federal uniformity.107 The Court discerned a trend toward uniform treatment of the containers at issue.108 It held that the divergence of California’s taxing formula prevented the federal government from speaking with one voice in international trade.109 Federal uniformity in matters affecting international trade was viewed as paramount.110 Thus, the tax in Japan Line was unconstitutional because it violated this “one voice” standard.111

II. Due Process

Generally, the states have been given broad discretion to tax corporate entities within their borders.112 In the exercise of that discretion, several states have utilized separate accounting principles to compute an intrastate corporation’s tax.113 Under separate accounting, the precise

101 Id. at 430-32. These requirements were as follows: (1) a reciprocal right to take property under the same terms must be provided to U.S. citizens in the foreign country; (2) U.S. citizens must have the right to receive payment in the United States from estates in the foreign country; and (3) foreign heirs must have the right to receive money from the Oregon estates without it being confiscated.
102 Id. at 432-41.
103 301 U.S. 324 (1937).
104 Id. at 326.
105 Id. at 327.
106 Id. at 332.
107 103 S. Ct. at 448-51.
108 Id. at 452.
109 Id. at 453.
110 Id. at 451-54.
111 See also United States v. Curtiss-Wright Export Corp., 299 U.S. 304 (1936); Fong Yue Ting v. United States, 149 U.S. 698 (1893); Colley v. Board of Wardens, 53 U.S. (12 How.) 299, 319 (1851).
geographical source of a corporation’s profits is determined and the corporation is taxed on the income earned in that particular state or geographic area.\textsuperscript{114} Although this method produces a satisfactory result when activities carried on within a state are truly separate from any business conducted outside the state,\textsuperscript{115} a substantial amount of revenue can be garnered from corporations operating in both interstate and foreign commerce.\textsuperscript{116} These multistate and multinational corporations create a problem in tax computation because when the individual subsidiaries are interdependent, an accurate measurement of taxable income through utilization of separate accounting methods is difficult.\textsuperscript{117} Interdependence of business activities, in and out of a state, creates a unitary business\textsuperscript{118} which is taxed using formula apportionment methods.\textsuperscript{119}

A. Unitary Business Principle

What constitutes a unitary business has been and continues to be the subject of considerable controversy and confusion.\textsuperscript{120} A unitary business has been defined as one in which “the operation of the portion of the business within the state is dependent upon or contributory to the operation of the business outside the state.”\textsuperscript{121} It has also been described as “either . . . an interstate business which is so integrated as to make separate accounting for the in-state business impossible, or . . . an interstate business in which the in-state activities contribute to the out-of-state business and the out-of-state activities contribute to the in-state busi-

\textsuperscript{114} Id. See also Moorman Manufacturing Co. v. Bair, 437 U.S. 267, 273 (1978).
\textsuperscript{115} See Keesling, supra note 113, at 304-05; Palestin, Interstate Taxation: Non-Unitary Corporation — Should Statutory Apportionment Yield to Separate Accounting?, 1965 PROC. NAT. T. 531.
\textsuperscript{116} See comments of Senator Church on the impact that interstate revenues would have on California’s economy; Church, Senator Church on Unitary Taxation, 11 TAX NOTES 6, 6 (1980). The taxation of interstate and foreign commerce has met with much approval by the states and the courts due to a belief that interstate commerce should “pay its own way.” See Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977); Michelin Tire Corp. v. Wages, 423 U.S. 276 (1976). According to the Supreme Court, the tax on interstate commerce is the price paid for benefits received. See Michelin Tire, 423 U.S. at 289. See also Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 458-62 (1959). Cf. Developments in the Law, Federal Limitations on State Taxation of Interstate Business, 75 HARV. L. REV. 953 (1962).
\textsuperscript{118} See supra notes 120-55 and accompanying text.
\textsuperscript{119} See infra notes 156-98 and accompanying text.
\textsuperscript{121} ALTMAN & KEESSLING, supra note 120, at 110.
ness." The definition is of particular importance because the Supreme Court views the unitary business principle as "the linchpin of apportionability in the field of state income taxation . . . ." Thus, while a state tax must pass muster under the due process clause, a court's finding that a corporation and its subsidiaries constitute a unitary business includes a finding that the state tax was applied to a corporation that has a nexus with the taxing state and benefits from services provided by the state. The state tax is presumed valid and the burden shifts to the corporation to prove that the income at issue was earned in activities outside the unitary business.

In practice, the Supreme Court's application of the unitary business principle appears somewhat haphazard. Businesses do not have to be entirely separate to qualify as non-unitary. The Court has declined, however, to detail precisely what factors constitute a unitary business and how much weight each factor will carry. Early cases turned upon the fact that the taxpayer had the burden of overcoming the presumption that a state's method of taxation produced an unfair result. Formulations of the present-day unitary business principle were present in early cases but the concept was far from clear.

In recent cases the taxpayer's difficulty with the burden of proof continues, but a more concrete formulation of the factors to be considered in determining whether a unitary business exists is beginning to appear. The Supreme Court's decisions appear to indicate that functional integration, centralization of management, and economies of scale are several of the factors which belie a unitary business. In Mobil Oil Corporation v. Commissioner of Taxes of Vermont, the Court held that Mobil, an integrated petroleum corporation with businesses in forty states (including Vermont), the District of Columbia, and several foreign countries was a unitary business. Vermont could tax a proportionate share of

122 Rudolph, supra note 117, at 184.
123 Mobil, 445 U.S. at 439.
124 See supra notes 71-72 and accompanying text.
127 Seago, supra note 126, at 104 n.15 and material cited therein.
129 Underwood, 254 U.S. at 120; Bass, 266 U.S. at 282; Hans Rees' Sons, 283 U.S. at 126-27.
130 See, e.g., Underwood, 254 U.S. 113.
132 Id. at 438-42.
Mobil's foreign source income, i.e., dividends received by Mobil from its foreign subsidiary, unless Mobil could prove that the dividends were earned in activities unrelated to the corporation's sale of petroleum products. Mobil was unable to carry this burden. Thus, Vermont was allowed to tax the dividends received by Mobil, the parent of a "functionally integrated enterprise."  

Functional integration was again the focus in Exxon Corporation v. Wisconsin Department of Revenue. Exxon, also an integrated petroleum company engaged in exploration, production, refining, and marketing, sought to utilize separate accounting with its marketing operations which were conducted solely in Wisconsin. The Court held that Exxon had failed to carry its burden of showing that its functional departments were discrete business enterprises. Accordingly, Wisconsin was allowed to tax a proportionate share of Exxon's total income.

Some guidance was provided by the Court concerning what is not a unitary business in ASARCO, Inc. v. Idaho State Tax Commission, and in F.W. Woolworth Company v. Taxation and Revenue Department of New Mexico. Both cases involved the apportionment of dividends received by a parent from its foreign subsidiary. In ASARCO, the taxpayer was engaged in the mining, smelting, and refining of nonferrous metals. Substantial evidence was presented by ASARCO that its subsidiaries

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133 Id. at 440. The Court noted that Mobil did not contest the fact that it was a unitary business and in fact regularly submitted tax returns combining all its operating income without regard to location. Id. at 437.
134 Id. at 440.
136 Id. at 211.
137 See supra notes 113-15 and accompanying text.
138 447 U.S. at 224.
139 Id. at 230.
141 458 U.S. 355 (1982). ASARCO and Woolworth have already been subject to much critical comment and discussion. See, e.g., Seago, supra note 126; Note, supra note 117.
142 458 U.S. at 309.
143 This suit involved five foreign subsidiaries: M.I.M. Holdings, Ltd.; General Cable Corp.; Revere Copper and Brass, Inc.; ASARCO Mexican, S.A.; and Southern Peru Copper Corp. Id. at 309. M.I.M. was viewed by the Court as an investment by ASARCO. Id. at 323. M.I.M. sold only 1% of its output to ASARCO at market rates. ASARCO owns 52.7% of M.I.M.'s stock, but M.I.M. chooses its own officers and directors and otherwise maintains minimal contact with ASARCO. Id. at 322-23. ASARCO owns approximately one-third interests in General Cable and Revere Copper. In regard to these subsidiaries, ASARCO consented to an antitrust decree that prohibits it from voting its stock held in them, from maintaining common officers in them, from acquiring stock in any other copper fabricators, or from selling copper to them at prices lower than those quoted to their competitors. ASARCO has no contact with these companies in regard to management or operational decisions. Id. at 323-24. Mexican was originally owned wholly by ASARCO but Mexican law forced them to divest themselves of 51% of their holdings. The Court did not disturb the state court's finding that Mexican operated independently of ASARCO. Id. at 324. ASARCO held 51.5% of Southern Peru's stock. Id. at 320. Southern Peru sold 35% of its output to ASARCO. Id. at 321. The state court found that ASARCO had the potential to control Southern Peru but that Southern Peru's remaining three shareholders refused to participate in Southern Peru unless assured that they would not be dominated by ASARCO. Thus, the parties entered into a management
were separate entities, not controlled by ASARCO. The subsidiaries selected their own officers and boards of directors, and any services provided to the subsidiaries by ASARCO were provided at the same rate paid by other companies. The Court concluded that ASARCO and its subsidiaries were "insufficiently connected" to permit a finding of a unitary business.

In Woolworth the taxpayer was engaged in retail sales with chains of stores located throughout the United States, Puerto Rico, and the Virgin Islands. In holding that Woolworth's subsidiaries were not part of a unitary business, the Court was influenced by testimony that each subsidiary acted autonomously in its selection of a store site, its advertising, and its control. The Court found no evidence of economies of scale due to centralized purchasing, manufacturing, or warehousing. Moreover, each subsidiary had control of its own management and employment decisions. Thus, the decision in Woolworth was reached after a careful examination of the actual practices of the subsidiaries, not just speculation as to the mere potential of Woolworth and its subsidiaries to be a unitary business — which was the legal standard applied by the state court.

Despite all of this recent litigation, the contours of the unitary business principle are still difficult to define and the Supreme Court is the first to admit this, stating in Container "that [the unitary business principle] is not, so to speak, unitary: There are variations on the theme, and any number of them are logically consistent with the underlying principles motivating the approach." This creates a problem which is readily apparent to the taxpayer who seeks to refute the contention that his corporation is a unitary business in order to rebut the presumption that the method of formula apportionment used by a taxing state is correct.

B. Formula Apportionment Methods

Methods of formula apportionment utilized by the states to tax contract which insures, by voting requirements and shareholder selection, that ASARCO cannot control Southern Peru. Id. at 321-22.
corporations engaged in interstate and foreign commerce vary from one to three factor formulas using a combination of sales or gross receipts, payroll, manufacturing costs, and tangible property.\textsuperscript{157} States also use varying definitions\textsuperscript{158} of the above items. For example, a sale may be defined either as occurring at the place of business where orders are placed, or at the sale's destination.\textsuperscript{159} The diversity of formulas and definitions has created considerable confusion and often results in multiple,\textsuperscript{160} or even under-taxation.\textsuperscript{161}

For many years, the Supreme Court did little to lessen or to control the increasing power of the states to tax interstate commerce.\textsuperscript{162} Faced with a diversity of formulas, it upheld them by default because the taxpayers failed to meet their burden of showing that the formula used by the taxing state was in error.\textsuperscript{163} Formula apportionment methods generally met with the Court's approval because they resolved the conflict between the desire to have instrumentalities of interstate commerce pay their own way and the principle that interstate commerce should not be burdened with multiple taxation.\textsuperscript{164}

In one of its first decisions on formula apportionment, \textit{Underwood Typewriter Company \textit{v.} Chamberlain},\textsuperscript{165} the Court upheld Connecticut's crude, single-factor formula based upon the proportion of tangible property owned by the corporation within the taxing state.\textsuperscript{166} The taxpayer conducted its manufacturing in Connecticut and had branch offices and

\begin{quote}
state. Moorman Mfg. Co. \textit{v.} Bain, 437 U.S. 267, 273 (1978). Formula apportionment methods have been examined and criticized by many sources. \textit{See, e.g., G. ALTMAN \& F. KEESSLING, supra note 120, at 97-102; Cohen, State Tax Allocations and Formulas Which Affect Management Operating Decisions, 1 J. of Tax'n 7 (July 1954); Corrigan, Uniformity in Interstate Taxation, 13 Tax Notes 200, 200 (1981); Dexter, supra note 120; Hellerstein, supra note 120, at 489; R. POSNER, ECONOMIC ANALYSIS OF LAW 515-16 (2d ed. 1977); Palestin, supra note 115, at 531.}
\end{quote}

\textsuperscript{157} Cohen, supra note 156 at 4. Cohen provides examples of how various formulas work. \textit{Id. at 4-5.}

\textsuperscript{158} \textit{Id. at 8-12.}

\textsuperscript{159} \textit{Id. at 8-10; see also House Comm. on the Judiciary, Report of the Special Sub-committee on State Taxation of Interstate Commerce, H.R. Rep. No. 1480, 88th Cong. 2d Sess. (1964) (provides a detailed discussion of the various positions on taxation of multistate and multinational corporations, discussing the various formulas and definitions used).}

\textsuperscript{160} \textit{See R. POSNER, supra note 156, at 515-16. Dexter, supra note 120, at 402-03, gives an example of how a corporation's intangibles could theoretically be subject to "quintuple taxation," by being taxed in: 1) state of incorporation; 2) principal place of business; 3) place where stock has business situs; 4) all states where it has income; and 5) all states that protect the corporation's intangibles.}

\textsuperscript{161} Dexter, supra note 120, at 403 n.8, discusses the fact that formulas may result in some income not being taxed. This income is called "nowhere income." \textit{Id. Further discussion of nowhere income can be found in Corrigan, Interstate Corporate Income Taxation—Recent Revolution and a Modern Response, 29 Vand. L. Rev. 423, 426 (1976); Hellerstein, State Taxation and the Commerce Clause: An Historical Perspective, 29 Vand. L. Rev. 335, 341 (1976).}

\textsuperscript{162} \textit{See discussion in Hellerstein, supra note 120, at 489.}

\textsuperscript{163} \textit{See, e.g., Underwood, 254 U.S. 113; Bass, 266 U.S. 271.}


\textsuperscript{165} 254 U.S. 113 (1920).

\textsuperscript{166} \textit{Id. at 121.}
sales in many other states. Connecticut taxed forty-seven percent of the taxpayer's income, the percentage of real estate and tangible personal property owned by the taxpayer within the state. The Court stated that Underwood had failed to show that Connecticut's method of taxation was inherently arbitrary or unreasonable.

Thereafter, until its decision in General Motors v. District of Columbia, the Court exhibited an attitude of almost total acceptance of state taxing formulas. In General Motors, however, it struck down a single-factor sales formula holding that it was defective because it attributed income to the District of Columbia from outside sources. General Motors sold cars in the District of Columbia but did no manufacturing there. In comparing the single-factor sales formula to three-factor formulas (which the Court said were used by most jurisdictions), the Court stated that the single-factor formula was inconsistent and would result in multiple taxation because it would tax fully what a three-factor formula taxes in part.

Since General Motors, the Court has conducted a more thorough examination of state taxing formulas, studying the corporations involved to discern whether a unitary business exists and whether the state taxing formulas conform with due process. It has been argued that the Court's actions constitute a response to the growing criticism of its earlier decisions which increased states' powers to tax intrastate commerce.

In Mobil Oil Corporation v. Commissioner of Taxes of Vermont, and Ex-
The Court upheld the three-factor apportionment formulas of Vermont and Wisconsin. In both cases, the Court found that a unitary business existed. This finding created a presumption that the state's taxing formula was accurate, which shifted to the taxpayer the difficult burden of proving that the income at issue was earned in activities unrelated to the unitary business. Being unable to carry this burden, the taxpayers were taxed on a proportion of their income.

Although the Supreme Court has expressed a preference for the three-factor apportionment formula which it approved in General Motors, Butler Brothers v. McColgan, and most recently in Container, it has, on occasion, upheld even a single-factor formula. Other sources have also voiced approval for a three-factor formula, although congressional proposals favor a two-factor approach. Thus, while the three-factor formula may be the most prevalent one in use, there is still considerable diversity in state taxation formulas.

The decision in Container ignores the continuing concern expressed by businesses and foreign governments over the lack of uniformity in state apportionment methods and the elusiveness of the unitary business principle. Congressional proposals for uniform legislation have failed, however, and local efforts by the states themselves have fallen short of the needed support and have been subject to constitutional attack.

In Container, the Court recognized that California's three-factor

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179 Mobil, 445 U.S. at 439; Exxon, 447 U.S. at 223.
180 Mobil, 445 U.S. at 439.
181 See supra note 174 and accompanying text.
183 103 S. Ct. at 2994. The Court stated that "[t]he three-factor formula used by California has gained wide approval precisely because payroll, property, and sales appear in combination to reflect a very large share of the activities by which value is generated. It is therefore able to avoid the sorts of distortions [of apportioning between 66% and 85% of the taxpayer's income to the taxing state by utilizing a single-factor formula based entirely on ownership of tangible property] that were present in Hans Rees' Sons." 184 See, e.g., Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1979) (Court upheld Iowa single-factor sales formula which attributed portion of income to state which gross sales made within the state bore to total gross sales).
185 See, e.g., Keesling, supra note 113, at 306.
187 See supra note 176.
188 See infra note 219-20 and accompanying text.
189 See supra note 186 and accompanying text.
190 A uniform method of taxation and a procedure for arbitration of disputes has been adopted by 22 states. This procedure is called the Multistate Tax Compact. Note, State Taxation of Interstate Businesses and the Multistate Tax Compact: The Search for a Delicate Uniformity, 11 Colum. J. L. & Soc. Pros. 231 (1975).
191 Id. at 247-54.
formula using sales, property, and payroll has its imperfections.\textsuperscript{192} For example, the weight given to each factor is arbitrary,\textsuperscript{193} and the factors can be manipulated to give more weight to those factors that will generate more revenue for the taxing state.\textsuperscript{194} There are also the previously discussed problems of differing definitions of factors, and multiple or even under-taxation.\textsuperscript{195} The Court approved California’s formula, however, because it viewed the three-factor formula as widely accepted, and because it felt that the factors used by California “reflect[ed] a very large share of the activities by which value is generated.”\textsuperscript{196} The reason the three-factor formula is so widely accepted may be that states realize the revenue it can generate.\textsuperscript{197} Unfortunately, no thorough analysis of the effects of the three-factor formula has been made. In both \textit{Container} and in \textit{Japan Line}, however, California’s three-factor formula resulted in double taxation.\textsuperscript{198}

The unitary business principle, also relied upon by the Court in reaching its decision in \textit{Container}, was described by the Court itself as “not . . . unitary.”\textsuperscript{199} The Court has discussed various factors it examines to determine whether a unitary business exists, e.g., centralization of management, functional integration, or economies of scale, but it has provided little guidance as to its application of these factors or the weight to be given each factor.\textsuperscript{200} In fact, a corporation can have some unitary factors and still not qualify as a unitary business.\textsuperscript{201} At some undefined point,\textsuperscript{202} the Court simply finds sufficient evidence to conclude that a unitary business exists.\textsuperscript{203} \textit{Container} was held to be a unitary business despite considerable evidence that its subsidiaries were autonomous,\textsuperscript{204} and despite charges that the stipulations of fact relied upon by the state court as unitary factors were misinterpreted.\textsuperscript{205}

\textsuperscript{192} 103 S. Ct. at 2949.
\textsuperscript{193} Id. at 2949 & n.20.
\textsuperscript{195} See supra notes 158-61 and accompanying text.
\textsuperscript{196} 103 S. Ct. at 2949.
\textsuperscript{197} See 136 Daily Tax Reports G-5-G-61 (July 14, 1983) (discussing Florida’s enactment of a statute similar to California’s statute in \textit{Container}. The statute is expected to raise about $95 million annually and is to be used to upgrade Florida’s education system).
\textsuperscript{198} See supra notes 63-64 and accompanying text.
\textsuperscript{199} 103 S. Ct. at 2941.
\textsuperscript{200} See, e.g., Woolworth, 458 S. Ct. at 136-38. See also the table in Seago, supra note 127, at 117, detailing the unitary business factors set forth in Woolworth.
\textsuperscript{201} See supra note 127.
\textsuperscript{202} Seago, supra note 127, at 116.
\textsuperscript{203} One author suggests that the \textit{Container} decision represents a tax break for multinational corporations that can alter their corporate structure turning foreign corporations into passive investments and thus providing protection from state taxation. See WhiteNack, \textit{State Litigation After the Container Decision}, 20 Tax Notes 771, 783 (Sept. 5, 1983).
\textsuperscript{204} 103 S. Ct. at 2943-44. See WhiteNack, supra note 203, at 772-73 for a comparison of the unitary v. non-unitary findings by the Court in \textit{Container}.
The Court's treatment of the Commerce Clause issues in *Container* is also disturbing. The Court makes light of the fact that the California taxing scheme has resulted in double taxation, and distinguishes the double tax in *Container* from the unconstitutional double tax in *Japan Line*, arguing that in *Japan Line* the double tax is inevitable. The dissent disputes this, pointing out that double taxation will always be inevitable under California's divergent taxing method because of the weight given to the factors in its formula. The dissent also criticizes California's three-factor formula by pointing out that it has no relationship to the amount of income earned in a specific area because a higher proportion of income is allocated to areas with higher wage rates, property values and sales. Although Container's subsidiaries earned more money than it did, more income was attributed to Container because California wages, property values, and sales costs are higher.

Also disturbing is the Court's dismissal of the possible foreign policy implications of its decision. It prefaced its discussion with the remark that "[t]his Court has little competence in determining precisely when foreign nations will be offended by particular acts, and even less competence in deciding how to balance a particular risk of retaliation against the sovereign right of the United States as a whole to let the States tax as they please." The Court then proceeded to find no indication that the Solicitor General is against the application of the unitary business principle and the formula apportionment method in *Container*. The Court ignored a memorandum pending before it in *Chicago Bridge & Iron Co. v. Caterpillar Tractor Co.*, a case dealing with the same issue. In the memorandum, the Solicitor General states that "the imposition of [a state tax] on the apportioned combined worldwide business income of a unitary group of related corporations, impairs federal uniformity in an area where such uniformity is essential." Refusing to rely on the Government's position in *Chicago Bridge* as indicative of the Government's stance in *Container*, the Court instead inexplicably assumed that the Government had changed its viewpoint since *Chicago Bridge*.

The possibility that any impact from its decision will be felt by foreign parties was similarly dismissed. The Court regarded the matter in *Container* as a local concern, stating that the tax in *Container* is on a...
domestic corporation and, therefore, foreign interests should not be concerned. The fact that subsidiaries located in a foreign country were being taxed was disregarded.

Foreign countries upset by the *Container* decision can retaliate with taxing measures that would be detrimental to U.S. interests. In fact, such retaliatory measures were discussed in letters submitted by Canada, France, the United Kingdom, and others, to protest the states' use of formula apportionment measures. Even if foreign governments agree that Container is an American concern (since it has been found to be a unitary business), they may still be concerned that such a tax will discourage American investment in foreign countries.

The decision in *Container* can perhaps be explained as a reaction to the criticism of *Japan Line*. After *Japan Line*, there were concerns that the costs of foreign commerce would be shouldered by local taxpayers. Although the Court in *Japan Line* destroyed a potential source of revenue for the states, a vast source of potential state revenue was opened up in *Container*. This fact was immediately apparent to Florida, which enacted a statute that essentially duplicates California's statute in order to get its share of revenue from multinational corporations.

The *Container* decision illuminates the need for a central coordinating authority or some form of uniform legislation to guide the states in taxing multistate and multinational corporations. A common formula apportionment method with uniform definitions is needed. More clear-cut guidelines must be formulated concerning what constitutes a unitary business. A tribunal to settle multiple taxation problems would also be helpful. Local efforts by the states have not solved the problem, and the Supreme Court cannot manage the difficult task of studying and assessing all possible contingencies. The task belongs to Congress.

With its decision in *Container* the Supreme Court chose to act in an area where action is needed. The Court has done little, however, to clear up the confusion that surrounds the unitary business principle and its application, or to provide uniformity in state apportionment formulas. The *Container* decision gives states the opportunity to obtain vast amounts of revenue by taxing multinational corporations according to the "Court-approved" California apportionment method. Unfortunately, it may also create disputes in the international business world.

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218 Id.
219 Id. at 2960 & n.4.
220 The dissent comments on this possibility in *Container*, 103 S. Ct. at 2959.
221 See Note, supra note 117, at 808.
222 See supra note 197 and accompanying text.
223 The Court also indicates that it will begin to be very selective about what cases it will hear in regard to whether a finding of a unitary business was proper. 103 S. Ct. at 2946 & n.14.
224 The *Container* decision has been criticized for not going far enough. WhiteNack, supra note 203, at 779-82 argues that the Supreme Court could have avoided future needless litigation by stating what actions invoke the prohibition of the commerce clause.
Uniformity is needed in this area. Perhaps the Court, with its action, will persuade others to act.

—CATHY M. RUDISILL