ORIGINAL

In the

Supreme Court of the United States

JAPAN LINE, LTD., ET AL.,

APPELLANTS,

V.

COUNTY OF LOS ANGELES, ET AL., No. 77-1378

APPELLEES.

Washington, D. C.
January 8, 1979

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JAPAN LINE, LTD., et al.,

Appellants,

v. No. 77-1378

COUNTY OF LOS ANGELES, et al.,

Appellees.

Washington, D. C.

Monday, January 8, 1979

The above-entitled matter came on for argument at 10:02 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

PETER L. BRIGER, ESQ., Briger & Associates, 299 Park Avenue, New York, New York 10017; on behalf of the Appellants.

KENT L. JONES, ESQ., Office of the Solicitor General, Department of Justice, Washington, D. C.; pro hac vice for the United States as amicus curiae

JAMES DEXTER CLARK, ESQ., Deputy County Counsel, Los Angeles, California; on behalf of the Appellees

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C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning and first this year in Japan Line, Ltd. v. County of Los Angeles.

Mr. Briger, you may proceed whenever you are ready.

ORAL ARGUMENT OF PETER L. BRIGER, ESQ.,

ON BEHALF OF THE APPELLANTS

MR. BRIGER: Mr. Chief Justice, and may it please the Court:

The precise issue to be decided in this case is whether the existence of situs through the fiction of an assumed average presence can be relied upon by appellees so as to tax foreign containers which are used exclusively in foreign commerce, are continuously in transit and which the trial court found had their home port in Japan, so as to justify a conclusion of continuous presence within appellee's jurisdiction. Such presence is necessary in order to permit the subjection of containers to an apportioned ad valorem California property tax. Such tax, it is noted, would be in addition to full ad valorem property taxes which have been levied upon the containers at their home port in Japan.

Unless the decision of the California Supreme Court is reversed, this case undoubtedly will have profound and adverse impacts upon the foreign trade relations of the United States. Indeed, the court, in requesting the Solicitor

General to express his views on the case, has recognized the important foreign policy and foreign relations questions triggered by California's unilateral rejection of the home port doctrine in the case of foreign owned instrumentalities used exclusively in foreign commerce.

QUESTION: Are you arguing both the home port doctrine and the customs convention, Mr. Briger?

MR. BRIGER: Yes, I am. The --

QUESTION: I thought perhaps you -- you tended to blend them together in that sentence.

MR. BRIGER: I do indeed. I believe that the customs convention is another indication of the frderal interest in this area and that the home port doctrine was a means enunciated by this Court more than 130 years ago in order to deal with the treatment of the taxation of foreign owned instrumentalities, that the customs convention is one of numerous areas of federal expression of its concern in this area.

QUESTION: But the home port doctrine is constitutionally based, is it not?

MR. BRIGER: Yes, it is.

QUESTION: And your case would not be as strong apart from the home port doctrine without the affirmative adoption of the customs convention, would it?

MR. BRIGER: I think it probably would be. What we

are arguing is that there are long established customs among the trading nations of the world which have been recognized by this Court in its adoption of the Hays v. Pacific Mail Shipping Company case. This is a basic commerce clause rule. And there are reliance interests of foreign governments on this long accepted policy. They have based their trade relations with the United States in connection with the international carriage of goods and passengers --

QUESTION: Well, what is it that they do, relying on --

MR. BRIGER: Well, every country, Your Honor -- and this comes out in the Solicitor General's brief -- every country, with the exception possibly of Afghanistan, in the treatment of the international carriage of goods and persons by aircraft, vessels or containers has followed a policy of reciprocal exemption from local or national taxes upon these instrumentalities, and all governments of the world in their trading relations have observed this policy.

QUESTION: But it is the legislative branch that speaks for this country on foreign policy, isn't it?

MR. BRIGER: Indeed.

QUESTION: And Hays v. Pacific Mail didn't depend on any action of the executive branch, did it, or the legislative branch?

MR. BRIGER: It did not. But there are really two

policies that coalesce. The Court in the Hays decision at that time came to this conclusion in order to eliminate the cumulative burdens of multiple taxation. There is a clear statement in that case.

Now, of course, the case was decided before the apportionment rule became the law for the states and --

QUESTION: Well, Hays wasn't an international case, was it?

MR. BRIGER: It dealt with ocean carriage and it dealt with --

QUESTION: But just between two ports in the United States --

MR. BRIGER: Indeed --

QUESTION: -- and the problem was among states of the United States.

MR. BRIGER: Well, Justice White, while the case did deal --

QUESTION: Well, give me one that dealt with international trade.

MR. BRIGER: Well, we are dealing with international trade in this case.

QUESTION: Just give me another one under Hays or any other one that dealt with international trade.

MR. BRIGER: The Court has never dealt with --

QUESTION: Well, that is what I thought. So to the

extent that Hays was a constitutional rule, it was a commerce clause rule and Congress could change it?

MR. BRIGER: Those were the specific facts in the Hays case.

QUESTION: Was the argument about the container convention presented to the California courts?

MR. BRIGER: No, I don't believe it was, Your Honor.

QUESTION: If it was not, may we consider it here?

MR. BRIGER: There were arguments that various treaties invalidated the imposition of the tax, specifically the Treaty of Friendship, Commerce and Navigation, the General Agreements on Tariffs and Trade, so that the argument was made that in general there were treaty obligations of the United States which indicated its interest in this area of the international carriage of goods in connection with foreign owned instrumentalities.

But we would argue that the commerce clause by itself gives the federal government without the necessity of any specific legislation or treaty the exclusive interest because this is an area that impacts upon the foreign relations of the United States, and there have been governments which for more than almost two-hundred years have relied upon this exemption from taxation.

In fact, we suggest in our brief that the California constitutional provision exempting domestic owned vessels from

taxation was inserted into the California law in recognition that under the home port doctrine, foreign owned vessels were accorded that privilege.

It is an area where there has been substantial reliance by foreign governments upon this rule, and that fact is the --

QUESTION: Do you think Hays would come out the same today?

MR. BRIGER: I believe --

QUESTION: Traffic between two states?

MR. BRIGER: Not at all, Justice White, and that is because the apportionment rule is the law for all of the states.

QUESTION: You are saying that something like the Hays rule that the Court and everyone thought appropriate for a long time is still appropriate for international trade?

MR. BRIGER: Yes, Your Honor, where the apportionment rule cannot be enforced upon foreign governments either by state and local governments or by the federal government. And it is really the major thrust of our argument and the lynch pin of our argument would be Standard Oil v. Peck, where this Court confirmed that the apportionment rule was the only means by which state and local governments could impose taxes in connection with interstate commerce. And once that rule became the law of the land, it was possible

for this Court to eliminate the burdens of multiple taxation which the Court since the time of Justice Stone has indicated would clearly be a violation of the commerce clause.

But absent the binding --

QUESTION: Well, you wouldn't say that there would be a violation of the commerce clause, would you, if the international practice had been just to the contrary?

MR. BRIGER: No, Your Honor, not at all, and we would argue that if there had been an international practice, whether by practice, custom, treaty, multilateral agreement, that that would not then involve the foreign relations of the United States.

But the point is that for two-hundred years this country has followed the practice of not imposing local property taxes upon foreign owned containers.

QUESTION: Well, you say it wouldn't involve the foreign relations of the United States. Now, supposing that in the interest of the administration's human rights policy it were determined by the executive here in Washington that a particular state government should release particular prisoners. Would you say that that is something that the executive would have power to order the state to do over and apart from any other substantive granted authority simply because it furthered the foreign relations of the country?

MR. BRIGER: It would depend on how significantly,

Justice Rehnquist, it interfered with the foreign relations of the country. If it were incidental and the states had a coextensive jurisdiction, it would be a weighing process. Here --

QUESTION: Would there be the same reciprocity factor that we have in international trade in the hypothetical presented by Mr. Justice Rehnquist?

MR. BRIGER: Well, this was the point I was just going to make, Your Honor, that here we are dealing with the clear situation where in the letter of the State Department, where they canvassed more than a hundred embassies, there seems to be a clearly established policy. I think we would have a very difficult time if roughly fifty percent of the nations were to impose these taxes and fifty percent did not.

QUESTION: Well, then the authority of a state to impose a tax depends on a head count of what other countries think about it, is that right?

MR. BRIGER: Not necessarily, Your Honor, but it may. What I am saying here is that there --

QUESTION: Can you conceive of a country that would say I think I should be taxed?

MR. BRIGER: Justice Marshall, that could be. If the government --

QUESTION: Do you really think that, please tax me?

MR. BRIGER: Yes, Your Honor, I could see that if

the governments decided that apportionment made more sense and was more rational and they adopted rules through some type of multilateral treaty. If, for instance, in connection with the current trade negotiations it were determined by a group of nations that it is a more sensible approach to follow apportionment, I could see --

QUESTION: Then why not turn it all over to them and let them decide it all? What are you here for?

MR. BRIGER: It might well be a good idea, and it is our -- since there has been --

QUESTION: Would you have to change the Constitution a little bit?

MR. BRIGER: I don't think so at all. I think that the states could urge the federal government indeed to enter into new treaties with foreign governments, and this could be done as a matter of the treaty of the federal government and in that sense it might be a rational way to approach the problem.

QUESTION: But that is not the way you approach it.

MR. BRIGER: No, Your Honor, that is --

QUESTION: You brought it here.

MR. BRIGER: We brought it here because there has been this clear custom, and where there has been a custom and a reliance interest by foreign governments, what we are suggesting is that the states, even in their power to tax,

cannot change a fundamental principle which has been recognized by the international community of nations for more than two-hundred years, probably longer.

QUESTION: Well, you are familiar with our Michelin Tire case, are you not?

MR. BRIGER: Yes, I am indeed.

QUESTION: What if the State Department had taken a census of foreign nations in that case and they had come out the same way, that they objected to this form of taxation, do you think Michelin should have come out differently in this Court?

MR. BRIGER: No, I think Michelin is correct, and I think that Michelin -- and the Court was very careful to indicate in Michelin, by the way, that they would not tax under the import-export clause or under the commerce clause property that was merely in transit. And I believe the Court left that exception there because they were concerned with the burdens of multiple taxation in an area where apportionment was not recognized by our trading partners.

QUESTION: Mr. Briger, your reference to this canvas of a hundred embassies I take it is not to suggest that we take a poll of what they think about it, but the implications of their answer and that those implications are that if you tax the components of our vessels, we are going to tax the components of your vessels. Isn't that --

MR. BRIGER: Indeed, that is the sum and substance of it. Also it is the preception of that department of the United States government which is charged with foreign relations, and whether the report is correct or not, it is the view of that agency which has the responsibility for the foreign relations of the United States, and it is important because this is the perception of the State Department of the foreign relations question. It is not a matter of a popularity contest, but it is the view of that agency charged with the foreign affairs of the United States and it is making its comment that it regards the imposition of these taxes as an event which could have an impact upon the foreign relations of the United States.

QUESTION: Mr. Briger, are you making either import-export or a tonnage clause argument?

MR. BRIGER: Well, we made in our brief a tonnage clause argument, and it is there. I don't really intend to elaborate on that --

QUESTION: Before if the tonnage clause prohibited this, there would be nothing Congress could do about it, is that right?

MR. BRIGER: That is correct, that would be an absolute test.

QUESTION: Are you suggesting then that the tonnage clause is a straw in the wind?

MR. BRIGER: It is a possible argument which if one looks at the impact of the tax and we find that the tax can apply only because of the repeated events of importation and exportation -- now we think there is an argument there that the Court has said we will not look to the mere label on a tax, we will look to its effect. We would argue that even though this is a general property tax, it applies solely because of this transit situation, and in that sense we think there is an argument that it could be considered a tonnage duty.

QUESTION: Mr. Briger, may I get back to the question my brother Blackman put to you before. I think you told us that in the California courts you argued the treaty of friendship between the United States and Japan, but the United States does not support you in that argument here, does it?

MR. BRIGER: That's correct, Your Honor.

QUESTION: Now, it does support you though in the customs convention on the containers argument, but you never raised that in the California courts.

MR. BRIGER: No, that was not raised specifically in the California courts.

QUESTION: I think my brother Blackmun asked you before then how can you be heard on the customs convention argument here.

MR. BRIGER: Because it is a law of the country and

the fact that a treaty -- the treaty is a law of the country.

QUESTION: But it is a treaty, as I recall it.

MR. BRIGER: Yes, it is a treaty.

QUESTION: But it deals only with import duties and taxes and import prohibitions and that sort of thing, doesn't it?

MR. BRIGER: Yes.

QUESTION: It doesn't deal with the type of tax we are dealing with here.

MR. BRIGER: Conceivably it does. I am not --

QUESTION: Under what --

MR. BRIGER: Again, under this concept that it talks about duties for taxes of any type whatsoever by reason of import, and we believe that there is an argument that can be made that the tax applies only by virtue of the repeated import and export of the containers, but we would -- we look to the treaty in --

QUESTION: Well, if it 's an applicable treaty, I take it that should end the case, shouldn't it, in your favor?

MR. BRIGER: Yes, Justice Brennan.

QUESTION: If it is an applicable treaty.

MR. BRIGER: If it is an applicable treaty. We find more support in the treaty as a general expression of the federal government's interest in promoting the usage of

containers. We think there is an argument that the language "any taxes whatsoever by reason of export" can be extended to the application of this tax in this case. But we find more solace from the treaty in expressing the views of the federal government to expand and nurture the use of containers as a new technological development in the shipment of cargo.

QUESTION: It certainly would have been sensible though if the convention addressed itself to containers and new taxes. I wonder, it would have been quite sensible to deal with property taxes like that, wouldn't it, instead of the --

MR. BRIGER: This is the great --

QUESTION: -- and then to reflect this international custom.

MR. BRIGER: Justice White, it is very difficult in dealing in a codified world. The drafters of tax statutes, in their attempts to deal with each specific problem, it is one of the criticisms and that is why the tax --

QUESTION: Well, they certainly considered import taxes because they use that expression in the convention. But was there any discussion at all in connection with the convention of the type of tax we are talking about?

MR. BRIGER: Your Honor, the reason why I believe that there was not was that the perception at the time the convention was entered into was that these were properly

dealt with under the home port doctrine.

QUESTION: I see.

MR. BRIGER: That would be our best analysis of the situation.

QUESTION: When was this negotiated?

MR. BRIGER: Well, the container convention which began to be negotiated in the 1960's as containers began to be used at that time. The 1962 convention was executed by certain of the signatory states in the 1960's. I believe the United States became a party to the treaty in 1972. But we feel that the lack of any specificity in the container is due to the general understanding at the time that the home port doctrine eliminated this type of tax, and certainly California in that period by following the SAS case certainly felt that way. And it would appear that to the drafters of this type treaty, that there was no need to put in this provision. And I believe the foreign and domestic airlines make certain points to that effect in their brief, that this was the understanding.

QUESTION: But you agree that the home port doctrine has heretofore never been applied by this Court to anything except domestic commerce, that it hasn't been applied to international commerce?

MR. BRIGER: Indeed.

QUSTION: And do other countries have a similar home

port doctrine to ours?

MR. BRIGER: Yes. For instance, Japan -- not only did the trial court find that Japan applied the home port doctrine, but we submitted to this Court a translation of the property tax law of Japan. Now, in that law owners of personal property such as containers, a Japanese company is required to register that property at the place of -- at its principal place of business in Japan, and a tax of 1.4 percent is imposed by Japan upon the value of the property as listed in that register of assets. So Japan certainly follows a home port doctrine.

QUESTION: Why would our negotiators be so confident that the home port doctrine would cover property taxes when this Court had never applied it to international trade?

MR. BRIGER: It seemed to be the practice, Your Honor, and --

QUESTION: When you say "seemed to be the practice," what do you mean by that?

MR. BRIGER: That for more than two-hundred years states have not levied personal property taxes on things such as airplanes. In the one case where it was attempted in California, we have the SAS case.

We feel that the Michelin case, in Michelin and Washington Stevedores there was a coalescing of many of the common principles, but they were clear to indicate that

property in transit, even if a tax was levied on a non-discriminatory basis, would be considered to violate both the import-export and the commerce clause, and I think that is the exact situation that we are dealing with here.

QUESTION: Are the containers here handled as the containers were in Michelin? As I recall in Michelin, they arrived at wherever it was, the state, North Carolina, loaded with tires and were unloaded and stored in a warehouse, some of them coming in from Nova Scotia, they simply took trailers and attached tracters to them and shipped them from Nova Scotia that way. But overseas they took the wheels off in France, was it --

MR. BRIGER: In Michelin, these containers are not containers with wheels, they are just boxes and they are shipped in these vessels which are specifically designed to handle --

QUESTION: But once they get to California, how do they get to the other states?

MR. BRIGER: By rail or truck, Your Honor. They are carried flat --

QUESTION: So they are not themselves trailers?

MR. BRIGER: No, they are hold-on trailers. But just in response to another question that Judge Rehnquist had raised, while the Court has never dealt with a situation imposing property taxes upon foreign owned instrumentalities,

it should be noted that none of the apportionment cases such as Pullman's Palace v. Pennsylvania, Ott v. Mississippi, or Braniff dealt with foreign owned instrumentalities. The key to our position is that neither this Court, the federal government nor the states have the right to require foreign governments to accept the apportionment approach. It might be logical if they did, and it might well be something that could be done through treaty.

QUESTION: You say that Congress couldn't by legislation impose such a tax as this or authorize the states to impose such a tax as this?

MR. BRIGER: I believe it could.

QUESTION: I thought a minute ago you said that not even the federal government could authorize the imposition of this tax.

MR. BRIGER: No, not the imposition of this tax, but it could not require foreign governments to accept apportionment as a means of the international taxation of these containers. We don't have that right, Your Honor, the federal government.

QUESTION: Do you think the Secretary of the Treasury has any regulatory power pursuant to the convention on containers or pursuant to any other statute to effect this tax?

MR. BRIGER: Well --

QUESTION: He has issued regulations to implement the United States duties under the container convention.

MR. BRIGER: Yes.

QUESTION: Do you think he could reach this question?

MR. BRIGER: No, I believe that this question can be reached only by the Court.

QUESTION: May I ask a question. You keep talking about two-hundred years. How long have you had these containers? About ten, right?

MR. BRIGER: Yes, Your Honor. In --

QUESTION: They didn't have anything like it before, did they?

MR. BRIGER: No, but in the --

QUESTION: It neither floats nor rolls of its own, it doesn't move at all? It can't move at all?

MR. BRIGER: No, it has to be hauled by something or carried by something.

QUESTION: So that is not a vessel?

MR. BRIGER: There is a great deal of --

QUESTION: It is a vessel like a teapot is a vessel, right?

MR. BRIGER: Well, for want of a better term, Justice Marshall, it is referred to as an instrumentality.

QUESTION: It is like a box.

MR. BRIGER: It is like a box, and I suppose an

airplane or a vessel is something like a box.

QUESTION: An airplane moves of its own, a box doesn't.

MR. BRIGER: No, this box has to be hauled, but we are analogizing it to vessels or to aircraft from the standpoint that it carries things in commerce and it may not have its own motor power --

QUESTION: Wouldn't they go to a warehouse?

MR. BRIGER: The containers, Your Honor?

QUESTION: Yes.

MR. BRIGER: It is not my understanding that they are carried to a warehouse --

QUESTION: What is the difference between a container sitting there on the ground and a warehouse, if you don't move the container?

MR. BRIGER: I think that is perhaps a different case because our containers are constantly in transit.

QUESTION: I agree that it is different, but there wouldn't be any difference in my case, would there?

MR. BRIGER: If the container --

QUESTION: If you have a warehouse that holds a thousand tires and a container that holds a thousand tires, and they both sit there for a year, the difference is what?

MR. BRIGER: It would depend on the facts of the case and in your illustration the container could be used as

a warehouse. The containers that we are dealing with --

QUESTION: And then you could tax it?

MR. BRIGER: If it were sedentary, I suppose --

QUESTION: If it were used as a warehouse, could California tax it?

MR. BRIGER: If it were continually there, yes, I would think that there are many distinctions. I mean it is almost like when an item of personal property becomes fixed to the real estate, it becomes real estate under the law. And I suppose a container would be no different from any other piece of personalty that became affixed to the realty. It would depend on the usage. I think that is a different case because in our case the average stay of the containers were stipulated by the parties to be less than three weeks per visit, and they were continually in motion. I don't disagree that if the container were affixed to the real estate it could be a warehouse or a building or anything else.

QUESTION: Well, you think the basis for ruling in your favor is the danger of double taxation, is that it? Is that really it?

MR. BRIGER: It is part of the danger. It isn't merely a question of double taxation. What we have in this case is long and well established reliance interests of foreign governments and it is very similar to what the Court admonished --

QUESTION: Well, what should California do about containers from Afghanistan, if there are any?

MR. BRIGER: Well, we feel that California can do two things. Number one, there are constitutionally viable means of collecting the value of services, benefits or opportunities that can be imposed within the constraints of this particular situation, namely to levy specific user charges; or, secondly, the states are not without the means to attempt to influence the federal government to seek a new rule.

QUESTION: But now you are talking about all containers, not just containers from Afghanistan. What about this property tax on containers from Afghanistan?

MR. BRIGER: Well, we think because of the foreign relations aspects of it, whether there is going to be retaliatory taxes imposed is something better left to the State Department and not to be determined by any number of local governments. The question of retaliation or reciprocity is the manner in which this international carriage of goods and cargo has been dealt with, so that if we are going to have either reciprocal exemptions or retaliatory taxes with our foreign trading partners, that clearly seems to be a matter of exclusive federal concern.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Jones.

ORAL ARGUMENT OF KENT L. JONES, ESQ.,

PRO HAC VICE FOR THE UNITED STATES AS

AMICUS CURIAE

MR. JONES: Mr. Chief Justice, and may it please the Court:

Concern has been expressed so far on the question of whether this Court has ever applied the home port doctrine in the international context. Of course, every time the Court has distinguished a case, it has done so with the express recognition that the rule may be different for international transport, and in the first case it distinguished Hays, the Pullman's Palace Car Company case, the Court expressly stated that the rule with regard to instruments for intercommunication with other nations may require national treatment.

But at least since this Court's decision in Hays, and until the imposition of the tax by appellees in this case, the consistent domestic practice of the United States has been to exempt foreign owned and domiciled instruments of foreign commerce from local property taxation. Our domestic practice in this regard is conformed to the international custom that affords an immunity from local property taxation to other nations' instruments of world commerce.

QUESTION: Mr. Jones, what if this container had been used not only to ship material from Japan to Long Beach and inland from Long Beach, say, to Sacramento, but then a

separate trip had been made in the container shipping goods from Sacramento down to the Imperial Valley and then had gone back to Long Beach?

MR. JONES: As I understand your question, at least part of that commerce was domestic commerce?

QUESTION: Right.

MR. JONES: Well, in that context the international custom wouldn't apply because the international rule would not purport to enter into the regulation of the domestic commerce between points within the nation.

QUESTION: So the container could -- a pro rata tax could be levied on the container based on the portion of the time it spent making the journey from Sacramento to another point in California carrying cargo?

MR. JONES: If that journey were in domestic commerce as opposed to simply carrying imported goods further along or bringing exported goods out, that would not be inconsistent with our understanding of the international practice.

QUESTION: Well, Mr. Jones, your Footnote 14 suggests another answer, "Under Article 11 of the Customs Convention on Containers...containers that are used 'even occasionally' for domestic traffic...may be taxed within" --

MR. JONES: Article 11 deals with the question of -- no, I think that Article 11 is exactly consistent with what I said.

QUESTION: Well, I would suggest maybe another answer to Mr. Justice Rehnquist, is it?

MR. JONES: But our position with regard to the Customs Convention on Containers is that by its terms it only restricts the imposition of duties. I intend to discuss at the close of my argument why we think it also has relevance to --

QUESTION: Well, what does your Footnote 14 mean? It is yours, isn't it?

MR. JONES: Yes, it is.

QUESTION: And you say that the Customs Convention, Article 11, says containers used even occasionally for domestic traffic may be subjected to duties and taxes within that nation.

MR. JONES: Well, I don't see -- I am having trouble seeing --

QUESTION: That is not another answer. It is a different ground for the same answer, isn't it?

MR. JONES: Yes, I wouldn't argue with that. The immunity conferred by the international custom is not simply a commercial favor granted by nations to foreign corporations. Instead, it is based on a recognition of the special interests that each nation possesses in the development and utilization of its instruments for world trade and is in this sense an expression of deference and mutual accommodation among

commercial nations.

The taxed imposed by appellees in this case and the similar tax on foreign aircraft that the proposed has proposed to assess is a direct departure from the accepted international practice. The appellees claim that because the tax is an apportioned tax, it does not unconstitutionally burden commerce. But this argument we submit is made within a parochial and unrealistic framework.

It is true that as recently as the Washington Stevedoring case, this Court has stated that when a tax on commerce within the United States is apportioned among the states, multiple burdens on such commerce "logically cannot occur." But the logic of that conclusion depends on the fact that in cases involving domestic or interstate commerce, such as the Standard Oil and Braniff cases, this Court can require the state of domicile as well as the non-domiciliary state to apportion the tax with the result that the property in aggregate is subject to only one tax on its full value.

QUESTION: Incidentally, Mr. Jones, the government makes neither a tonnage nor import-export clause argument, does it?

MR. JONES: That's correct.

QUESTION: You rely exclusively on the commerce clause argument?

MR. JONES: Well, we rely exclusively on the commerce

clause. We think the import-export clause argument could be investigated but is wholly subsidiary to the commerce clause argument. If we lose on the commerce clause argument, we would definitely lose on the import-export clause argument.

QUESTION: But your Customs Convention argument isn't an independent one, you don't --

MR. JONES: It is an independent argument which --

QUESTION: But that isn't necessarily commerce.

MR. JONES: No, I would say it is a supremacy clause argument.

The logic of the domestic cases, however, have not and cannot be realistically applied to foreign domiciled instruments of foreign commerce. The international custom that exempts these instruments from local property taxation also recognizes, as this Court recognized in Hays, that the nation of domicile may impose a full tax on the value of its instruments of foreign trade. The practical, logical consequence of appellee's unilateral imposition of its tax in conflict with the international practice is to inflict a multiple tax burden on foreign domiciled instruments of commerce and especially disadvantage this commerce because of its origin.

The burden cannot simply be removed by international agreement, as the state court suggests. Even assuming that a rule of apportioned taxation is desirable in the international context, such a rule cannot be dictated to the world by the

United States, much less by a single state. The State Department has noted that there is no realistic likelihood that other nations will be willing to alter the international practice merely to conform to the state's contrary rule. Retaliation rather than accommodation appears the more likely response to any unilateral domestic action.

Unless foreign commerce is to suffer, the tax treatment of foreign domiciled instruments of foreign commerce necessarily requires a uniform national rule that is based either on the accepted international practice or results from the reciprocal negotiations rather than international fiat.

QUESTION: Well, would you say that is consistent with the Bob-Lo case, what you just said?

MR. JONES: Yes.

QUESTION: That there have been either reciprocal negotiations or uniform practice?

MR. JONES: No, I would say that the Court's conclusion in that case was that there was no need for a uniform national rule or in any event that the state's rule didn't conflict with any such need.

QUESTION: But that isn't quite what you said in the sentence before that, is it, that it has to depend either on uniform international practice or on negotiations reciprocal?

MR. JONES: The uniform rule that we think is needed in this case would have to come either from the accepted

international practice or a revision of that practice that could only be obtained by reciprocal negotiations.

QUESTION: But you say in some cases international commerce does not "need" a uniform rule?

MR. JONES: I would say that that is correct. The state's interjection of its single voice on a matter that has previously been characterized by and we think requires international accommodation has occasioned substantial expressions of concern by our major trading partners. The principle of mutual accommodation that underlies the home port rule and the desire to avoid multiple burdens on foreign trade has consistently been reflected in our foreign policy as in our adoption of international conventions to provide temporary free admission to this country of foreign containers and aircraft employed in foreign commerce.

The state's independent action threatens the national interests in conducting foreign commercial relations on a basis of international mutuality and reciprocity. We submit that the action of a single state cannot consistent with the commerce clause be allowed to define the appropriate foreign commercial policy for the entire union.

As we noted in our brief, we think there is an additional reason that appellee's tax is invalid based on the rationale of the McGoldrick case. In McGoldrick, this Court had before it the provisions of the customs laws that permit

imported articles to be admitted free of duty for manufacture and re-exportation. The Court held that the objectives of this federal immunity was to provide a competitive advantage to the trade and that that would be injured if the state were allowed to impose its general sales tax on the merchandise, thereby lessening the competitive advantage that Congress had created.

The Court concluded that the state tax was invalid because in this practical operation it tended to frustrate the federal objective.

In our brief, we note that the Customs Convention on Containers provides similar treatment to foreign owned containers in that the containers are to be admitted free of duty for exclusive use in foreign commerce.

QUESTION: Do you agree that this wasn't raised before the Supreme Court of California?

MR. JONES: My understanding of the record is that the effect of the -- the possibility of the state tax was inconsistent with the Container Convention was raised. Now, the way in which the argument was framed below was different than the wya it is framed here. Below it was framed simply as a question, as I understand it, of whether the state tax was a prohibited duty. Here it is raised on a different basis, but it is our understanding that the Container Convention was discussed by the court below.

QUESTION: But another treaty was presented, I take it, and at least the treaty clause or the supremacy clause was -- that kind of an argument was presented?

MR. JONES: That is true and in this sense the cause of action was stated. It was certainly claimed that the Container Convention as a treaty but there was the added operation of the state --

QUESTION: Wasn't the treaty of friendship relied upon, too?

MR. JONES: Yes, it was raised also.

QUESTION: Which was another supremacy clause argument.

MR. JONES: Yes.

QUESTION: Well, would you think it would be sufficient for the state court, for a party to rely on the equal protection clause of the Fourteenth Amendment and come up here and say I abandon my equal protection clause argument, I am now relying on the due process clause and say I talked about the Fourteenth Amendment in the State Supreme Court?

MR. JONES: Well, with the last caveat that you added, I would say that, yes, he could raise it if he talked about it in the State Supreme Court.

QUESTION: Is it in the briefs?

MR. JONES: Oh, yes, sir.

QUESTION: In the state court?

MR. JONES: Oh, I would have to defer to counsel on that. I can't say for certain.

QUESTION: Well, how can we be sure that it was raised if we can't find it in the brief?

MR. JONES: Well, my understanding was --

QUESTION: If you want to say that it was raised, wouldn't you be more helpful if you could show it in the briefs?

MR. JONES: As I recall the decision of the State Supreme Court which, of course, incorporated the decision of the appellate court, the Container Convention argument had been rejected in the case the court previously considered, the Sea-Land case, and it is my recollection -- which may be incorrect, and I cannot find the source at this point -- that there was reference made in the opinion in this Court to the fact that the customs convention had been held to be inapplicable in its prior decision. The issue has been presented to the state court --

QUESTION: So the point that you allege, you want us to look it up?

MR. JONES: I don't want you to look it up. I wish I knew where it were, but I regret that I do not. I can if time permits, I will attempt to find it.

The objective of the Container Convention is to facilitate the use of the containers in world trade by avoiding

the imposition of multiple burdens on the containers as they move from nation to nation. The tax imposed in this case could under appellee's theory be assessed also by other states and other nations and thus create a multiple barrier to the use of containers as instruments in world trade, a barrier that would frustrate the objective of the Container Convention.

I should note in one limited regard the regulations implementing the Container Convention go beyond the convention's subjstantive requirement that containers be exempted from duties only while they are engaged exclusively in foreign commerce. Subsection (f) of the regulations allows a narrow exception for domestic use of foreign containers if the domestic traffic is only incidental to the foreign commerce and is along the container's route in international trade.

If any foreign containers travel under that exception, state taxation of the incidental domestic use would not conflict with the objective of this convention which affords an immunity only when the container moves exclusively in foreign commerce.

QUESTION: Where does the Secretary's authority come from to issue regulations?

MR. JONES: We don't think that the regulations themselves here in this case control our analysis under the

McGoldrick theory, any more than the regulations were thought relevant by the Court in McGoldrick. We think that the substantive scheme is established by the treaty as it was established by the statute in McGoldrick, so --

QUESTION: So you rely only on the treaty and not on the regulations?

MR. JONES: That's correct.

QUESTION: But the regulatory authority arises under a separate statute?

MR. JONES: The regulatory authority -- there is regulatory authority to amplify the substantive scheme. We wouldn't contend that an incidental domestic use exception was inconsistent with the Container Convention, but we would say that it is not supported by the Container Convention and that it is only the objectives of the Container Convention to protect the use of these instruments as they are used exclusively in foreign commerce, thus state taxation of the incidental domestic use would not conflict with the Container Convention. It is only where the tax is applied, as in this case, to containers that are involved exclusively in foreign commerce that the tax is in conflict with international practice and also tends to frustrate the objectives of the Container Convention.

Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Clark.

ORAL ARGUMENT OF JAMES DEXTER CLARK, ESQ.,

ON BEHALF OF THE APPELLEES

MR. CLARK: Mr. Chief Justice, and may it please the Court:

I would like to get right down to the nature of the home port doctrine, if I may. The home port doctrine in essence says that there will be no taxation of a movable piece of property by a state which is visited unless actual situs is acquired there.

In actual fact, the dispute between the appellants and the appellees in this case does not involve the existence or non-existence of a home port doctrine but only the exception thereto, and that is whether or not there will be indeed an exception created by continuous presence by means of rotation or whether each piece of property must exist in the taxing jurisdiction all year long. That is the nub of the real home port doctrine. That is the nub of the dispute in this case, and it is also the nub of the enactment, that is, the treaty dispute in this case.

I would like to proceed directly to the treaties involving friendship, commerce and navigation, and specifically that one involving Japan. The first --

QUESTION: Before you do that, just on the point you just made about the home port doctrine, would it apply -- would there be any difference if this case involved the

taxation on the vessel itself rather than the container?

MR. CLARK: Quite frankly --

QUESTION: The vessels were there, you know, ten or fifteen days at a time.

MR. CLARK: Quite frankly, Mr. Justice Stevens, it would depend upon whether that presence was created there. If a vessel came into the tax -- I'm sorry, it depends upon two things, not only the presence, but it also depends upon the benefits and protections conferred by the taxing jurisdiction.

QUESTION: Suppose they are precisely the same, there is the same amount of time in the port and exactly the same protections?

MR. CLARK: If those vessels came in and stayed there for an average of three weeks and came in on a rotation basis, as far as the Constitution is concerned I believe there is no difference whatsoever.

QUESTION: Well, that would be the same if the average were three days, wouldn't it?

MR. CLARK: That is correct, Mr. Justice Stewart, if the continuous presence were there and --

QUESTION: For an average of three days per annum.

MR. CLARK: Per individual ship.

QUESTION: Yes.

MR. CLARK: That is correct, Mr. Justice Stewart. That would be the case. I think --

QUESTION: And that was the case, wasn't it, in the Hays case, that was a New York corporation with New York shareholders, but their ships regularly went to San Francisco and the opinion states -- I don't have it in front of me -- that the ships were in San Francisco regularly and spent enough time in San Francisco to unload and get new stores aboard and so on, and presumably they were there for an average length of time, each ship, for each year.

MR. CLARK: Judge Stewart, the problem in Hays, of course, not only had it not considered the apportionment idea but in addition there was no continuous presence cited in that case. There was no year-long presence cited in that case.

QUESTION: But there was in fact an average presence per ship, obviously, wasn't there?

MR. CLARK: That's correct, Your Honor, but the tax was a full ad valorem tax, and the tax dealt with not an apportioned tax but a tax on each ship as its full value, and that is I think the real distinction in terms of Hays' factual situation and this one, that we do not pretend that we can tax each container on a full ad valorem basis. We contend that we can tax the continuous presence of all of those containers in the taxing jurisdiction. I think that is a key difference, between when Pullman's Palace Car went to that difference, it said when it involved the situation of foreign

versus domestic carriers or international versus not international carriers, it was looking at a time I believe when there were very few fleets of ships under one ownership, and it was looking at a single presence or a single item at a time, and the opinion in Pullman's Palace Car said that, while those instrumentalities in foreign commerce in no way maintain themselves as a continuous presence in the taxing jurisdiction. That is totally different. But at the same time, of course, Pullman's did recognize the idea that instrumentalities of foreign commerce as well as instrumentalities of interstate commerce may be taxed.

QUESTION: Mr. Clark, did I understand you right that in the good old days when the Queen Mary and the Queen Elizabeth were coming over every week, that Cunard could be taxed, because if so New York wouldn't have all of this financial problem.

(Laughter)

MR. CLARK: Mr. Jusice Marshall, if that --

QUESTION: I don't understand how you can tax a ship that comes back and forth and say you are not taxing commerce --

MR. CLARK: Mr. Justice Marshall --

QUESTION: -- a ship that is in commerce.

MR. CLARK: -- the logical extension of that is if you say that the railroad cars in Pullman's Palace Car may be

taxed, then I believe if the benefits and protections are there, you are not taxing commerce as such, you are recouping the return on the benefits and protections conferred and the burdens on the local government. The distinction -- yes, Mr. Justice Marshall?

QUESTION: Well, what benefits do you give to a ship? Doesn't a ship have its own firefighting equipment?

MR. CLARK: It may have, and it may have a

QUESTION: They may have? Aren't they required to have it in order to come into port?

MR. CLARK: Yes, Mr. Justice Marshall, that is true, too, and also ports have their own firefighting equipment, as the appellants pointed out, as far as Long Beach is concerned. Whether or not the fee imposed by the court would negate the idea of a benefits and protections test as applied to a vessel, I don't know because I have not looked into the question of a local jurisdiction's benefits and protections as applied to a vessel. I do know that if the benefits and protections are there, that I believe that it is the local government's right to recoup that particular buden on them.

I admit that the containers I think are quite distinguishable from vessels in that they more clearly supply those burdens on local government. They go through our roads, they stay here for at least for an average of three weeks, they entail police and fire protection by the municipalities as

well as the county throughout their stay.

QUESTION: Any more than the truck itself that bears them?

MR. CLARK: Mr. Chief Justice, that is in all probability, no, as long as that truck has the same kind of existence in the taxing jurisdiction.

QUESTION: The carrier, the container here doesn't wear the highway out any more than the truck would if they had taken everything out of the container and piled it on the truck.

MR. CLARK: Yes, it would, Your Honor. Quite frankly, it would, with the added weight.

QUESTION: No.

MR. CLARK: There would be a substantial difference in --

QUESTION: Does the record show what the added weight is?

MR. CLARK: No, it does not, Your Honor. But, Mr. Chief Justice, when we arrived at the particular point in question, I think we have all of those benefits and protections which we have logically cited in our brief, and it is the appellant's burden to dispute that and to reject the fact that the services to which the tax is put does not apply to them, and I think that we have logically shown that they do apply to them, that fire and police protection apply to them,

that the flood control applies to them, that all of the other services which aid the appellants in coming into our taxing jurisdiction as an enterprise and earning profit should be recouped by the local government.

Once you get beyond that point, we look into the treaty itself to determine whether or not the federal government has indeed enacted a particular point in order to disturb that relationship, I think it is wise to look at the friendship, commerce and navigation treaties. And the start of that inquiry, of course, is Article 22, paragraph 4, where national treatment is defined differently for the states and territories than it is for the United States itself, and by treaty national treatment does not say no less than treatment you will give to other people. It says that national treatment equals the same treatment you give enterprises from other states, and relating that national treatment to the articles which are key in this particular case we run up against the import-export provision in Article 14, paragraph 5, which says you will give national treatment in all respects to import-export; in Article 19, paragraph 3, you will give national treatment and equal treatment to vessels coming into your territory; and in Article 16, paragraph 1, you will give national treatment with regard to internal taxes.

I believe that the friendship, commerce, and navigation treaties thereby show that the states -- that the federal

government, even if we admit the federal power to exist to exempt from state taxation without taking the responsibility for the services provided, even if we say that that power exists in the federal government, we have a problem with regard to the FCN treaties. And one would believe that in light of the apportionment statements in the FCN treaties, in light of the particular statements with regard to import-export and vessels and internal taxes, that some demonstrable showing with regard to the Container Convention would be present if the Container Convention is cited as apparently overruling the FCN treaties, that some positive showing -- and as a matter of fact, the Secretary's authority under 19 U.S.C. 1322(a) shed even additional light beyond that, and that is that the Secretary has the authority with regard to all instrumentalties of commerce which come from foreign countries to say that they will be exempt from the ordinary customs laws.

Now, if we say that this non-discriminatory uniform property tax is indeed a customs law, then I think we have said that practically every general tax in the country is a customs law. I find no allusion to property taxes in 19 U.S.C. whatsoever. I find no allusion to property taxes in the Customs Convention or the Container Convention, which I believe ought to be present if we are going to have such an impact which was acknowledged in the FCN treaties to be the other way. We would have something explicit in the Container

Convention. And to simply say that property is taxed by reason of importation simply because it comes into the taxing jurisdiction is to say that every tax on every piece of foreign property is immune.

Now, the idea is that in essence what the appellants are really -- the logic of the appellant's position is that because there is a danger of multiple taxation, we should not tax this property which has exactly the same kind of benefits and burden relationship as any other property continuously existing in the taxing jurisdiction. That is not so to be wrong by the appellants of the United States or anyone.

The United States relies on a custom of international law, and they prove half of it. They say that some countries do not tax our property going into their jurisdiction, but they do not prove the other half. They do not say that they have personal property tax structure in their country and therefore they have made some kind of exception. They do not say that they do not recoup these matters by other kinds of fees or taxes.

They simply say that when it gets down to personal property taxes, most other countries don't impose them and then they cite a few exceptions, and that is the thirty-day rule, the ninety-day rule in Afghanistan. One would believe therefore that since we have a thirty-day rule on the customs laws of other countries, that therefore California could tax

if the containers were here for over thirty days.

Now, we do have a questionmark on the factual stipulation, the average is three weeks and no less than six months. It is quite possible that many of those containers are over here for over thirty days. We don't know. But the very idea is that if they are, then California would be going along reciprocally with those nations who impose a thirty-day rule.

QUESTION: Tell me, Mr. Clark, if you prevail, could Congress constitutionally prohibit this tax?

MR. CLARK: Mr. Justice Brennan, it is not simply the power to prohibit that the United States or the Solicitor General seeks.

QUESTION: No, no. My question is if you prevail.

MR. CLARK: Yes, sir.

QUESTION: If you prevail.

MR. CLARK: Right.

QUESTION: Could Congress nevertheless prohibit the county from imposing this tax?

MR. CLARK: Right, Mr. Justice Brennan. I believe it goes two ways.

QUESTION: I see.

MR. CLARK: I think that Congress can prohibit perhaps this particular levy in the national interest if it also does not take -- if it also takes responsibility for the benefits and protections conferred. What the --

QUESTION: How does it do that?

MR. CLARK: Well, the Solicitor General is urging this Court to adopt a position that would say in essence that Congress can exempt a piece of property from state taxation whereas at the same time it leaves the state holding the bag for providing the benefits and protections to that particular piece of property. Now, if it does that in the name of reciprocity, it is in essence saying, well, gee, this businessman in Virginia needs some help and he is operating in Japan, therefore we are going to confer a benefit on a Japanese company operating in California.

QUESTION: But isn't the state of California perfectly free if the judgment of the Supreme Court of California is reversed here to say to hell with these containers, we are not going to provide any protection to them because they don't contribute, we are not allowed to exact a share of their tax burden?

MR. CLARK: That may be true, Mr. Justice Brennan, because I have a rough time saying that a state that provides general benefits and protections can suddenly say that for --

QUESTION: If you don't tax that container, you are going to lose the house that that container is next to.

MR. CLARK: I think that is true, Mr. Justice Marshall. We have both sides of that question, that I believe -- I do not know that a state could simply say for one specific

person we are not going to protection you because you don't pay. On the other hand, I think that there would be a danger physically of saying that for foreign cargo containers we are not going to protect them, when in actual fact if a fire breaks out it imperils other structures. And, of course, there are the other indirect public health burdens which we simply have to provide in order to keep our population at work.

I think that what the Solicitor General is in essence saying, Mr. Justice Brennan, is the idea that they don't have to do that, that they can benefit the man in Virginia ultimately by this reciprocal thing without underwriting the California expense and leave the California taxpayers holding the bag.

QUESTION: What Article I power would that be, the power over international commerce?

MR. CLARK: I believe that it would either be the commerce clause power over commerce or perhaps the treaty power. I quite frankly have --

QUESTION: Well, the President of the United States negotiates treaties and then only one house of Congress gets involved in those and that is the Senate. My brother Brennan's question to you had to do with what Congress could do, not what the President and two-thirds of the Senate could do.

MR. CLARK: Well, I hope that I have answered the question with regard to Congress. I believe that under its

power to regulate foreign commerce, regulation and taxation for benefits and protections --

QUESTION: Why couldn't Congress under that explicitly conferred power totally exempt these things from taxation, local, state or national, and why wouldn't that be preemptive of any county or state?

MR. CLARK: Number one, regulation and taxation are two entirely different things. Mr. Justice Stewart, we exist, or I hope we exist in a federal system. It involves that the people who are local to that jurisdiction, I myself can go to my city council and say I would like to ask a question about fire protection. Now, if the United States or Congress -- or I would like to ask a question about my property tax, why am I paying more than somebody else. If the city council tells me that the United States Congress has said that that guy is going to be exempted and you have to pay his bill, that I think is right at the heart of the federal system. If we have a --

QUESTION: We must all concede that of course we have a federal system, but we must all concede further that the framers chose to confer a great deal of power upon the Congress of the United States in the area of interstate and international commerce. That is correct, isn't it?

MR. CLARK: That is correct, Mr. Justice Stewart.

QUESTION: And if Congress would -- if these things

are -- if these instrumentalities, as they have been called, are in international commerce, then why wouldn't Congress have complete power to exempt them from taxation?

MR. CLARK: Because the regulation of commerce is different from the taxation of the property within the taxing jurisdiction. The regulation of commerce deals with gearing up toward giving somebody a benefit and not giving other people a benefit; the taxation of commerce was treated separately in the Constitution, and Gibbons v. Ogden recognizes the difference between taxation and regulation, and we exist in terms of the states, as narrow as their ambit has become. We exist in terms of a uniform nondiscriminatory tax levied in return for benefits and protections conferred and --

QUESTION: Did I misunderstand your answer to my brother Bennan's question? I thought you said, yes, Congress could do it?

MR. CLARK: I'm sorry, Mr. Justice Stewart, my feeling is that if they can, if they can do it, then they must take the responsibility as well as the benefits. In other words, if the commerce clause says that pursuant to regulation you can disturb that relationship and take off a tax, you have to take the benefits and protections along with it, otherwise what you have --

QUESTION: What protections are you talking about now? Do you mean the federal government has got to come in

and furnish police excort and fire departments on the road and --

MR. CLARK: I'm sorry, Mr. Chief Justice. The very idea of a tax on a piece of property being imposed, my vision would be perhaps that if the federal government decided that all foreign goods would remain immune from state taxation, that in order to proceed in the national interest with national resources, as was done in Missouri v. Holland, they didn't use state troopers to go out and protect the birds, they use federal officers and it became a federal law that if they use those national resources in the national interest, they have to take both the benefits and protections along with the benefit of --

QUESTION: Well, you mean, Mr. Clark, that the federal government, if it were to exempt these containers, would have to at least provide the county with the same amount that it loses in taxes in order to help support the police and fire?

MR. CLARK: I believe, Mr. Justice Brennan, if there is anything to be said about that particular point, if we go so far as to say that the federal government can make a non-discriminatory tax into a federal regulation, then I believe they have to take the burdens with the benefits.

QUESTION: Then your answer to my question is yes?

MR. CLARK: Yes, sir, it is.

QUESTION: What would we do, issue mandamus against Congress?

MR. CLARK: No, Mr. Justice Marshall --

QUESTION: Well, how would you get this equipment out there that the federal government has to, how would you get it?

QUESTION: Oh, I'm sorry, Mr. Justice Marshall. I believe that the idea -- if, for instance, customs had sealed off an area, had bought a federal enclave, as they do in federal enclaves, Mr. Justice Marshall, as --

QUESTION: Well, this is no federal enclave.

MR. CLARK: No, it is not, Mr. Justice Marshall.

QUESTION: We are talking about Long Beach.

MR. CLARK: That's right.

QUESTION: Do you want Congress to take over Long Beach?

MR. CLARK: No, Mr. Justice Marshall, I do not.

QUESTION: I didn't think you did.

MR. CLARK: The very idea though, I think that what I believe is that --

QUESTION: I don't know what you're talking about when you say that the federal government has to give fire protection to Japanese containers in Long Beach.

MR. CLARK: Mr. Justice Marshall --

QUESTION: Is that what you said?

MR. CLARK: What I am saying is this, sir --

QUESTION: Is that what you said?

MR. CLARK: I think I said if the federal government -- it is logical to do that if the federal government claims the privilege of immunizing a piece of property from tax which is the recoupment for those benefits and protections.

QUESTION: Well, can't we rule against you without all of that?

MR. CLARK: You have to reach, I believe, Mr. Justice --

QUESTION: Can't we --

MR. CLARK: -- you have to reach the congressional power. You have to at least say that Congress can --

QUESTION: We have to?

MR. CLARK: If you rely on the enactments of the treaties --

QUESTION: How do we have to, because you say so?

MR. CLARK: No, sir. No, sir. Of course not. What I --

QUESTION: I've got news for you.

MR. CLARK: I'm sorry, Mr. Justice Marshall, I did not mean to in any way say that the Court has to --

QUESTION: Well, you said Congress had to. You said Congress, if Congress enforced the Constitution and said that Long Beach cannot enforce this tax, that Congress would have to give the police, fire and other protection. Isn't that

what you said?

MR. CLARK: Logically, under the federal system, yes, sir.

QUESTION: That is what you said.

MR. CLARK: Yes, sir.

QUESTION: Let's assume that someone in New Jersey starts a steam boat line running up -- or a diesel that would be today, I suppose, a diesel running up the Hudson River and they obviously make stops at Hudson River ports. Can New York tax the diesel barges and vessels going from New Jersey up the Hudson?

MR. CLARK: I think only --

QUESTION: Let's say they have exactly what we've got here, containers.

MR. CLARK: If they have a continuous presence in the taxing jurisdiction, and I think that those benefits and protections are there, then the tax I think automatically follows.

QUESTION: Now, Gibbons v. Ogden didn't involve a tax, it involved the licensing --

MR. CLARK: No, it did not.

QUESTION: -- but do you suggest that New York could tax New Jersey's diesel barges going up the Hudson?

MR. CLARK: That is certainly what Pullman's Palace Car says, Mr. Justice. The other side though, too, is that

the regulation -- that is what Gibbons v. Ogden I think is all about. It says first of all they cannot regulate, you cannot prohibit that man from going up that river, but that you can tax him. You can go out there and get a return for the benefits and protections conferred, and I think that is true as long as the continuous presence and those benefits and protections are there.

I believe in this case the continous presence and the fact situation that we have here fully support -- and the appellants have not refuted it -- that the benefits and protections are there.

QUESTION: Mr. Clar, suppose the President were to negotiate a treaty with Japan, ratified by the Senate and Congress were to pass implementing legislation under the interstate commerce power saying exactly what the treaty said, that no property imported from Japan should ever be subjected to any state property tax so long as it was in evidence, no matter how long it had been in this country. Do you think that would be constitutional for Congress to do?

MR. CLARK: Mr. Justice Rehnquist, I have gotten into trouble with the Court on this. I do not believe that that would be proper under the federal system. I think --

QUESTION: When you say "proper," do you think it would be constitutional for Congress to do that?

MR. CLARK: No, sir, I wouildn't. I think there are

limitations on congressional authority, and what I was getting to, if I may emphasize this once again, is that the logical of the federal system requires that if the federal government take the tax power away from the states, they must also have a responsibility for those benefits and protections which the state confers in one way or another. Now, that is the logic to me of the federal system and the relationship between those benefits and protections that you have.

QUESTION: Are you making that as an economic argument, advancing it that way, or as a constitutional argument, that there is a constitutional obligation to provide a substitute for the tax revenue?

MR. CLARK: Mr. Chief Justice, I think the constitutional argument is that there is no power in Congress to do that in the first place.

QUESTION: Well, you said --

MR. CLARK: I speak economically in the other terms of --

QUESTION: You said they could do it if they made the substitute provision.

MR. CLARK: I'm sorry, Your Honor. I meant to say if they could do it, I believe that that would follow, and I believe that is an economic argument following I think the federal relationship between the state and the federal government.

QUESTION: I just want to be sure that what you are suggesting here about the quid pro quo, this is your idea, there are no cases that suggest this?

MR. CLARK: No, sir, there are not.

QUESTION: I am just wondering why you make the argument so strenuously. It seems to me you would be tactically much better off to say, yes, Congress has all the power in the world but hasn't exercised it.

MR. CLARK: Well, I think that quite frankly tactically -- I'm sorry, it is true, the enactment is not there. Mr. Justice Stevens, perhaps that is a luxury of those of us in public law have to strenuously urge those things which we feel are right and sound, and perhaps that is where I am. But I believe that both arguments are quite correct.

I am concerned, Mr. Justice Stevens, if the federal government has that power as to what is going to happen in terms of our federal system, in terms of state-federal relationships. I honestly believe that the states have a purpose, and I say it has been constricted by probably correct interpretations of the commerce clause.

QUESTION: Of course, what might happen is that you won't be able to tax things you haven't been able to tax for the last couple of hundred years.

MR. CLARK: Mr. Justice Stevens, the idea of course is that they have not been here for a couple of hundred years.

California has exercised I guess --

QUESTION: No, but the vessels have been coming and going. I think you started earlier in saying these are just like vessels, and I don't think you've tried to tax vessels for a couple hundred years.

MR. CLARK: Well, under California law we cannot. The state constitutional provision which the appellants alluded to has been interpreted as not corresponding with the equal protection standards and therefore the exemption was applied by the Court to all vessels.

QUESTION: Mr. Clark, may I ask you an easier question.

MR. CLARK: Mr. Justice Powell.

QUESTION: If we should affirm the decision of the California court, could the county tax aircraft owned by foreign lines and based in foreign countries but that use your airport?

MR. CLARK: If the continuous presence is there -- actually, on the scheduled airlines, I think that Ott v. Mississippi Barge Line would go along with their regular presence as well as continuous -- I would say yes.

QUESTION: The aircraft also use containers.

MR. CLARK: They have their own interior containers which, however, are not used in the same way as these containers. They are simply taken off the airplane, perhaps

taken to the warehouse, often unloaded directly at the airport and kept with the airplane itself.

QUESTION: But, Mr. Clark, you say they could not only tax the containers but the aircraft themselves, wouldn't you say?

MR. CLARK: Oh, yes, Mr. Justice Brennan, I thought that was the question, whether we could tax the aircraft, and I think that is correct.

QUESTION: Is it possible to distinguish the aircraft from the taxation on the containers here so that we could affirm the decision of the Supreme Court of California and yet nonetheless not foreclose the question of the taxability of the aircraft?

MR. CLARK: Yes, Mr. Justice Rehnquist, I think so. The aircraft -- I hate to use this touching language, but the aircraft do come in to only one place in the taxing jurisdiction, and that place is covered -- well, like the New York Airport Authority, Los Angeles has the same sort of thing, and is covered by airport fees. When the container comes in here, the fee in the port is imposed on the vessel, whether it has containers or not. When the containers come here, they proceed in and through and to destinations and from destinations throughout the taxing jurisdiction, and that gives you the assurance I believe that the benefits and protections and the tax relationship is there; whereas, with the airplane,

perhaps that benefit and tax relationship is a little bit more conjectural simply because --

QUESTION: But, Mr. Clark, if you are right and you could tax the aircraft, I take it if Japan Air Lines has a scheduled stop at Los Angeles --

MR. CLARK: Yes, sir.

QUESTION: -- and another scheduled stop at Chicago and another scheduled stop at New York, at Idlewild, that Illinois and New York could also tax the aircraft.

MR. CLARK: That's correct, Mr. Justice Brennan, they could indeed but only in the sense of its apportioned presence.

QUESTION: Only what?

MR. CLARK: Only in keeping with its apportioned presence.

QUESTION: Could you also tax the trains that stop at each place?

MR. CLARK: Mr. Justice Marshall, we do.

QUESTION: You could?

MR. CLARK: Yes, sir.

QUESTION: What happened in the Pullman case?

MR. CLARK: The Pullman case has been followed by every state imposing personal property tax ever since its inception, yes, sir.

QUESTION: You put the planes and the trains on the

same level?

MR. CLARK: Sir, I think that different --

QUESTION: Aren't you taking a whole lot of weight? You are only talking about a -- this case only involves containers.

MR. CLARK: Yes, Mr. Justice Marshall.

QUESTION: And you carry this out on ships and everything else. How far are you going on this?

MR. CLARK: Mr. Justice Marshall, I think that there are --

QUESTION: Won't you be satisfied with just the container point being decided?

MR. CLARK: I believe that it can be decided that way, Mr. Justice Marshall, that is correct. And I don't mean to assert or push anybody, Mr. Justice Marshall. What I am saying in essence is that the apportionment doctrine logically applies to the benefits and protections conferred to all of these instrumentalities if, as I say, the port authority and these other things follow.

QUESTION: So you won't be satisfied if we just stop on containers?

MR. CLARK: Oh, no, sir, I will be satisfied.

QUESTION: Well, it wasn't your idea to make this broad argument. You are simply trying to answer the questions from members of the Court.

MR. CLARK: That is correct, Mr. Justice Stewart, and I --

QUESTION: He started it.

(Laughter)

MR. CLARK: The whole port doctrine then deals with the exception to it, and the argument with the home port doctrine deals with that exception by means of apportionment. The friendship, commerce and navigation treaty stands I believe soundly for the proposition that both national treatment and apportionment are the expectations which the appellants receive when they come here.

There are many treaties involving prevention of double taxation with regard to federal income taxes and the like, and the friendship, commerce, and navigation treaties I believe were intended to fill a general rule as to all other taxes, including state and local taves, which are specifically mentioned therein, and which in essence show that the national treatment and the very idea of apportionment were encountered by the people involved in negotiating that treaty and accepted both. So that I think the enactment of the executive and of the federal government indicate that this tax is proper. The Container Convention contains no specific language and, as I say, if we contend that the taxation by reason of importation means that this tax is covered by that language, then all taxes are covered by that language.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen. The case is submitted.

(Whereupon, at 11:21 o'clock a.m., the case in the above-entitled matter was submitted.)

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