SUPREME COURT OF THE UNITED STATES

No. 91–321

ITEL CONTAINERS INTERNATIONAL CORPORATION, PETITIONER *v.* JOE HUDDLESTON, COMMISSIONER OF REVENUE OF TENNESSEE

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF TENNESSEE, MIDDLE DIVISION

[February 23, 1993]

JUSTICE BLACKMUN, dissenting.

It is established "that a treaty should generally be `construe[d] . . . liberally to give effect to the purpose which animates it' and that `[e]ven where a provision of a treaty fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred.'" *United States* v. *Stuart*, 489 U. S. 353, 368 (1989), quoting *Bacardi Corp. of America* v. *Domenech*, 311 U. S. 150, 163 (1940); see also *Nielsen* v. *Johnson*, 279 U. S. 47, 51–52 (1929). This Court recognized in *Japan Line, Ltd.* v. *County of Los Angeles*, 441 U. S. 434 (1979), that the Container Conventions reflect a "national policy to remove impediments to the use of containers as `instruments of international traffic.'" *Id.*, at 453, quoting 19 U. S. C. §1322(a); see Customs Convention on Containers, Dec. 2, 1972, [1983] 988 U. N. T. S. 43 (hereinafter 1972 Convention); Customs Convention on Containers, May 18, 1956, [1969] 20 U. S. T. 301, T. I. A. S. No. 6634 (hereinafter 1956 Convention). Tennessee's tax clearly frustrates that policy.

In concluding that Tennessee's tax is not prohibited, the majority studiously ignores the realities of container leasing. All petitioner's containers are dedicated to international commerce, which means that they spend no more than three months at a time in any one jurisdiction. See 1972 Convention, Art. 4; 1956 Convention, Art. 3. Furthermore, transferring

containers to new lessees is an integral part of any container-leasing operation. A major advantage of leasing rather than owning a container is that a shipper may return the container to the lessor at or near the shipment destination without having to provide for the return transport of the container. J. Tan, Containers: The Lease-Buy Decision 13 (London, International Cargo Handling Co-ordination Association, 1983). The lessor then transfers the container to another shipper who needs to carry goods from that location or transports the container to another location where it is needed. Leased containers like those of petitioner are constantly crossing national boundaries and are constantly being transferred to new lessees at the ends of their journeys. Whether Tennessee taxes the act of importation or the act of transfer makes little difference with respect to leased containers. Each kind of tax imposes substantial "impediments to the use of containers as `instruments of international traffic.'" *Japan Line*, 441 U. S., at 453, quoting 19 U. S. C. §1322(a), and each, in my view, is prohibited by the Container Conventions.

This is also the view of the other signatory nations to the Conventions. Their consistent practice is persuasive evidence of the Conventions' meaning. See *Air France* v. *Saks*, 470 U. S. 392, 396 (1985), quoting *Choctaw Nation of Indians* v. *United States*, 318 U. S. 423, 431–432 (1943) ("`[T]reaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the written words to . . . . the practical construction adopted by the parties'"). Neither Tennessee nor the United States as *amicus curiae* can point to any other jurisdiction that directly taxes the lease of containers used in international commerce. Under the European Value Added Tax ("VAT") system, as the majority acknowledges, *ante*, at 5, no direct tax is imposed on the value of international container leases.

In an attempt to make international practice fit its reading of the Conventions, the majority mistakenly equates the European VAT on *goods* with Tennessee's tax on *containers*. See *ante*, at 5–6. The European VAT is analogous to an American sales tax but is imposed on the value added to goods at each stage of production or distribution rather than on their sale price. See *Trinova Corp.* v. *Michigan Dept. of Treasury*, 498 U. S. 358, 365–366, n. 3 (1991). The act of transporting goods to their place of sale adds to their value and the cost of transportation is reflected in their price. An American sales tax reaches the cost of transportation as part of the sale price of goods. The European VAT taxes the cost of transportation as part of the value added to goods during their distribution. Tennessee's analogue to the European VAT is its sales tax on goods imported by container, not its direct tax on the proceeds of container leases. Petitioner does not argue that Tennessee must refrain from imposing a sales tax on goods imported by container. It argues, instead, that like every other party to the Conventions Tennessee may not impose a direct tax on containers

themselves.

Even if Tennessee's tax did not violate the Container Conventions, it would violate the Foreign Commerce Clause by preventing the United States from "speaking with one voice" with respect to the taxation of containers used in international commerce. See *Japan Line*, 441 U. S, at 452; *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U. S. 159, 193 (1983). This Court noted in *Japan Line* that the Conventions show "[t]he desirability of uniform treatment of containers used exclusively in foreign commerce." 441 U. S., at 452. Tennessee's tax frustrates that uniformity.

The Court correctly notes that the Solicitor General's decision to file an *amicus* brief defending the tax "`is by no means dispositive.'" *Ante*, at 15, quoting *Container Corp.*, 463 U. S., at 195–196. Indeed, such a submission, consistent with the separation of powers, may not be given any weight beyond its power to persuade. The constitutional power over foreign affairs is shared by Congress and the President, see, *e.g.*, U. S. Const., Art. I, §8, cl. 11 (Congress shall have the power to declare war); Art. II, §2, cl. 2 (President shall have the power, by and with the advice and consent of the Senate, to make treaties); and Art. II, §3 (President shall receive ambassadors), but the power to regulate commerce with foreign nations is textually delegated to Congress alone. Art. I, §8, cl. 3. "It is well established that *Congress* may authorize States to engage in regulation that the Commerce Clause would otherwise forbid," *Maine* v. *Taylor*, 477 U. S. 131, 138 (1986) (emphasis added), but the President may not authorize such regulation by the filing of an *amicus* brief.

While the majority properly looks to see whether Congress intended to permit a tax like Tennessee's, it mistakenly infers permission for the tax from Congress' supposed failure to prohibit it. *Ante*, at 14–

15. "[T]his Court has exempted state statutes from the implied limitations of the [Commerce] Clause only when the congressional direction to do so has been `unmistakably clear.'" *Taylor*, 477 U. S., at 139, quoting *South-Central Timber Development, Inc.* v. *Wunnicke*, 467 U. S. 82, 91 (1984). "The need for affirmative approval is heightened by the fact that [Tennessee's tax] has substantial ramifications beyond the Nation's borders." *Wunnicke*, 467 U. S., at 92, n. 7. Not only does the majority invert this analysis by finding congressional authorization for the tax in congressional silence, but it finds silence only by imposing its own narrow reading on the Conventions.

The majority invites States that are constantly in need of new revenue to impose new taxes on containers. The result, I fear, will be a patchwork of state taxes that will burden international commerce and frustrate the purposes of the Container Conventions. I respectfully dissent.