RECENT DEVELOPMENT

CONSTITUTIONAL LAW—IMPORT-EXPORT CLAUSE—NON-DISCRIMINATORY, FAIRLY APPORTIONED EXCISE TAX APPLIED TO STEVEDORING COMPANIES LOADING AND UNLOADING GOODS IN IMPORTS AND EXPORT TRANSIT DOES NOT CONSTITUTE AN IMPORT OR DUTY WITHIN THE PROHIBITION OF THE IMPORT-EXPORT CLAUSE.

In January 1975, respondents, the Association of Private Stevedoring Companies[1] and the Washington Public Ports Association, brought suit in Washington to have Revised Rule 193, Part D, Washington Administrative Code 458-20-193-D,[2]

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[1] Respondents engaged in the stevedoring business, loading and unloading cargo from ships at various ports in the State of Washington. The record of the case contained no succinct definition of the activities of a stevedoring business. Thus the Court, in a footnote, cited the definition contained in a previous stevedoring case:

> What was done by the appellant in the business of loading and unloading was not prolonged beyond the stage of transportation and its reasonable incidents . . . . True, the service did not begin or end at the ship's side, where the cargo is placed upon a sling attached to the ships tackle. It took in the work of carriage to and from the 'first place of rest,' which means that it covered the space between the hold in the vessel and a convenient point of discharge on the dock . . . . The fact is stipulated, however, that no matter by whom the work is done or paid for, 'stevedoring services are essential to waterborne commerce and always commence in the hold of the vessel and end at the "first place of rest," and vice versa.'

Puget Sound Stevedoring Co. v. State Tax Comm'n, 302 U.S. 90, 93 (1937). Department of Revenue v. Association of Washington Stevedoring Companies 435 U.S. 734 (1977).

[2] Wash. Admin. Code 458-20-193D (Rule 193—Part D) TRANSPORTATION, COMMUNICATION, PUBLIC UTILITY ACTIVITIES, OR OTHER SERVICES IN INTERSTATE OR FOREIGN COMMERCE.

> In computing tax there may be deducted from gross income the amount thereof derived as compensation for performance of services which in themselves constitute interstate or foreign commerce to the extent that a tax measured thereby constitutes an impermissible burden upon such commerce. A tax does not constitute an impermissible burden upon interstate or foreign commerce unless the tax discriminates against that commerce by placing a burden thereon that is not borne by intrastate commerce, or unless the tax subjects the activity to the risk or repeated exaction of the same nature from other states. Transporting across the state's boundaries is exempt, whereas supplying such transporters with facilities, arranging accomodation, providing funds and the like, by which they engage in such commerce is taxable.

Examples of Exempt Income:

> 1. Income from those activities which consist of the actual transportation of persons or property across the state's boundaries is exempt.

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Examples of Taxable Income:

> 3. Compensation received by contracting, stevedoring or loading companies for services performed within this state is taxable.

which applied the Washington Business and occupation tax[3] to stevedoring, held unconstitutional. The respondents alleged that the levy as applied to stevedoring was violative of both the Commerce Clause[4] and the Import-Export Clause[5] of the United States Constitution, relying on the Stevedoring Cases[6] previously decided by the Supreme Court of the United States. The Superior Court of

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[3] Wash. Rev. Code 82. 04.220:

> There is levied and shall be collected from every person a tax for the act or privilege of engaging in business activities. Such tax shall be measured by the application of rates against value of products, gross proceeds of sales or gross income of the business, as the case may be.

Wash. Rev. Code 82.04.290 in applicable part reads:

> Upon every person engaging within this state in any business activity other than or in addition to those enumerated in . . . ; as to such persons the amount of tax on account of such activities shall be equal to the gross income of the business multiplied by the rate of one percent. This section includes, among others, and without limiting the scope hereof . . . persons engaged in the business of tendering any type of service which does not constitute a "sale at retail" or a "sale at wholesale. . . ."

Wash. Rev. Code 82.04.460 reads in applicable part:

> Any person rendering services taxable under WRC 82.04.290 and maintaining places of business both within and without this state which contribute to the rendition of such services shall, for the purpose of computing tax liability under WRC 82.04.290, apportion to this state that portion of his gross income which is derived from services rendered within this state.

[4] The Commerce Clause and the Import-Export Clause present two independent, although admittedly related issues. In the *Richfield Oil* case, the Supreme Court stated:

> The two constitutional provisions, while related, are not conterminous. To be sure, a state tax has at times been held unconstitutional both under the Import-Export Clause and under the Commerce Clause. But there are important differences between the two. The invalidity of one derives from the prohibition of the import or export; the validity of the other turns nowise on whether the article was, or had ever been, an import or export.

329 U.S. at 75 (1946). Although the Court determined that the Washington business and occupation tax as applied to the activity was not violative of *either* Clause, this paper will be limited to the Import-Export Clause portions of the decision.

[5] U.S. CONST., Art. I, § 10, Cl. 2. "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its inspection Laws: and the net Produce of all Duties and Imposts, laid by the State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

[6] *See, e.g.*, Puget Sound Stevedoring Co. v. State Tax Comm'n, 302 U.S. 90 (1937); Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422 (1947); where the Supreme Court held that an excise tax, measured by gross receipts, applied to the stevedoring business, was violative of Commerce Clause despite the fact that all of the activities were conducted within one state. Mr. Justice Douglas, in his dissenting opinion in *Carter and Weekes*, felt that the tax was not violative of the Commerce Clause but did violate the Import-Export Clause. His determination was based on the well accepted principle that the Import-Export Clause prohibited *any* tax applied to an import or export or their processes. 330 U.S. at 444-45.

Washington issued a declaratory judgement invalidating Revised Rule 193, Part D, to the extent that it applied to stevedoring operations engaged in interstate or foreign commerce. The court rested its decision on the precedent set by the Stevedoring Cases.[7] Petitioner, the Washington Department of Revenue, appealed the decision to the Washington Supreme Court. The Supreme Court, after accepting certification, affirmed the lower court decision,[8] again citing the Stevedoring Cases. The two dissenting justices found no Import-Export Clause infringement because the exaction was applied to the activity of handling the goods and not imposed directly upon the goods themselves. They would, however, have considered the application of the tax to stevedoring itself violative of the Commerce Clause. The United States Supreme Court granted certiorari "because of the possible impact on the issues made by the intervening decision in *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977)."[9] *Held,* the Washington business and occupation tax as applied to stevedoring was not violative of the Commerce Clause or the Import-Export Clause of the Constitution. Under the Import-Export Clause, only exactions that amount to Imports or Duties cannot be applied to exports or the exportation process. *Department of Revenue of State of Washington v. Association of Washington Stevedoring Companies,* 435 U.S. 734 (1978).

Prior to 1976, the Import-Export Clause was construed to prohibit any and all taxes applied to imports or exports or upon the importing or exporting processes.[10] Once a good gained status as

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[7] The Superior Court, with noteworthy candor stated:

> It would seem to the Court . . . that there certainly is a swing away from the *Puget Sound* and *Carter and Weekes* cases . . . .
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> It sticks in this Court's mind, however, that there has to be a reason, of which is beyond the ability of this Court to comprehend, that everyone has shied from the stevedoring cases, and many minds obviously more brilliant than mine have not been able to overturn those cases directly in thirty-eight years . . . . Under those circumstances the Court does hold that the *Puget Sound* and *Carter and Weekes* cases are the law of the land, as exemplified by those decisions; that they have not been reversed by implication, nor has there been a invitation to anyone to reverse those cases.

[8] 559 P.2d 997, 88 Wash. 2d 315 (1977).

[9] 435 U.S. at 743; *see also* Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?* 75 MICH. L. REV. 1426, 1441-1446 (1977); J. HELLERSTEIN & W. HELLERSTEIN, STATE AND LOCAL TAXATION at 286-288 (4th ed. 1978).

[10] 435 U.S. at 752. *See also* Rictfield Oil Corp. v. State Board, 329 U.S. 69, 76 (1946); Joseph v. Carter and Weekes Stevedoring Co., 330 U.S. 422, 445 (1947). The Surpeme Court has consistently held that once an item was deemed an import or export, the item and its processes were immune from any type of exaction, discriminatory or otherwise.

an import or export a blanket immunity extended to the goods themselves and to the process of transporting the goods.[11]

The Import-Export Clause was designed to insure protection to the landlocked States from the threat of selective privilege taxes imposed by the seaboard States upon goods passing through their borders.[12] The Framers of the Constitution had three main objectives in mind when they drafted the Import-Export Clause.[13] First, and foremost, the Framers were aware of the necessity of establishing effective foreign policy controls for the federal government. It was paramount that control be vested exclusively in the federal government to assure uniformity and predictability. Second, the Framers were concerned with maintaining sufficient Federal revenues. At the time, it was believed that import duties would account for a majority of the national revenue. Finally, the Framers were aware of the necessity of avoiding disputes among the States both commercially and politically.

The seminal case interpreting the Clause in the area of exports is *Coe v. Errol*.[14] In *Coe* the Supreme Court sustained an ad valorem property tax levied on a shipment of spruce logs stored in New Hampshire and intended to be floated down the Androscoggin River for eventual processing and sale in Maine. Although this case involved an attack under the Commerce Clause, the Court nevertheless established criteria for determining export immunity. The Court's holding indicated that mere intent to export without any physical movement was insufficient to invoke immunity under the Import-Export Clause. Mr. Justice Bradley, in upholding the exaction stated:

> [S]uch goods do not cease to be part of the general mass of property in the State, subject, as such, to its jurisdiction, and to taxation in the usual way, until they have been shipped, or entered with a common carrier for transportation to another State, or have been started upon such transportation in a continuous route or journey.[15]

[11] *See* note 5 *supra*.

[12] For a more detailed historical account of the Import-Export Clause *see generally* THE FEDERALIST Nos. 15-22 (A. Hamilton); Note, *State Taxation of Exports: The Stream of Constitutionality*, 54 N.C. L. REV. 59, 59-65 (1975).

[13] Youngstown Sheet & Tube Co. v. Bowers, 358 U.S. 534, 555-56 (1959); Cook v. Pennsylvania, 471 U.S. 566, 574 (1978); Michelin Tire Corp. v. Wages, 423 U.S. 276, 285-286 (1976).

[14] 116 U.S. 517 (1886).

[15] 116 U.S. at 527.

The prerequisite of some movement was to insure that the articles would not be returned to the United States. This conclusion was given further support by the fact that the court would also recognize export immunity for articles committed to a common carrier despite the fact that physical motion was lacking. *Coe* exemplifies the principle that immunity from taxation "attaches to the export and not to the article before its exportation."[16]

The next case of major significance in the export immunity area was *A.G. Spalding & Bros. v. Edwards.*[17] This case involved a challenge of a New York sales tax imposed on the sale of baseballs and bats to a Venezuelan company with a New York purchasing agent. In quashing the levy, the Supreme Court held that actual delivery of the goods to the Venezuelan ship constituted a significant step in the exportation process, thus activating the immunity of the Import-Export Clause. The holding made a clear distinction between goods qualifying for the immunity and those merely intended for future export and therefore subject to taxation by the State. The Court's opinion was consistent with *Coe* to the extent that committment to a common carrier was considered sufficient to insure immunity. Mr. Justice Holmes, speaking for the majority stated:

> The very act that passed the title and that would have incurred the tax had the transaction been domestic, committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods. The fact that further acts were to be done before the goods would set to sea does not matter so long as they were only regular steps to the contemplated result.[18]

Once again, in 1946, the Supreme Court decided a case with a claim of export immunity in *Richfield Oil Corp. v. State Board.*[19] In *Richfield,* the taxpayer sold a quantity of oil to a New Zealand vessel and California tax authorities attempted to impose a sales tax on the transaction. The Supreme Court held that the delivery of the oil to the export bound ships "marked the commencement of the movement of the oil abroad,"[20] thereby invoking the immunity of the Import-Export Clause. The main consideration in

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[16] Cornell v. Coyne, 192 U.S. 418, 427 (1904).
[17] 262 U.S. 66 (1923).
[18] *Id.* at 69-70.
[19] 329 U.S. 69 (1946).
[20] *Id.* at 83.

the determination of the status of the oil as an export was the "certainty that the goods [were] headed to sea."[21] *Richfield* was the case placing the greatest emphasis on "certainty for export" as a factor in establishing immunity under the Import-Export Clause. The tax was struck down despite the fact that it was not directly applied to the goods themselves. Mr. Justice Douglas, speaking for the Court stated: "The prohibition contained in the Import-Export Clause against taxation on exports clearly invokes more that a mere exemption from taxes laid specifically upon the exported goods themselves."[22] The Court was unequivocal in its determination that the Import-Export Clause prohibited any and all taxes on imports, exports, or their processes without congressional approval. Applying the familiar doctrine of *expressio unius est exclusio alterius*, the Court concluded that since the Clause contained one express exception to immunity no other exception was intended.[23] *Richfield* also endorsed the holding in *Brown v. Maryland*[24] that a tax on the sale of an article amounts to a tax on the article itself. Thus the immunity of an article was to be wholly dependent on its status as an export.

Mr. Justice Black's dissenting opinion in *Richfield* stressed the importance of defining the precise point at which an article was

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[21] Id. at 82.

[22] *Id.* at 85.

[23] *See* note 5 *supra*.

[24] As to imports the Court concluded:

> All must perceive, that a tax on the sale of an article, imported only for sale, is a tax on the article itself. It is true, the State may tax occupations generally, but this tax must be paid by those who employ the individual, or be a tax on his business. The lawyer, the physician, or the mechanic, must either charge more on the article in which he deals, or the thing itself is taxed through his person. This the State has a right to do, because no constitutional prohibition extends to it. So, a tax on the occupation of an importer is, in a like manner, a tax on importation. It must add to the price of the article, an be paid by the consumer, or by the importer himself, in like manner as a direct duty on the article itself would be made. This the State has not the right to do, because it is prohibited by the constitution.

As to exports the Court concluded:

> The States are forbidden to lay a duty on exports, and the United States are forbidden to lay a tax or a duty on articles exported from any state. There is some diversity in language, but none is perceivable in the act which is prohibited. The United States have the same right to tax occupation which is possessed by the States. Now, suppose the United States should require every exporter to take out a license for which he should pay such tax as Congress might think proper to impose; would government be permitted to shield itself from the just censure to which this attempt to evade the prohibitions of the constitution would expose it, by saying, that this was a tax on the person, not on the article, and that the legislature had a right to tax occupations?

12 Wheat 419, 444 (1827).

deemed an export. The significance of the distinction was attributed to the fact that the Constitution did not intend to relieve exports from any prior tax burdens levied on like articles.[25] He felt that the majority exposition would result in immunizing all exactions once an article acquired export status, and would thus act to 'not only grant tax immunity to many profitable businesses which share governmental protections from payment of their fair part of taxes; it also throws an unfair part of the tax burden on others."[26] Black asserted that the sales tax was imposed on a transaction occuring prior to the point at which the oil became an export. He therefore concluded that the policy behind the immunity, to protect inland States from selective and discriminatory taxation by the seaboard States, was not served by immunizing a wholly intrastate sale. "It was not intended to bestow a bounty of blanket tax immunity upon all those who engaged in the production, processing, purchase, or sale of goods shipped abroad."[27] Black considered that the excise tax was the quid pro quo for the use and enjoyment of California's services and protections.

The Court made a slight revision in the "physical movement" doctrine in the case of *Empresa Siderurgica v. County of Merced*,[28] which sustained the imposition of a California ad valorem property tax on a portion of a cement factory sold and prepared for shipment to Columbia, South America. Twelve percent of the factory had been shipped to Columbia prior to the imposition of the tax. California taxed the remaining eighty-eight percent remaining on tax day in the United States, some of which was dismantled and packaged for shipment. Despite the fact that the seller had obtained an export license, the sale was finalized, and the goods were virtually certain to be exported, the Court per Justice Douglas, upheld the validity of the property tax:

> It is not enough that there is an intent to export, or a plan which contemplates exportation, or an integrated series of events which will end with it. . . . It is the entrance of the articles into the export stream that marks the start of the process of exportation. Then there is certainty that the goods are headed for their foreign destination and will not be diverted to domestic use. Nothing less will suffice.[29]

[25] 329 U.S. at 86.
[26] *Id.* at 87.
[27] *Id.* at 89.
[28] 337 U.S. 154 (1949).
[29] *Id.* at 155-57.

This decision indicated a rejection of the "certainty for export" doctrine, motivated by concern that the article in question would some how find their way back to the domestic market. The Court applied a purely mechanical test of "physical movement" to mark the precise point at which an article will attain export immunity pursuant to the Import-Export Clause.

The doctrine of "certainty for export" was finally laid to rest in 1974 in *Kosydar v. National Cash Register Co.*[30] In *Kosydar*, the Supreme Court sustained an Ohio ad valorem property tax levied on N.C.R. cash registers stored in an Ohio warehouse awaiting shipment out of the United States. Although this decision was quite consistent with previous rulings, there were some additional facts worthy of comment. The cash registers were custom designed to the peculiar specification of the foreign purchasers. N.C.R. asserted that the unique design of the machines, which rendered them useless in the United States, coupled with the virtual certainty that the goods were to be exported, mandated immunity.[31] In sustaining the tax, Mr. Justice Stewart wrote: "Consequently, the essential question in cases involving the Clause is a narrow one: is the property upon which a tax has been sought to be imposed an 'export,' and thus entitled to protection under the provision's literal terms?"[32] In defining tests for determining when an article becomes an export, the Court reviewed the previous cases from *Coe* to *Empresa*, and observed that "the essential problem in cases involving the constitutional prohibition against taxation of exports has therefore been to decide whether a sufficient commencement of the process of exportation has occured so as to immunize the article at issue from State taxation."[33] The Court could not find any material distinction between the case sub judice and the *Empresa* case. In both fact situations the articles were awaiting shipment when the exaction was levied. Additionally, there had been no commencement of the export process, nor were the goods in transit. Despite N.C.R.'s allegation that the registers were certain to be exported, the Court could find no distinction between the cash registers and the part of the cement plant dismantled and packaged for shipment in *Empresa*. The various contingencies which might arise prior to exportation (the orders

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[30] 417 U.S. 62 (1974).

[31] *Id.* at 64, n. 3.

[32] *Id.* at 66.

[33] *Id.* at 67.

could be cancelled, the export permit might not be granted, or the machines might be destroyed or utilized as scrap) reduced the alleged certainty that the goods would be exported. But even if the goods were "certain for export," they would nevertheless be subject to taxation because they were in the warehouse on tax day. Citing *Joy Oil*, the Court concluded: "The Import-Export Clause was meant to confer immunity upon property being exported, not to relieve property eventually to be exported from its share of the cost of local services."[34]

The *Kosydar* opinion recognized the policy considerations underlying the Import-Export Clause. The Clause was not designed to benefit exporters or to relieve from taxation those who merely happen to handle articles eventually exported. The Court adopted the mechanical "movement test" to distinguish between exports and those goods merely intended to be exported. Although this test, by its very nature, was not definitive in scope, the Court observed that "simplicity has its virtues."[35] Utilizing the "movement test," the tax authorities could easily determine whether specific goods would carry immunity under the Import-Export Clause. On the other hand, the test might result in unfair taxation of goods clearly for export, yet not in actual physical movement due to circumstances beyond the control of the parties.[36]

Kosydar was the last major Supreme Court case[37] involving a claim of exort immunity prior to *Washington Stevedoring*. The cases have clearly marked a trend to narrow the scope of immunity under the Clause to conform with commercial considerations and the ever declining usefulness of the Clause to achieve its original objectives.[38] As of 1976, articles were immune from taxation only

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[34] *Id.* at 70.

[35] *Id.*

[36] *Cf.* dissenting opinion of Mr. Justice Vinson in *Empresa* where he asserted that the tax should be overturned because the delay was occasioned by circumstances beyond the taxpayers control; intent alone should suffice to invoke the immunity of the Import-Export Clause. 337 U.S. 154 (1949).

[37] *But see,* Connel Rice & Sugar Co. v. County of Yolo, 569 F2d 514 (9th Cir. 1978), where the Court of Appeals sustained a California ad valorem property tax levied on rice stored in Sacramento awaiting the arrival of shipping vessels for export transit. Although the rice had been prepared for export and was virtually certain to be exported, the Court held the goods taxable because they were in storage and had not begun their final journey to Japan. The Court, in upholding the tax stated:

> Moreover, a 'virtual certainty' of shipment to Japan evidenced by a financial and contractual relationship fails to place the subject rice in the stream of commerce so as to prevent taxation by the local authority.

569 F2d at 518.

[38] *See generally* Comment, 51 MINN. L. REV. 15 (1966).

if they qualified as "exports." The *Kosydar* test allowed immunity when the goods entered the export stream, "the final and continuous journey out of the country."[39] Once a good was deemed to have export status, the good itself and all associated processes, including its sale and transporation, were immune from any levy by State or federal governments.

In 1976, the landmark case of *Michelin Tire Corp. v. Wages*[40] reversed this long-standing position and held that the Import-Export Clause merely afforded a conditional ban against taxation of imorts and importation processes. The Supreme Court sustained the imposition of a nondiscriminatory ad valorem property tax upon imported tires and tubes stored in a warehouse in Gwinnet County, Georgia. In the import area, prior to *Michelin*, the status of goods as imports was determined by application of the "original package" doctrine,[41] which granted complete immunity to imported goods retaining their original (foreign) packaging. Once the goods were removed from this original package, they immediately lost their status as imports and were freely amenable to taxation. *Michelin* discarded the original package doctrine and adopted an entirely different analysis, directed to the nature of the exaction rather than that of the goods involved. Only those taxes that amounted to imposts or duties fell within the scope of immunity provided by the Import-Export Clause. Mr. Justice Brennan, speaking for the Court, stated that, "nothing in the history of the Import-Export Clause even remotely suggests that a nondiscriminatory ad valorem property tax which is also imposed on imported goods that are no longer in import transit was the type of exaction that was regarded as objectionable by the Framers."[42]

In order to determine whether or not the exaction constituted an impost or duty, the Court analyzed the tax to determine if it violated any of the objectives underlying the Import-Export Clause, and concluded in the negative.[43] The *Michelin* holding was in many respects consistent with the principles expressed by Mr. Justice Black in his dissenting opinion in *Richfield Oil*. "[W]e

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[39] 435 U.S. at 752.

[40] 423 U.S. 276 (1976); for a excellent exegesis on the *Michelin* decision *see* Hellerstein, *Michelin Tire Corp. v. Wages: Enhanced State Power to Tax Imports*, 1976 Sup. Ct. Rev. (1977).

[41] *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW, at 370-71 (1978). *See also* note 40 *supra*.

[42] 423 U.S. at 286.

[43] *See* note 40 *supra*, at 107-113.

should not invalidate such a tax unless satisfied beyond doubt that it falls squarely and wholly within the area marked by the Constitution for tax exemption."[44] Under the *Michelin* approach no exaction could be applied to goods still in import transit, though the Court was equivocal as to when transit status terminated.[45] *Michelin* dealt on its facts only with immunity claims as applied to imports. Thus, until *Washington Stevedoring* there was no indication of any change in the export area.

In 1978, the Supreme Court, in the *Washington Stevedoring* case, held that the *Michelin* approach was equally applicable in the export area. Applying the *Michelin* analysis, the Court determined that the Washington business and occupation tax as applied to stevedoring was not violative of any of the goals underlying the Import-Export Clause and therefore did not constitute an impost or a duty.[46] The Court found no violation of the policy of maintaining the Federal government's ability to effectively conduct foreign policy because the assessments were nondiscriminatory and therefore did not constitute any special protective tariff.[47] In addition the tax was levied only on business activity conducted exclusively within the State and thus did not obstruct the regulation of foreign commerce. The Court also concluded that the exaction did not offend the second policy of the Framers, to insure a sufficient source of federal import revenues. Following the same reasoning applied in *Michelin*, the Court held that the exaction was merely a quid pro quo for the benefits conferred by the State and therefore did not divert funds from the federal coffers.[48] In any case, a prohibition from taxation of exports would have no effect on federal revenues because the Constitution forbids any federal taxation of exports.[49] Finally, the goal of preventing interstate friction was not involved because so long as the Commerce Clause requirements were satisfied, there would be no cause for dissention between the States.[50] Mr. Justice Blackmun, representing the majority observed: "Requiring coastal States to

[44] 329 U.S. at 87.

[45] *See* note 40 *supra*, at 122-26.

[46] 435 U.S. at 755.

[47] *Id.* at 753.

[48] *Id.*

[49] *Id.* at 758.

[50] The Commerce Clause requires that the exaction be related to the service and protection offered by the State. Further, the Clause requires the tax to be fairly apportioned and nondiscriminatory. Any tax that satisfies these requirements cannot cause friction between the States. *Id.* at 754.

subsidize the commerce of inland customers may well exacerbate, rather than diminish, rivalries and hostility."[51] The Court concluded that since the exaction did not violate any of the underlying purposes of the Import-Export Clause, it did not fall within the imposts or duties prohibited by the Clause.

The Court acknowledged, in passing, two major factual distinctions between *Washington Stevedoring* and *Michelin*. *Michelin* indicated that the goods taxed there were no longer in import transit[52] and specifically stated that if the goods had been in transit, the Import-Export Clause would have prohibited even a nondiscriminatory property tax. But in *Washington Stevedoring* the exaction was applied while the articles were still in transit. Secondly, the tax was applied to the handling of the goods in the *Washington Stevedoring* case, whereas in *Michelin* the tax was imposed directly on the goods themselves. Nevertheless, the Court claimed that the exaction would not constitute an impost or duty if it was applied to the handling of the goods whether or not they were still in transit.[53] In order to reconcile these distinctions the Court made reference to the 1951 case of *Canton R. Co. v. Rogan*,[54] which sustained the imposition of a Maryland franchise tax, measured by gross receipts, upon a railroad operating exclusively within the State. The railroad alleged immunity because almost half of its income resulted from the transport of imports and exports. In upholding the tax, Mr. Justice Douglas stated:

> The difference is that in the present case the tax is not on the goods but on the handling of them at port. An article may be an export and immune from tax long before or after it reaches the port. But when the tax is on activities connected with the export or import the range of immunity cannot be so wide.[55]

The *Canton* opinion never addressed the application of the tax to stevedoring because the record of the case indicated that the railroad merely leased the loading crane and therefore did not engage in stevedoring activities.[56] The Court concluded that the

[51] *Id.* at 760.

[52] 423 U.S. at 302.

[53] 98 U.S. at 758.

[54] 340 U.S. 511 (1951).

[55] *Id.* at 514 (emphasis added).

[56] In concluding that the Court did not reach the application of the tax to stevedoring, Mr. Justice Douglas said:

> We do *not* conclude, however, that any activity more remote than that does not commence the movement of the commodities abroad nor end their arrival and therefore is *not* a part of the export or import process.

Id. at 515 (emphasis added).

railroad's activities preceded and were not a part of the actual import or export processes immune from taxation.

The Court in *Washington Stevedoring*, finding no economic distinction between the case at bar and the *Canton* decision, concluded: ". . . the *Michelin* policy analysis should not be discarded merely because the goods are in transit, at least where the taxation falls upon a service distinct from the goods and their value."[57]

Respondents offered three arguments in support of their contention that the exaction was prohibited under the Clause. First, respondents asserted that the Import-Export Clause was an absolute ban on all taxation.[58] The Court rejected this assertion on grounds that *Michelin* construed the Import-Export Clause as a mere conditional ban against imposts and duties. Furthermore, construction of the Clause as an absolute ban would render many of the terms in Article I, section 8, clause 1 of the Constitution superfluous.[59]

Secondly, respondents contended that in *Michelin* the tax was applied to articles deemed a part of the general mass of property, whereas in *Washington Stevedoring* the tax was levied on goods remaining in transit. The Court recognized that the alleged distinction rested upon the status of the goods rather than upon the status of the tax as an impost or duty.

Finally, respondents alleged that the exaction was in effect a transit fee applied to inland consumers in violation of the Import-Export Clause. The Court dismissed this argument concluding that the exaction was merely the quid pro quo for services and protection provided to the stevedoring business by the State of Washington.

Mr. Justice Powell wrote a separate concurring opinion, agreeing that the Washington business and occupation tax as applied to stevedoring did not constitute an impost or duty within the prohibition of the Import-Export Clause, and also conceding that the levey did not result in a transit fee upon inland consumers. But Powell disagreed with the majority's reasoning in determining

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[57] 98 U.S. at 757.

[58] *Id.* at 759.

[59] Finally, to conclude that "Imports or Duties" encompasses all taxes makes superfluous several of the terms of Art. I, § 9, Cl. 1 of the Constitution, which grants Congress the "Power to lay and collect Taxes, Duties, Imposts and Excises." In particular the Framers apparently did not include "Excises," such as an exaction on the privilege of doing business, within the scope of "Imposts or Duties."

435 U.S. at 759.

that the tax was not of the type prohibited even by *Michelin*.[60] He argued that the majority improperly resurrected the "direct-indirect" test by distinguishing between a tax applied directly on goods and a tax imposed on handling of goods.[61] Powell regarded the distinction as artificial in that a tax based on some criterion distinct from the value of the goods could still amount to a selective transit fee. Nonetheless, he concluded that the exaction was not among those prohibited by the Clause because it was a quid pro quo for benefits provided by the State and was not imposed merely for the privilege of moving through the State.[62]

The Supreme Court's approval of the *Michelin* analysis for application in the export area as well as the import area will require considerable adjustment by affected parties. Previous decisions were consistent in forbidding the imposition of any levy nondiscriminatory or otherwise, upon export articles or export processes.[63] If one applied the *Michelin* approach to exports, the initial inquiry would appear to be whether the tax amounts to an impost or duty, regardless of export status. However, due to the peculiar nature of exports, the practical effect of *Washington Stevedoring* will not be as expansive as one might conclude. The determinative inquiry will continue to be whether the goods have entered the "export stream, the final, continuous journey out of the country." The Supreme Court has consistently determined that export goods gain no immunity until they begin their journey in export transit. However, under *Michelin*, even a nondiscriminatory charge would be prohibited if the goods were in transit. The distinction lies in the natural differences between import and export items. An item can gain the status of an import without being in transit. Thus it appears that the *Michelin* decision was an attempt to reconcile the area of import immunity with the principles of export immunity to the extent that no taxation was permitted on imports or the import processes once transit begins.

[60] *Id.* at 763. Recall that even a nondiscriminatory tax should be prohibited on goods shall in import transit under the *Michelin* approach. Mr. Justice Brennan said, "A nondiscriminatory ad valorem property tax obviously stands on a different footing, and to the extent there is any conflict whatsoever with this purpose of the Clause, it may be secured merely by prohibiting the assessment of even nondiscriminatory property taxes on goods which are merely in transit through the State when the tax is assessed." 423 U.S. at 290 (footnote omitted).

[61] *Id.* at 762.

[62] *Id.* at 764.

[63] *See* note 10 *supra*.

The important distinction between *Michelin* and *Washington Stevedoring* was that the tax in the latter case was applied not to the goods themselves, but to the handling of the goods. The majority in *Washington Stevedoring* expressly noted that they did not address the application of the *Michelin* approach to a tax applied on goods still in import or export transit.[64] It therefore appears that the most significant impact of *Washington Stevedoring* was the upholding of a nondiscriminatory excise tax applied upon a service distinct from the goods while they were in export and import transit. This result may not appear to be innovative in light of the *Canton* decision that permitted the taxation of income derived from railroad services incidental to the importing and exporting of goods. However, *Canton* clearly defined the railroad's activity as one preceding the actual process of exportation. The Court was well aware that the processes of exportation were immune from taxation under the Clause. It was perhaps noteworthy that the Court in *Washington Stevedoring* found no economic distinction between the railroad's activity and the activity of stevedoring companies.[65] There is no indication that the Supreme Court would sustain a nondiscriminatory exaction applied directly on goods that are in import or export transit.[66] However, one may be more confident in concluding that *Washington Stevedoring* will modify the *Michelin* decision to the extent that a nondiscriminatory tax applied to a service distinct from the goods would be upheld even if the goods were in export or import transit.

Powell's concurring opinion appears to carry the State's ability to tax imports and exports one step further. Powell felt the tax was justified, not because it was levied on the handling of the goods, but because the tax was the quid pro quo for services and protections proffered by the State. He agreed with the conclusion in *Michelin* that the Import-Export Clause was only designed to prohibit taxes that were merely exactions for the privilege of moving through a State.[67] In view of Powell's analysis, perhaps in the future a nondiscriminatory, fairly apportioned ad valorem property tax may be upheld if it can be shown that the tax merely compensates the State for services rendered.

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[64] 435 U.S. 757, n. 23.

[65] *Id.* at 757.

[66] This outcome is consistent with the analysis contained in note 40 *supra*, at 131-132.

[67] *See* note 62 *supra*.

Washington Stevedoring appears to be generally consistent with the original considerations underlying the Import-Export Clause. No one would contend that the decision permitted the imposition of a discriminatory transit fee for the privilege of moving goods through the State. The Court was unequivocal in deciding that the Clause was intended to prohibit only such taxes as constituted imposts or duties from being applied to exports or imports. To hold otherwise would result in an inequitable tax burden on non importing/exporting taxpayers. It would force these concerns with purely domestic operations to "pick up the tab" for benefits provided by the State to import/export businesses. This shift in tax burden was clearly not the intent of the Framers in drafting the Import-Export Clause. As the Court in *Michelin* indicated, "there is no reason why an importer should not bear his share of these costs along with his competitors handling only domestic goods."[68] The Court in *Washington Stevedoring* has carried this concept one step further by permitting a non-discriminatory excise tax to be applied to the processes of importation and exportation even while the goods are still in transit.

There are many who feel that the Import-Export Clause has become somewhat obsolete.[69] As a result of the numerous technological advances in the field of transportation, such as large capacity freight airplanes and the like, goods being transported by the inland States will not fall amenable to the taxing power of the coastal States as the goods will no longer have to cross State lines in order to reach their foreign destination. In addition, levies that comply with the Commerce Clause requirements[70] *a fortiori*

[68] 423 U.S. at 287.

[69] *See* Note, 12 WAKE FOREST L. REV. 1054, 1061 (1976).

[70] The United States Supreme Court granted certiorari because of the possible impact on the issues made by the intervening decision in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). In *Complete Auto Transit*, the Supreme Court upheld a Mississippi excise tax on the privilege of doing business in the State against a challenge under the Commerce Clause. The Court found no such violation primarily because of the nature of the tax. First, the Court found a substantial nexus between the activities of the taxpayer and the State of Mississippi. Second, the tax was fairly apportioned, that is the measure of the tax was based on the amount of activity conducted within the State. Third, the Court determined that the tax did not discriminate against interstate commerce as there was no possibility of multiple tax burdens on the taxpayer. Finally, the tax was reasonably related to the services provided by the State. For a more detailed account of *Complete Auto Transit* and the Commerce Clause area, *see* Hellerstein, *State Taxation and the Supreme Court: Toward a More Unified Approach to Constitutional Adjudication?* 75 MICH. L. REV. 1426, 1441-1446 (1977); J. HELLERSTEIN & W. HELLERSTEIN, STATE AND LOCAL TAXATION at 286-288 (4th ed. 1978).

Essentially, any tax that can withstand scrutiny under the Commerce Clause by definition will not constitute selectively imposed, discriminatory privilege taxes that the Framers of the Import-Export Clause sought to prohibit.

Tony G. Mills

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would not amount to the type of tax feared by the Framers. Therefore, an exaction satisfying the Commerce Clause should not violate the Import-Export Clause as it has been interpreted by the Supreme Court. But the Court has not addressed the issue of a properly apportioned, nondiscriminatory ad valorem tax levied on imports or exports. Although there is no indication that such a tax would be upheld, a consistent trend of the Court's decisions would appear to eventually sustain such a tax if in fact the Commerce Clause requirements were met.