

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

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WASHINGTON, D.C., 20543

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 84-902

TITLE WARDAIR CANADA, INC., Appellant V. FLORIDA  
DEPARTMENT OF REVENUE

PLACE Washington, D. C.

DATE March 31, 1986

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IN THE SUPREME COURT OF THE UNITED STATES

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WARDAIR CANADA, INC., :  
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Appellant :  
:  
v. : No. 84-902  
:  
FLORIDA DEPARTMENT OF REVENUE :  
:  
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Washington, D.C.

Monday, March 31, 1986

The above-entitled matter came on for oral  
argument before the Supreme Court of the United States  
at 10:57 a.m.

APPEARANCES:

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behalf of the Appellant.

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Solicitor General, Department of Justice,  
Washington, D.C., in support of Appellant.

JOSEPH C. MELLICHAMP, III, ESQ., Assistant  
Attorney General of Florida, Tallahassee,  
Florida; on behalf of the Appellee.

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1 the bilateral agreement because there was no exemption  
2 from the payment of a state fuel tax.

3 That decision is at total odds with Japan Line  
4 against the County of Los Angeles in which this Court held  
5 that the California tax on cargo containers used exclusively  
6 in international commerce and owned by foreign nationals  
7 was unconstitutional even though there was no specific  
8 federal prohibition against the tax.

9 The question in this case is identical to the  
10 question in the Japan Line decision, whether a state has  
11 the power to tax an instrument of foreign commerce owned  
12 by foreign nationals and used exclusively in international  
13 commerce.

14 The Japan Line case is a pure one involving,  
15 as it does, solely the power over foreign commerce, an  
16 exclusive preserve of the federal government, with no parts  
17 shared with the individual states.

18 QUESTION: Well, Mr. Hansen, in Japan Line I  
19 think the Court at least expressed considerable concern,  
20 reliance upon the asymmetry that would exist, and here,  
21 I guess, Canada imposes a tax on fuel under the same  
22 circumstances that Florida does.

23 MR. HANSEN: Yes, you are quite right, Justice  
24 O'Connor. But, it is my belief that that fact does not  
25 enter into this case as an issue. What it does do is

1 show --

2 QUESTION: But, certainly -- It certainly cuts  
3 back on the reliance you can place on Japan Lines in my  
4 view.

5 MR. HANSEN: Well, no, I respectfully disagree.  
6 What it does show, Justice O'Connor, is that if there is  
7 a method to remedy the problem that the United States may  
8 have with Canada as to this reciprocity, the federal  
9 government has to have the exclusive power to devise the  
10 remedy to suit the national interest. It cannot be worried  
11 about what the individual states may do with that circum-  
12 stance. It has to have the power. The federal government  
13 has to have the power to attempt to remedy and it is doing  
14 that right now.

15 QUESTION: Well, isn't the Canadian counterpart  
16 provincial rather than national?

17 MR. HANSEN: Yes. The tax is a tax --

18 QUESTION: It is not imposed by dominion plenum,  
19 it is imposed by a couple of provinces.

20 MR. HANSEN: It is imposed by the provinces,  
21 just like Florida is imposing a tax here.

22 I might suggest, however, that insofar as that  
23 problem is concerned, there are several things to  
24 consider.

25 One, to my knowledge, there has not been a U.S.

1 air carrier which has challenged that tax in Canada.

2 Two, there is presently a diplomatic initiative  
3 in an attempt to seek a remedy to that problem.

4 And, three, one of the United States air carriers  
5 that performs service to Canada has joined with other  
6 carriers in an amici brief supporting Wardair's case today.

7 In the Containers Corp. of America against the  
8 Franchise Tax Board, this Court commented on the Japan  
9 Line case, saying that it was consistent with international  
10 practice and expressed federal policy. That case is a  
11 pure case involving the power of the federal government  
12 over foreign commerce.

13 And, this case is as pure. It is Wardair's  
14 contention that the Japan Line decision should be  
15 considered here.

16 QUESTION: Mr. Hansen, just to clear up one point  
17 for me to be sure I am right on it, you do not contend,  
18 as I understand your position, that there is a violation  
19 of any specific treaty between the United States and your  
20 executive agreement?

21 MR. HANSEN: By the Florida tax?

22 QUESTION: Yes, or by the provincial tax in  
23 Canada, either one.

24 MR. HANSEN: Well, I can't answer insofar as  
25 Canada is concerned. I do know that the provision in

1 the Nonscheduled Air Services Agreement shows that the  
2 countries are to provide these tax exemptions to the best  
3 possible way that the national law will provide.

4 Now, whether or not Canada can do anything about  
5 this problem, I don't really know.

6 QUESTION: Well, just more narrowly, as I read  
7 your brief, you did not contend that the Florida tax  
8 violated that convention.

9 MR. HANSEN: Well, I did insofar as it violated  
10 the -- what those tax exemptions demonstrate and they  
11 demonstrate just what this Court concluded was demonstrated  
12 by the Customs Convention on Containers in Japan Line.  
13 It demonstrated a desirability for a uniform --

14 QUESTION: But, that all is support for your  
15 basic argument that Japan Line controls as a matter of  
16 constitutional law.

17 MR. HANSEN: Yes.

18 QUESTION: But, as I understand, you do not  
19 independently argue that the convention itself provides  
20 a federal reason for holding a state tax unconstitutional.  
21 Maybe you did. I missed it.

22 MR. HANSEN: There is no specific exemption from  
23 a state tax in the Chicago Convention or the Nonscheduled  
24 Air Services Agreement.

25 In Japan Line there were three elements which



1 were essential to the Court's decision. The subject taxed  
2 was owned by a foreign national. It was used exclusively  
3 in international commerce and it was an instrument of  
4 foreign commerce. All three of those elements are met  
5 here. Wardair is a foreign national. The aviation fuel  
6 it uplifts out of Florida is used exclusively in  
7 international commerce. Wardair cannot provide any service  
8 other than foreign air transportation exclusively. And,  
9 it is an instrument of foreign commerce.

10 Now, an instrument of foreign commerce is no  
11 term of art. Means of commerce is another way of  
12 expressing it as shown by this Court in Helson against  
13 Kentucky where it found that fuel used to propel a  
14 transport vehicle was an instrument of commerce.

15 In Japan Line, the Court found that the cargo  
16 containers were instrument of foreign commerce as a matter  
17 of law based on the tax exemption provisions contained  
18 in Customs Convention on Containers. In that convention  
19 for cargo containers used exclusively in international  
20 commerce the convention provided an exemption from  
21 national import duties and national import taxes and that  
22 is all. It did not exempt from any state taxes, yet this  
23 Court held the California tax to be unconstitutional.

24 In this case, both the Chicago Convention and  
25 the Nonscheduled Air Services Agreement provide tax

1 exemptions almost exactly the same as those contained in  
2 the Customs Convention on Containers plus other state  
3 exemptions for aviation fuel uplifted -- I am sorry, used  
4 exclusively in international commerce and cover fuel which  
5 is uplifted in the territory of one country by the carrier  
6 of another, thus Wardair's aviation fuel uplifts in Florida  
7 are covered.

8 Now, the Court in Japan Line showed that it was  
9 not important whether the exemption granted an exemption  
10 from state taxes. What it did show is what it demonstrates,  
11 what the tax exemption demonstrates. And, the Court  
12 reasoned that the tax exemption provision evidenced a  
13 desirability for a uniform federal regulation of containers  
14 used exclusively in international commerce and reflected  
15 a federal policy to remove all impediments as to their  
16 use as instruments of foreign commerce.

17 It was on that basis that the Court held that  
18 since the California tax frustrated the attainment of that  
19 federal regulatory uniformity, it was inconsistent with  
20 the power of Congress over foreign commerce and, therefore,  
21 unconstitutional.

22 That same reasoning and that same ultimate  
23 conclusion is as applicable in this case.

24 Florida's tax on Wardair's fuel was uncon-  
25 stitutional because it was a serious infringement on

1 the power of Congress over foreign commerce.

2 There is another element here that is not  
3 contained in the Japan Line case that bolsters the case  
4 against the Florida fuel tax.

5 Congress has expressed a clear mandate through  
6 the Federal Aviation Act requiring the uniform federal  
7 regulation of foreign air transportation. Even though  
8 Congress deregulated domestic air transportation almost  
9 eight years ago, the federal government still regulates  
10 on a highly structured basis through the Federal Aviation  
11 Act all foreign air transportation and the reason is clear.  
12 United States air carrier participation in foreign air  
13 transportation is totally dependent upon the ability of  
14 the federal government to operate effectively in regulating  
15 foreign air transportation with foreign governments and  
16 reaching adequate international regulatory agreements or  
17 understandings based on reciprocity and comity.

18 The uniform federal regulation of foreign air  
19 transportation by the federal government is absolutely  
20 essential if that national interest purpose is to be  
21 met.

22 By Section 1102 of the Federal Aviation Act,  
23 Congress enacted a set of goals to be met through the  
24 International Regulatory Agreement signed by the United  
25 States. Those goals include the reduction of

1 discrimination and the increased competition opportunities  
2 by the United States air carriers in foreign air trans-  
3 portation.

4 Any unilateral state action which may disrupt  
5 the regulatory balance as to foreign air transportation  
6 reached by the International Regulatory Agreements signed  
7 by the United States would either impair or thwart the  
8 achievement of those statutory goals set by Congress and  
9 thereby infringe on Congress' power over foreign commerce.

10 There is one other aspect to this case. If there  
11 is proliferation of any such interferences by states such  
12 as Florida's tax on Wardair's fuel, in the words of this  
13 Court in Japan Line, would make speaking with one voice  
14 impossible, yet if the Florida Supreme Court is not  
15 reversed here, such a proliferation will take place.  
16 The amici brief supporting Florida in this case makes that  
17 fact known very clearly.

18 Now, this case concerns solely the power of the  
19 federal government to regulate foreign air transportation  
20 in concert with its foreign government partners and to  
21 devise such remedies as the national interests warrant  
22 when there are disagreements with those partners.

23 This power over foreign commerce --

24 QUESTION: May I ask you one question that goes  
25 back to Japan Line.



1 MR. HANSEN: Okay.

2 QUESTION: What was the tax? That was a property  
3 tax on the --

4 MR. HANSEN: Yes, that is right.

5 QUESTION: And here we have a sales tax.

6 MR. HANSEN: Yes. Well, whether it is a sales  
7 tax or excise tax, it depends upon who you talk to.

8 QUESTION: Do you think Japan Airlines would  
9 have made it unconstitutional for California? Say the  
10 containers had been manufactured in California. You  
11 can impose a sales tax on --

12 MR. HANSEN: Yes, I do.

13 QUESTION: You do?

14 MR. HANSEN: Yes.

15 QUESTION: And, you think this is the same as  
16 if they imposed a property tax on the -- If they imposed  
17 a personal property tax on the value of the gasoline while  
18 it was in the state or something like that?

19 MR. HANSEN: Yes.

20 QUESTION: You think it is the same?

21 MR. HANSEN: Yes, I do.

22 This case concerns solely the power of the  
23 federal government to regulate foreign commerce and that  
24 is the reason there is no pre-emption question in this  
25 case. Florida did not have the power to tax Wardair's

1 fuel.

2 QUESTION: You mean even in the absence of a  
3 convention?

4 MR. HANSEN: In the absence of the -- With the  
5 circumstances which we have in this case, it is our  
6 position that they did not have the power.

7 QUESTION: Even without -- Supposing there had  
8 been no convention in this case.

9 MR. HANSEN: Oh, yes. I think even in the  
10 absence of such a convention because whatever is done in  
11 foreign air transportation it is done in concert by the  
12 United States and foreign governments. There cannot be  
13 any foreign air transportation unless there is an agree-  
14 ment between the United States and foreign governments  
15 as to what air transportation will be permitted. That  
16 ability is solely in the hands of the federal government  
17 and the states have no power in that area.

18 What we are talking about here is foreign air  
19 transportation and what happened here was that Florida  
20 intruded and that intrusion --

21 QUESTION: Does your principle apply to an  
22 American carrier which buys gasoline in Florida just for its  
23 overseas flights?

24 MR. HANSEN: That question has not been brought  
25 to this case.

1 QUESTION: I understand that.

2 MR. HANSEN: To this Court. And, in Japan Line,  
3 if I recall correctly, the Supreme Court reserved its  
4 decision on that point.

5 And, now, I think, Justice Stevens, you are  
6 asking me to hazard a guess as to what the Supreme Court  
7 will do.

8 QUESTION: I was just wondering whether your  
9 evaluation of your own principle would apply in that case  
10 or not or you just don't know.

11 MR. HANSEN: If it is construed to be foreign  
12 air transportation and not a question of a domestic power  
13 such as was contained in the Containers Corp. of America  
14 with just resinouses of foreign commerce, but strictly  
15 involved foreign commerce and foreign air transportation,  
16 then I would say that Florida would violate the  
17 Constitution.

18 Here, again, some of the United States air  
19 carriers that brought the case up from Florida did not  
20 raise that question. They raised interstate commerce  
21 questions solely.

22 CHIEF JUSTICE BURGER: Your time has expired  
23 now, counsel.

24 Mr. Lauber?

25 --

1 ORAL ARGUMENT OF ALBERT G. LAUBER, JR., ESQ.

2 IN SUPPORT OF APPELLANT

3 MR. LAUBER: Mr. Chief Justice, and may it please  
4 the Court:

5 Let me begin by saying a word about the Canadian  
6 problem we have in the case. It is somewhat ironic that  
7 this case involves a carrier from the only nation in the  
8 world that to our knowledge lets its political subdivisions  
9 impose taxes on aviation fuel use by foreign carriers.

10 Two Canadian Provinces, Quebec and Alberta,  
11 exempt foreign carriers from the tax, but the balance  
12 do impose a tax.

13 I should note that the State Department has not  
14 yet determined finally whether these Canadian provincial  
15 taxes do breach reciprocity. We think that they probably  
16 do, but that question is often a rather ambiguous one.

17 QUESTION: Is there some argument -- some plausible  
18 argument to be made, Mr. Lauber, do you think, that  
19 although the Florida tax does breach reciprocity the  
20 Canadian provincial tax don't?

21 MR. LAUBER: Well, I can imagine arguments  
22 Canada might try to make to defend the tax. They might  
23 try and defend the tax in some kind of price equalization  
24 measure to bring up the eastern seaboard prices to the  
25 level comparable to western. They might try and defend



1 it. We think they probably could not do that successfully.

2 We think here it is quite clear that these  
3 taxes do breach reciprocity. But, in other cases, it  
4 might be very unclear. It is very often --

5 QUESTION: You mean just something out of the  
6 air. Reciprocity would be some principle or do you mean  
7 some treaty or some executive agreement?

8 MR. LAUBER: By that we mean the international  
9 consensus that aviation fuel used by foreign carriers in  
10 foreign commerce should be exempt from all taxes except  
11 those imposed by the home country of the airline and  
12 that --

13 QUESTION: Where do you find that consensus  
14 reflected, in some document or --

15 MR. LAUBER: Well, the Chicago Convention by  
16 its terms says that foreign carriers are to be exempt from  
17 tax on aviation fuel they bring into a country, exempt  
18 both from national taxes and local taxes. That is a treaty  
19 ratified by the Senate.

20 QUESTION: It certainly doesn't reach this case.

21 MR. LAUBER: Right. You have to go further to  
22 get to this case.

23 QUESTION: You really don't find that in that  
24 document.

25 MR. LAUBER: That is correct. The treaty by --

1 If the tready pre-empted the tax, you wouldn't be here.

2           However, the International Civil Aviation  
3 Organization which is an arm of the Convention has  
4 adopted resolutions which have extended the exemption from  
5 local and national taxes to include that only fuel brought  
6 into a country, but fuel, equipment, and supplies taken  
7 on board within the country.

8           QUESTION: Whose resolution is that?

9           MR. LAUBER: That is International Civil Aviation  
10 Organization. That resolution has no force of law, but  
11 it expresses the strong commitment of all parties to the  
12 Convention to this policy of reciprocal tax exemption  
13 for aviation fuel.

14           QUESTION: Except for Canada and --

15           MR. LAUBER: Except for the Canadian provinces.

16           QUESTION: And Florida?

17           MR. LAUBER: And for Florida and several other  
18 states have followed Florida's example.

19           But, in our view, the key thing is it is not  
20 the particular taxing practices of different foreign  
21 countries or their provinces that determine the outcome  
22 here. It is the federal policy of reciprocal exemptions.  
23 We are now at the negotiations with Canada to try and get  
24 this situation resolved and Florida's action has impeded  
25 our ability to do that because we can't really promise

1 Canada exemptions here and --

2 QUESTION: What do we mean when you say "we"  
3 can't? Are you talking about the President, Congress,  
4 this organization you referred to? Who is the we?

5 MR. LAUBER: We is the Transportation Department  
6 aided by the State Department who are charged by the FAA  
7 Act with negotiating --

8 QUESTION: Do they have lawmaking authority that  
9 supercedes the power of a state?

10 MR. LAUBER: Well, they have been empowered by  
11 Congress to enter into bilateral aviation agreements and  
12 we believe --

13 QUESTION: Which they have done and which don't  
14 control the case.

15 MR. LAUBER: They don't fully control the case,  
16 but --

17 QUESTION: They don't touch this at all, do  
18 they?

19 MR. LAUBER: But, they do evidence, as the  
20 Customs Convention on Containers evidence in Japan Line  
21 a very strong federal and international commitment to  
22 avoiding the kinds of taxes involved here.

23 QUESTION: But, is it not correct that if there  
24 were no Convention, nothing, just the facts we have here,  
25 you would have the same kind of constitutional argument

1 or do you depend on these various executive agreements  
2 that are not controlling.

3 MR. LAUBER: We depend on them the way the  
4 shipping company in Japan Line depended on the Container  
5 Convention. That multilateral compact did not pre-empt  
6 state taxes, but the Court viewed it as showing a very  
7 strong federal and worldwide commitment to a tax exemption  
8 for Chicago Container.

9 So, we think just as the Container Convention  
10 was evidentiary of the correct result while not despositive  
11 in Japan Line, the same is true here of the Chicago  
12 Convention in the various bilateral agreements.

13 QUESTION: Would the agreements now in existence  
14 between this country and other countries, would they  
15 forbid the United States from imposing a tax on aviation  
16 fuel?

17 MR. LAUBER: Clearly. The agreements all bar  
18 national taxes.

19 QUESTION: Well, wouldn't you think that if they  
20 wanted to go farther, they should have gone farther?  
21 These agreements directed themselves to taxation and they  
22 didn't touch local taxes.

23 MR. LAUBER: But, the same is true in Japan Line,  
24 Justice White. The Congress in a way had spoken there  
25 by enacting the Container Convention which barred taxes



1 imposed by reason of the importation. They addressed taxes  
2 only to that degree and the Court nevertheless held that  
3 despite the lack of expressed pre-emption there is still  
4 a violation of the Commerce Clause.

5 Indeed, if one required a congressional statute  
6 on point, there would never be any Commerce Clause  
7 jurisprudence. By definition we only rely on the negative  
8 implications of the Commerce Clause when the reason of  
9 the statute --

10 QUESTION: Mr. Lauber, does the airline have  
11 to pay all the other taxes in Florida?

12 MR. LAUBER: Justice Marshall, the airline is  
13 required --

14 QUESTION: All of the sales taxes and everything  
15 else?

16 MR. LAUBER: In our view, they should be exempt  
17 from sales tax on equipment and fuel they use on the  
18 aircraft in international commerce. They pay sales tax  
19 on the computer equipment in the terminal. They pay user  
20 fees for equipment they rent from the state at the air-  
21 port.

22 QUESTION: And the difference is?

23 MR. LAUBER: This goes up in the air on the way  
24 to foreign nations.

25 QUESTION: Well, don't the pork chops go up in

1 the air that you purchased for dinner that night?

2 MR. LAUBER: Well, that is --

3 QUESTION: On the plane.

4 MR. LAUBER: That is a difficult question, but  
5 our position is that the food taken onboard to be fed to  
6 the passengers in international traffic also must be  
7 exempt from sales tax. Food that people eat in the  
8 terminal when doing the tickets is not exempt from sales  
9 tax. Whatever goes into the plane to facilitate  
10 international transportation, in our view, must be exempt  
11 from tax as it is in every other country of the world  
12 except, it seems, in some Canadian provinces.

13 QUESTION: Mr. Lauber, does Section 1513(b)  
14 of Title 49 which says states can levy sales taxes have  
15 any application here?

16 MR. LAUBER: I think not, Justice O'Connor.  
17 Were it not for -- That section makes it clear that a sales  
18 tax per se can be levied on airlines which means the  
19 domestic airlines can be required to be paid the tax,  
20 but whether the tax can be applied constitutionally to  
21 one group of airlines, namely the foreign airlines, is  
22 a constitutional question which Congress didn't address  
23 in that statute.

24 QUESTION: Yes. The statute does not  
25 differentiate between foreign and domestic flights.

1 MR. LAUBER: That is correct. But, that statute  
2 had a rather narrow purpose. It was enacted as part of  
3 an overruling of this Court's decision which allowed a  
4 head tax to be imposed, a per-passenger head tax by  
5 states, and Congress declared in Section A of that  
6 provision that head taxes could not be imposed, thereby  
7 overruling the Court's decision. But then to reassure  
8 the states it enacted B which said that other taxes of  
9 general application were not pre-empted.

10 But, we don't think Congress had in mind any-  
11 thing like what we have here which is a tax imposed on  
12 foreign airlines, fuel use in foreign commerce.

13 Let me say one thing about Justice Stevens'  
14 question about the containers in Japan Line. Our view  
15 would be that if the containers -- if the Japanese  
16 company there bought containers in California to replace  
17 containers on their container ships and used them solely  
18 in foreign commerce, they would have an exemption from  
19 sales tax. They would not be exempt from equipment they  
20 bought in the state to be used in California.

21 QUESTION: What about the emphasis in the Japan  
22 case of the risk of multiple taxation? Do you have that  
23 risk here?

24 MR. LAUBER: We think there is no risk of that  
25 here.

1 QUESTION: At least on that ground it is  
2 different from Japan Line?

3 MR. LAUBER: It is different, but the Court in  
4 Japan Line quite clearly said that if the state tax either  
5 creates a risk of multiple taxation or prevents federal  
6 uniformity from being achieved, it would be invalid.

7 And, in fact, I think in Container Corporation  
8 where the Court did find multiple taxation, they neverthe-  
9 less upheld the California unitary income tax on a U.S.  
10 company. We think that shows that the multiple taxation  
11 is not really the key to Japan Line because that aspect  
12 was present in Container Corporation. I think what Con-  
13 tainer shows is that the key to Japan Line is really the  
14 second part of the test which we do have here.

15 Thank you.

16 CHIEF JUSTICE BURGER: Mr. Mellichamp?

17 ORAL ARGUMENT OF JOSEPH C. MELLICHAMP, III, ESQ.

18 ON BEHALF OF THE APPELLEE

19 MR. MELLICHAMP: Mr. Chief Justice, and may it  
20 please the Court:

21 The question presented in this case is whether  
22 the excise tax, which is a sales tax, imposed by Florida  
23 upon the privilege of engaging in the business of selling  
24 tangible personal property, which in this case includes  
25 aviation fuel, unconstitutionally impairs the power of



1 the federal government to regulate foreign commerce.

2 The case is a narrow constitutional challenge  
3 to the exercise of this fundamental state power, the power  
4 to tax, the power to tax purchases of goods in the state.

5 The challenge by the Appellant rests on two  
6 grounds and those two grounds are set forth in the Japan  
7 Line case of this Court. In that case this Court said  
8 when you are looking to taxes that affected foreign  
9 commerce there were two additional tests beyond that in  
10 the Complete Auto case. There were four of them in that  
11 case.

12 In this case, the tax unquestionably passes the  
13 four-prong test in Complete Auto. We are left with two  
14 in Japan Line.

15 The first in Japan Line was the risk of multiple  
16 taxation. The parties in this case concede there are no  
17 such risks of multiple taxation in this case unlike in  
18 Japan Line where there was an ad valorem tax on a  
19 container and that container could be taxed somewhere else,  
20 and in that case in Japan -- In fact, was taxed in Japan.

21 In this case, we have an excise tax or sales  
22 tax upon the privilege of doing business in the State of  
23 Florida. That incident can only be taxed once.

24 The second ground in Japan Line and the ground  
25 that the Appellant relies on is that it prevents the

1 United States from speaking with one voice. And, it is  
2 the Appellant's position that there are two grounds for  
3 finding a violation of this test.

4 The first ground was that the tax, the sales  
5 tax involved in this case was pre-empted by federal  
6 legislation and the international agreements or the  
7 executive agreements involved in this case. And, the second  
8 ground was that the state excise tax impermissibly  
9 intrudes upon the federal government's power over foreign  
10 affairs.

11 On the first issue of pre-emption, they claim  
12 that under the Federal Aviation Act that the Congress has  
13 pre-empted this entire area. I would submit to the Court  
14 that there is nothing contained in any of the provisions  
15 they cite that pre-empts the state from imposing an  
16 otherwise valid sales tax, in fact, such as before the  
17 Court today.

18 And, in fact, Section 1513(b) evidences Congress'  
19 intend to preserve that source of income to the State of  
20 Florida, in other words, sales tax. And, that section,  
21 as this Court found in the Aloha case, Congress preserved  
22 that right or reserved that right to the states, whereas  
23 in subsection (a) of that section it prohibited or pre-  
24 empted certain state taxes.

25 So, now we are down to the international

1 agreements, or in this particular case, one international  
2 agreement. The question when you look at the international  
3 agreement is what is the one voice that the federal  
4 government has spoken in these agreements? I would submit  
5 that in those agreements what the federal government has  
6 done is reserve its sovereign right to allow the states  
7 to tax as they please as long as the tax is not dis-  
8 criminatory in this area of sales tax.

9 The agreement itself speaks only to national  
10 excise taxes. The Convention of 1944 speaks only of  
11 national and local taxes on fuel brought into the country.

12 The resolution that was mentioned by the  
13 Appellant that was done in 1966, while it speaks to state  
14 taxes or taxes on a local level, this resolution, I  
15 submit, has never been incorporated into this agreement  
16 or any other of the agreements.

17 In fact, the United States has reserved its  
18 sovereign power in this area in these agreements. Some  
19 of the other agreements mentioned by the various amicus  
20 in this case, some of the newer agreements after 1978,  
21 use the term "best efforts" and this begs the question, if  
22 the United States in these agreements, other agreements  
23 involved in this case, are saying they will use their best  
24 efforts, it is an admission that the agreements don't cover  
25 this area. It is an admission that the federal government

1 has reserved its sovereign power in this area to allow  
2 the states to tax as they please as long as it is not dis-  
3 criminatory.

4 So, the federal policy is not there. The federal  
5 policy is there, Florida would submit, that allows the  
6 state to impose this tax. That policy is expressed in  
7 these agreements.

8 The only other two grounds for a federal policy  
9 to violate is the threat of retaliation which is not  
10 present in this case. In this case, Canada, under this  
11 agreement, allows its provinces to do the same that the  
12 United States, in reserving its sovereign power, allows  
13 the State of Florida to do.

14 QUESTION: But, Florida, counsel, reserves the  
15 right to tax other foreign airplanes besides Canadian  
16 planes on their fuel, doesn't it?

17 MR. MELLICHAMP: Yes, Justice Rehnquist.

18 QUESTION: So, that may be a good defense to  
19 this case, but how about Florida's assertion of a power  
20 to tax, say, you know, a plane flying from Miami to London,  
21 a British plane, or a Belgium plane flying from Brussels  
22 to Miami?

23 MR. MELLICHAMP: None of the agreements that  
24 are before this Court, Justice Rehnquist, affect or  
25 discuss or pre-empt or prohibit state excise taxes or



1 sales taxes involved in this case.

2 The Solicitor General in his brief points this  
3 out. None of them talk about it. All of them reserve  
4 the sovereign right of the United States to allow the  
5 states to tax as they please as long as it doesn't dis-  
6 criminate.

7 QUESTION: Well, do think then the fact that  
8 the Canadian provinces that are imposing a tax here --  
9 Is it kind of a make weight argument for your side or is  
10 it a pretty important argument or does it really not amount  
11 to very much?

12 MR. MELLICHAMP: When you are looking to see  
13 what these agreements cover and how the people that  
14 negotiated them, the nations that negotiated them, felt  
15 were covered, what were covered in these agreements, it  
16 has considerable weight, because in this case, the other  
17 nation in this case considers the agreements not to pro-  
18 hibit such taxation by their subnational units of  
19 government and in that respect it has some weight.

20 The other source of federal policy only exists  
21 in the brief of the Solicitor General and only at the  
22 request of this Court was that brief submitted.

23 Florida submits to this Court that the agree-  
24 ments, the Convention evidences the federal policy that  
25 was not evident in the Japan Line case, but was evident



1 in the Container case. In that case, this Court found that  
2 on numerous occasions treaties were entered into by the  
3 United States, but specifically would not address the  
4 taxation of income by states.

5 I submit in this case the same is evident for  
6 this Court, that in numerous, in all occasions in these  
7 executive agreements entered into by the federal government,  
8 none of them prohibit the states from imposing sales tax.  
9 All of them reserve the United States sovereign power to  
10 allow the states to do this just as in the Container case.

11 I would submit that Florida's tax has not been  
12 pre-empted, that Florida's tax does not impair the ability  
13 of the federal government to speak with one voice and,  
14 as such, the tax is not unconstitutional.

15 CHIEF JUSTICE BURGER: Thank you, gentlemen.

16 The case is submitted.

17 (Whereupon, at 11:40 a.m., the case in the  
18 above-entitled matter was submitted.)  
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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

#84-902 - WARDAIR CANADA, INC., Appellant V FLORIDA DEPARTMENT OF REVENUE

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BY Paul A. Richardson

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