

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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CAPTION:

FRANCHISE TAX BOARD OF CALIFORNIA, ET AL.,
Petitioners v. ALCAN ALUMINIUM LIMITED, ET AL.

CASE NO:

88-1400

PLACE:

WASHINGTON, D.C.

DATE:

November 1, 1989

PAGES:

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ALDERSON REPORTING COMPANY
1111 14TH STREET, N.W.
WASHINGTON, D.C. 20005-5650
202 289-2260

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 FRANCHISE TAX BOARD OF :

4 CALIFORNIA, ET AL., :

5 Petitioners :

6 v. : No. 88-1400

7 ALCAN ALUMINIUM LIMITED, :

8 ET AL. :

9 -----x

10 Washington, D.C.

11 Wednesday, November 1, 1989

12 The above-entitled matter came on for oral argument
13 before the Supreme Court of the United States at 11:51 a.m.

14 APPEARANCES:

15 TIMOTHY G. LADDISH, ESQ., Assistant Attorney General of
16 California, San Francisco, California; on behalf of
17 the Petitioners.

18 LAWRENCE A. SALIBRA II, ESQ., Cleveland, Ohio; on behalf of
19 the Respondent.

C O N T E N T S

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ORAL ARGUMENT OF

PAGE

TIMOTHY G. LADDISH, ESQ.

On behalf of the Petitioners

3

LAWRENCE A. SALIBRA II, ESQ.

On behalf of the Respondent

22

REBUTTAL ARGUMENT OF

TIMOTHY G. LADDISH, ESQ.

On behalf of the Petitioners

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1 P R O C E E D I N G S

2 (11:51 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument next
4 in Number 88-1400, Franchise Tax Board of California versus
5 Alcan Aluminium Limited.

6 Mr. Laddish, you may proceed.

7 ORAL ARGUMENT OF TIMOTHY G. LADDISH

8 ON BEHALF OF THE PETITIONERS

9 MR. LADDISH: Mr. Chief Justice, and may it please the
10 Court:

11 This is a tax case, but where are the taxpayers? The
12 domestic corporations that do business in California and that
13 are assessed and pay the California taxes are not before this
14 Court today. Counsels employed by those taxpayers are counsel
15 of record here and they are challenging the validity of the
16 California tax. But today they are on the record as
17 representing the taxpayers' sole stockholders, Alcan and
18 Imperial, the foreign corporations which control the domestic
19 taxpayer corporations.

20 It is that control which has orchestrated these suits
21 so that taxpayers are not before the Court today. It is that
22 control which should lead to the dismissal of these actions
23 under the Tax Injunction Act.

24 Most of the space in the briefs is taken up with
25 discussions of the standing issues, but since the Tax

1 Injunction Act provides its own plain, speedy and efficient
2 means of resolution of these case, I will discuss the Tax
3 Injunction Act first.

4 For purposes of this part of the argument it should be
5 assumed that somehow the Respondents have satisfied the
6 Article III and prudential standing rules. If the taxpayer
7 subsidiaries were before the Court today in these federal
8 actions there is no question but that the Tax Injunction Act
9 would apply to bar them from the federal courts and to point
10 them back to the plain, speedy and efficient remedies provided
11 by the California courts. Recognizing that, Respondents, the
12 foreign corporation parents, have decided to hide the
13 taxpayers under their parental skirts and take the federal
14 field themselves. They have filed their actions in the
15 Seventh Circuit, since the Ninth Circuit had denied relief to
16 other foreign corporations, foreign parents --

17 QUESTION: Mr. Laddish, does the California state board
18 have an office in Chicago, so there is personal jurisdiction,
19 I take it?

20 MR. LADDISH: There is an office there and audits are
21 conducted there, Your Honor. Not necessarily the audits in
22 this case, but audits are conducted there.

23 The -- certainly Alcan would not be bringing this
24 action in the Second Circuit because it had already been
25 denied standing in that Circuit to -- to raise these sort of

1 issues. But once they were in the federal courts and were
2 confronted with a Tax Injunction Act, then they said well, the
3 Tax Injunction Act can't apply to us because we have no plain,
4 speedy or efficient remedies in the state courts.

5 QUESTION: Do they?

6 MR. LADDISH: They do, in effect, have plain, speedy
7 and efficient remedies.

8 QUESTION: How? How?

9 MR. LADDISH: Through the fact that they are the sole
10 stockholders of the taxpayers in this --

11 QUESTION: You think that the domestic subsidiary can
12 raise the issues for them?

13 MR. LADDISH: Certainly, Your Honor. The -- the
14 domestic subsidiaries are the taxpayers. They are the parties
15 that have been assessed the tax. What's put in issue in the -

16 QUESTION: You think they can raise the foreign
17 commerce clause issues, the domestic subsidiary can?

18 MR. LADDISH: It -- it's only common sense that they
19 can, and also it's, if you look to what is going on in the
20 California courts right now --

21 QUESTION: You don't think you would be in there
22 arguing against that?

23 MR. LADDISH: Excuse me?

24 QUESTION: In the -- you wouldn't be arguing against
25 that in the state courts?

1 MR. LADDISH: Currently there are cases pending in the
2 California state courts where the issues are being raised by
3 subsidiaries --

4 QUESTION: And what position is the state taking on
5 those? Is the state saying fine, we're going to litigate
6 those issues?

7 MR. LADDISH: The state is taking the issue, as to some
8 of them, the state is taking a procedural defense that they
9 did not raise them in the claims for refund. But in no case
10 is the state claiming that the subsidiaries cannot raise those
11 foreign commerce claims. And we -- we would be unsuccessful
12 if we did try to raise that, because --

13 QUESTION: And how about the claim that it costs more
14 for the parent?

15 MR. LADDISH: Those claims are being fully litigated in
16 -- in the state courts. In one case, the Barclay's case, I
17 believe that is one of the issues where we are claiming that
18 they did not raise that in the -- in the claim for refund.

19 QUESTION: Do you think under California state tax law
20 that the state could take the position that it can tax the
21 parent, that the parent's the taxpayer?

22 MR. LADDISH: Not under the California state law, Your
23 Honor, in that the California --

24 QUESTION: Well, it reads broadly enough. I mean, you
25 take the position you can tax all their income.

1 MR. LADDISH: No, Your Honor, we do not.

2 QUESTION: Well, that you can consider worldwide income
3 in levying the tax.

4 MR. LADDISH: The California statute states that the --
5 taxpayer is the person subject to the tax. That doesn't get
6 us anywhere except that the section that does impose the tax,
7 Section 23151 of the California Revenue and Taxation Code,
8 says that -- imposes the tax on every corporation doing
9 business in the state. Now, in these cases the corporations
10 doing business in the state are the domestic subsidiary
11 corporations. And those are the corporations, under the
12 stipulations of fact, that the assessments have been made
13 against, those are the corporations that information has been
14 requested from and those are the corporations that we are
15 determining what their -- what income should be attributed to
16 their California business.

17 Now, in determining that, California does turn to the
18 income of the unitary business, and looks to the whole unitary
19 business in order to make the apportionment. But the tax is
20 levied on that corporate entity, and the Franchise Tax Board
21 deals with that corporate entity in its tax procedures. In
22 the Container case, this Court recognized that, although
23 California counts income arguably attributable to foreign
24 corporations in calculating the tax -- taxable income of that
25 domestic corporation, the legal incidence of the tax falls on

1 that domestic corporation.

2 And as a final touch to consider, if that corporation
3 did not pay the tax, under California law there was no means
4 for us to go after the foreign parent corporation. It is that
5 corporation that has the tax liability, and if that
6 corporation goes insolvent we must file claims in the -- in
7 the bankruptcy of that corporation. But there are no
8 provisions that that is not really the taxpayer after all, and
9 we can go after anyone else.

10 So we submit that the foreign parents, having let their
11 subsidiaries keep their California procedures lying fallow
12 while going to the foreign -- the federal courts, that this is
13 a forum shopping, a form of forum shopping that strikes at the
14 very heart of the federalism that Congress meant to preserve
15 in the Tax Injunction Act. This forum shopping strips
16 California of its tax remedies, which Congress meant to
17 protect in the Tax Injunction Act, and subjects California to
18 the expense and peril of litigating the ultimate
19 constitutional validity of its tax structure, regardless of
20 whether the tax has been paid, against nontaxpayers, in
21 actions where California would not have the other procedural
22 or other substantive defenses or issues it might raise against
23 the taxpayer itself.

24 QUESTION: We'll resume there at 1:00, Mr. Laddish.

25 MR. LADDISH: Thank you.

1 (Whereupon at 12:08 p.m., the oral argument in the
2 above-entitled matter was recessed, to reconvene at 1:00 p.m.,
3 this same day.)

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1 AFTERNOON SESSION

2 (12:59 p.m.)

3 CHIEF JUSTICE REHNQUIST: You may resume, Mr. Laddish.

4 MR. LADDISH: Thank you, Mr. Chief Justice. You will
5 recall, we left California confronting a challenge to its
6 basic tax structure in a distant federal forum which has
7 absolutely no familiarity with the procedural or substantive
8 nature of California tax law. The threat that this might
9 occur to other states has caused 39 amici states to join with
10 California in asking this Court to recognize this threat for
11 what it is and give it the fate that it deserves under the Tax
12 Injunction Act.

13 The Tax Injunction Act has quite clear language to
14 avoid such forum shopping as we see today. These shareholder
15 corporations cannot get the declarative or injunctive relief
16 that they seek if -- where a plain, speedy and efficient
17 remedy may be had in the courts of the state. This Court, in
18 the Grace Brethren case, recognized that, at the time of the
19 Tax Injunction Act's enactment, Congress was well aware that
20 tax refund procedures were the sole remedy offered in many
21 states, and in the same case this Court recognized that
22 California's tax refund remedy, in a similar statute and
23 another tax, provided a plain, speedy and efficient remedy.

24 Under a very strict reading of the Tax Injunction Act
25 language itself, this recognition would be enough to bar these

1 suits, for at least some interpretation must be had -- given
2 to the language to add the requirement that anyone other than
3 the taxpayer have a plain, speedy and efficient -- remedy. If
4 a requirement were to be read into the statute that the party
5 bringing the federal action must, in effect, have a plain,
6 speedy and efficient remedy in the California courts, that
7 requirement would be met here.

8 In order to protect the state's finances, the State of
9 California offers its remedy in the usual tax refund form.
10 This is, by its form, limited to the taxpayers. That
11 limitation, though reasonable by itself, could arguably lead
12 to inapplicability of the Tax Injunction Act if the parties
13 before the court, the federal court, only could rely upon the
14 hope of persuading the taxpayers in the state courts to raise
15 certain issues or to raise them in a certain way. But that is
16 not the case before the Court today.

17 Here we have the sole stockholders of the taxpayers in
18 California, and those stockholders do not need to rely upon
19 the hope of persuasion. They have the certainty of control.

20 The result of barring these actions under the Tax
21 Injunction Act is not only consistent with the language, it is
22 fully consistent with the purpose underlying the act, which
23 was to limit drastically federal court jurisdiction to
24 interfere with the lifeblood intense local concern of the
25 states in the assessment and collection of their own state

1 taxes. In furtherance of this purpose, this Court, in the
2 Grace Brethren Church case, recognized that the plain, speedy
3 and efficient remedy should be construed narrowly.

4 Now, in further answer to the question as to whether
5 the taxpayers' remedy themselves, itself, encompasses the
6 ability to raise all the foreign commerce clause issues, I
7 submit that if -- upon reflection, any other result would be
8 absurd. The issue before the Court today is the
9 constitutionality of the California tax. That tax is imposed
10 upon the domestic corporation subsidiaries. If the tax is
11 invalid, the subsidiary would not be liable for that tax, and
12 it only stands to reason as common sense, that the subsidiary
13 necessarily had standing to raise any question going to its
14 own tax liability.

15 When we move to the standing issue, the subsidiary
16 taxpayer's ability to raise all the issue pertaining to the
17 validity of its tax is also central, and the application of
18 the dispositive rule here, the stockholder standing rule.
19 Under the stockholder standing rule a stockholder will not
20 have standing to litigate an issue if the stockholder's injury
21 is derived from its status as a stockholder, and if the
22 corporation itself would have standing to raise the same
23 issue. Assuming arguendo for the moment that there is Article
24 III standing here, which I will be dealing with in a moment,
25 clearly the stockholder standing rule would apply under the

1 facts of this case as a prudential rule of standing.

2 QUESTION: May I -- may I give you a hypothetical case
3 --

4 MR. LADDISH: Sure.

5 QUESTION: -- that I have been thinking about?
6 Supposing the subsidiary's tax would be the same whether you
7 use the unitary business approach or their, you could somehow
8 or other isolate them, if they claimed it was
9 unconstitutional. But there really didn't make any difference
10 in the tax obligation of the subsidiary, and therefore
11 arguably it wouldn't have standing to raise all sorts of
12 constitutional issues. Might it, nevertheless, be true that
13 in such a case the state's insistence on following the unitary
14 approach would pose a lot of burdens on your adversaries here
15 that were not imposed on the taxpayer, and that there would no
16 forum in which that particular claim could be litigated?

17 MR. LADDISH: Still, if, as to the validity of the tax,
18 I believe, since California is not only taxing the --
19 corporation that is doing business in California, it is asking
20 that corporation for all the information pertaining to the
21 assessment of the tax. Why, it is that corporation that has
22 the direct request or demand made upon it by the Franchise Tax
23 Board, and that corporation would have the standing still to
24 challenge, if -- if we're talking about whether the tax is
25 valid because of administrative burdens --

1 QUESTION: It would even if it didn't affect its tax --
2 even if it wouldn't affect its tax liability?

3 MR. LADDISH: I believe so, Your Honor, because it
4 would still be, as is the situation in the litigation in the
5 California courts today, that is one of the grounds that is
6 being raised. And that ground itself, I think, is based on a
7 cost factor. And so, it's more than just an idle question as
8 to -- there would be a case in controversy as to whether or
9 not this corporation would need to supply the information, or
10 undergo the penalties for failing to supply the information.

11 The stockholder standing rule here clearly applies
12 because all of the injuries flow to -- if there are injuries
13 here, they flow to the Respondents here because of their
14 stockholder status. And I think a hypothetical would make
15 this clear.

16 If Alcan, say, were not a stockholder in its domestic
17 subsidiary, in other words Alcan and AlcanCorp, have
18 absolutely no stockholder relationship, but California somehow
19 didn't get the word and still assessed a tax on AlcanCorp
20 taking into account all of Alcan's income, and asking
21 AlcanCorp for a considerable amount of information about
22 Alcan, Alcan, not being a stockholder, could just sit by and
23 see how it all comes out if it is even interested in finding
24 out. But there would be absolutely no acrimonious detriment to
25 Alcan. All of the injuries that are alleged in this case and

1 that are found by the Seventh Circuit flow from the
2 stockholder standing, from the stockholder status.

3 Just as clearly, as I mentioned before, pure common
4 sense says that the corporation itself would have standing to
5 raise all of the issues that are being -- meant to be raised
6 today by the Respondent. And I point out that the Grace
7 Brethren Church case, again, in looking at a similar
8 California tax refund statute for another tax, particularly
9 recognized that the taxpayer there could raise all the
10 arguments pertaining to the validity of the tax.

11 Respondents have not come forward with any policy
12 reasons justifying the departure, any departure from the use
13 of the stockholder standing rule as a prudential rule of
14 standing. To the contrary, there are strong policy reasons
15 supporting the application of the rule in this case.

16 QUESTION: Well, the Seventh Circuit found, didn't it,
17 Mr. Laddish, or perhaps found isn't the right word, maybe
18 held, that the corporations here did sustain a different kind
19 of injury from the taxpayer?

20 MR. LADDISH: The Seventh Circuit, Your Honor, mixed
21 the merits with the standing issue, when considering the
22 standing issue forgot to consider the strong issues of
23 federalism that we can maintain underlie both the standing
24 issue and the Tax Injunction Act issue in this case, and did
25 find this injury that was really, as I understand it, would

1 be, gee, there's a good chance that foreign commerce is being
2 interfered with here, and these people are in foreign
3 commerce, and therefore we will find an injury where we might
4 not otherwise find. It is submitted that that injury is not
5 cognizable standing injury, even under Article -- Article III
6 standards. It certainly would fit under the stockholder
7 standing rule, without the stockholder link there would be no
8 standing. And certainly I think it could be raised by the
9 taxpayer corporation as a violation of the foreign commerce
10 clause.

11 But, under Article III standing, when boiled down to
12 its essence, that, that injury, as found by the Seventh
13 Circuit, is really that if a state imposes any tax upon a
14 subsidiary, why, then, that -- the subsidiary's parent,
15 whether it is an interstate or foreign commerce, would feel
16 this burden upon its decision making as to whether to do
17 business in that state through the use of the subsidiary.

18 It is submitted that that is basically saying
19 corporation don't like standing and, to borrow a term from
20 First Amendment cases, if you impose a -- tax on a corporation
21 and its parent is doing business in interstate or foreign
22 commerce, that is a chilling effect on interstate and foreign
23 commerce. And it is submitted than an analogous approach was
24 taken in Meese v. Keen in 1987 First Amendment case of this
25 Court, which found that -- noted that such arguments of a

1 subjective chill would not be cognizable injury.

2 Moving back to the stockholder standing rule itself,
3 this Court in Hawes v. Oakland, more than 100 years ago,
4 decided that it was perfectly appropriate to apply the
5 stockholder standing rule to prevent forum shopping through
6 the abuse of federal diversity jurisdiction. And then in 1945
7 this Court, in the Shindley Corporation case, held that it was
8 particularly appropriate to apply the stockholder standing
9 rule when there was a situation where you had sole
10 stockholder, since that sole stockholder could control the
11 litigation of its subsidiary, precisely the situation we have
12 today.

13 The facts of today's case and the forum shopping
14 aspects of it that I described earlier, and the combination of
15 these policy currents that we have seen from prior cases, show
16 that the stockholder standing rule as applied in this case
17 certainly would not be an anachronism. It is supported --
18 that application would be supported by the same concerns that
19 underlay the Tax Injunction Act itself: the basic principles
20 of federalism which recognize the imperative need of the state
21 to administer its own fiscal operations regarding its own
22 taxes.

23 Now, a somewhat closer question comes up when we talk
24 about whether Alcan and Imperial have Article III standing. I
25 have already discussed the Seventh Circuit's found injury that

1 Alcan and Imperial didn't know they had until the Seventh
2 Circuit pointed it out to them. But as to the injuries that
3 they assert as far as the standard double taxation injuries
4 and cost of compliance injuries that they assert, I would
5 point out that there is -- although the rule may be different
6 in other areas, when a party is challenging the validity of a
7 statute, federal or state, in order to establish a distinct
8 and palpable injury to himself, that party must demonstrate a
9 realistic danger of sustaining a direct injury as a result of
10 the statute's operation or enforcement.

11 That rule was most recently stated in the case of Penel
12 v. City of San Jose in 1988. That rule would apply to the
13 facts of this case in that the only actions by the Franchise
14 Tax Board were taken as against the stockholder -- excuse me,
15 as against the subsidiary corporation, the California taxpayer
16 in this case. And any effect of those actions would be
17 indirect upon the Respondent.

18 As to Imperial's argument that if its United States
19 subsidiary had issued any dividends, why then a double
20 taxation injury would have occurred to Imperial because of the
21 United Kingdom statutes having to do with dividend credits, we
22 submit that that purported injury would fail for two reasons.
23 Number one, it is hypothetical. There never were any such
24 dividends. We don't know exactly what would happen when that
25 occurred, and the only source for determining that is an

1 affidavit where the United Kingdom person giving the affidavit
2 was not -- was very forthright in saying he wasn't entirely
3 certain what would happen under the law. But the second
4 reason that that injury should be rejected is that, under this
5 Court's decision in Warth v. Seldin, the line of causation
6 that has to do with the requirement, Article III requirement,
7 that the injury must be fairly traced to the actions of the
8 defendant, that line of causation would be broken by any
9 intervening acts of the tax authorities, in this case it would
10 be the United Kingdom tax authorities.

11 Franchise Tax Board is in full agreement with Imperial
12 in one respect, and that is that Alcan is wrong when it argues
13 that this Court must decide the ultimate constitutional merits
14 of this case in order to decide the standing issue. This
15 Court, barely six months ago in ASARCO Inc. v. Kadish, stated
16 the established rule that federal standing in no way depends
17 on the merits of the claim. And it certainly makes sense in
18 the foreign commerce clause area, where you might have an
19 undoubted injury -- I'm giving you a hypothetical example -- a
20 party may, may be subjected to the same injury that the
21 taxpayer in Japan Line felt, double taxation injury, and yet
22 upon analysis this Court might find that Congress had taken
23 the same line of actions as was taken in the case of Ward Air
24 Canada v. Florida Department of Revenue.

25 In that case this Court decided that Congress, through

1 its actions, had indicated that the states could tax as they
2 pleased in a particular area, and Congress, being in control
3 of foreign commerce, not the executive, would have control,
4 and that would not be a violation of the foreign commerce
5 clause, even though the taxpayer might have an injury that, in
6 Japan Line, led to a decision in its favor in the merits.

7 Moving to the question as to what effect does the
8 pleadings have in the -- on the standing issue in this case.
9 The -- if standing was being decided at the pleading stage, by
10 non-speculative allegations of the complaint certainly would
11 be binding on the standing issue. But here we have
12 stipulations of fact which have superseded the complaints in
13 many respects.

14 QUESTION: Well, if there is no standing, do we ever
15 reach the Tax Injunction Act?

16 MR. LADDISH: There is, if there is no standing there
17 is no need to reach the Tax Injunction Act.

18 QUESTION: No need, but can we?

19 MR. LADDISH: I believe this Court can assume standing
20 --

21 QUESTION: Assume it? Assume it?

22 MR. LADDISH: -- and reach the Tax Injunction Act.

23 QUESTION: And reach the, and say, and dismiss the case
24 on the --

25 MR. LADDISH: That even if there were standing, why the

1 Tax Injunction Act would apply. I believe so, Your Honor.

2 QUESTION: Would that be true if there were no Article
3 III standing?

4 MR. LADDISH: I believe the Court could take that
5 approach. I believe the Court has at times decided that it
6 would not reach a particular issue because another issue would
7 apply even it -- no matter what it decided on the first issue.

8 QUESTION: Even where that issue was a standing issue?

• 9 I mean, that is sort of remarkable. We can decide all sorts
10 of things though where there is no standing, so long as we
11 decide them against the person who asserts standing, we can
12 reach all sorts of issues.

13 MR. LADDISH: I would be perfectly happy, Your Honor,
14 if you decided for me on the standing issue and left the Tax
15 Injunction Act issue alone.

16 QUESTION: I think --

17 MR. LADDISH: I wanted to argue the tax --

18 QUESTION: I always thought we had to resolve standing
19 issues before we got to other issues.

20 MR. LADDISH: That certainly makes practical sense to
21 me, and I believe --

22 QUESTION: It is very impractical. I think it --

23 QUESTION: You just wanted to make sure to get the Tax
24 Injunction Act argued before you ran out of time.

25 (Laughter)

1 MR. LADDISH: That is absolutely correct, Your Honor.

2 The -- also we should point out that the allegations of
3 the complaint should not be irrefutable for standing purposes
4 when they are indeed matters of law. As an example, Alcan's
5 complaint in paragraph 17 of page 10 of the Joint Appendix
6 says that since California is using worldwide unitary income
7 as its base, it is therefore imposing a tax upon Alcan. There
8 is no sense to bind California to that for standing purposes,
9 when just this last term in Shell Oil Company v. Iowa
10 Department of Revenue this Court decided that the mere
11 inclusion of income in the preapportionment tax base does not
12 by itself constitute taxation of that income.

13 I would like to reserve the remainder of my time, if I
14 could.

15 QUESTION: Thank you, Mr. Laddish.

16 Mr. Salibra.

17 ORAL ARGUMENT OF LAWRENCE A. SALIBRA II
18 ON BEHALF OF THE RESPONDENT

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

21 I represent two foreign parents, Alcan Aluminium
22 Limited and Imperial PLC. They have some common
23 characteristics that give rise to this litigation that I think
24 are important to consider. The first is they are foreign
25 parents and do not operate in the United States. They have no

1 permanent establishment in the United States, as that term is
2 generally recognized in the tax area. They operate
3 exclusively in the U.S. through subsidiaries. Both are
4 assessed by California on the worldwide combined apportionment
5 method. And both, in their view, feel that as a result of
6 that assessment the promises made to their government, that
7 when they invested in the United States through a subsidiary
8 they would have no impact on their operations outside of the
9 United States, except as derived from the shareholder status,
10 is being in fact undermined by the California tax.

11 We see this case not as a Tax Injunction Act case, but
12 as a shareholder case. Is this tax treating us like a mere
13 shareholder or a passive investor? It came up out of the
14 district court in that way. Judge Williams ruled that we had
15 no right to pursue this case because the only possible injury
16 we could have is the injury derived from a passive shareholder
17 investor. We think that is incorrect.

18 We think, and we agree with the Seventh Circuit, that
19 when you look at this case and you look at the impact of the
20 tax, it is the fact that we are not being treated like a
21 shareholder which gives rise to our right to standing and
22 gives rise, simultaneously, to our objection to the tax on
23 constitutional grounds.

24 QUESTION: You're not being treated at all by
25 California.

1 MR. SALIBRA: On the contrary, Justice Scalia. We are
2 in fact being treated as though we in fact were operating in
3 the United States as a permanent establishment.

4 QUESTION: You don't get any bill from California, do
5 you?

6 MR. SALIBRA: We get a bill from California in this
7 sense. California says there is, there is a single unitary
8 business. It is operating in our state. We want to determine
9 what income is available to is. We have determined that based
10 on that worldwide operation, and we are sending that bill to
11 that portion of the unitary business that is in our state. Do
12 they send it to Alcan Aluminium? No. Is there a real
13 worldwide impact from the tax? Yes.

14 I think the most telling example that probably answers
15 your question perhaps more directly than whether we get a bill
16 is the example I used in the brief concerning the impact on a
17 totally independent operation halfway around the world. If
18 there is a business manager in an Alcan facility --

19 QUESTION: May I interrupt before you go with --

20 MR. SALIBRA: Yes, you may.

21 QUESTION: Are you assuming this totally independent
22 operation is part of the unitary business?

23 MR. SALIBRA: I am, Your Honor.

24 QUESTION: Then it is not totally independent.

25 MR. SALIBRA: Well, it is not -- it is part of the

1 unitary business, that is correct, it is not totally
2 independent. That may be a wrong -- it is part of the
3 business; it is operating in India. As it operates, the
4 business manager of that facility decides that, some employees
5 are retiring, and he can do two things. He can not replace
6 those employees and maintain the same productivity level, and
7 he can not replace, he can actually change the process and
8 eliminate some of his capital equipment. The result of that
9 plant decision, his California tax goes up. That is where the
10 impact --

11 QUESTION: Well, is that true? The total income goes
12 up, but isn't it also true that the percentage of the business
13 done in California goes down?

14 MR. SALIBRA: No, no. I didn't say that. It is the
15 tax goes up, I am sorry. The tax goes up, the California tax
16 goes up.

17 QUESTION: Well, does it? Because ---

18 MR. SALIBRA: The income --

19 QUESTION: The gross income goes up.

20 MR. SALIBRA: No, the total income stays the same. He
21 is making his same level of productivity. He has produced --
22 the same amount of goods are produced now as they were before.
23 All that has happened is he has reduced his payroll and he has
24 reduced his property factors.

25 QUESTION: Oh, I see.

1 MR. SALIBRA: Fewer people, same income, California tax
2 goes up. He has made a limited operational decision, a plant
3 decision in India, and California tax goes up. And that is
4 the impact. That is what they are doing to us that is the
5 cause of concern.

6 And I might add, Justice Scalia --

7 QUESTION: (Inaudible) like a little different -- you
8 present this argument to the court of appeals?

9 MR. SALIBRA: Oh, yes.

10 QUESTION: Are you arguing standing now?

11 MR. SALIBRA: Yes. And I am arguing why that --

12 QUESTION: Well, they -- did they agree with you?

13 MR. SALIBRA: I believe they did. They ruled in our
14 favor.

15 QUESTION: Well, I know. I thought they invented
16 another sort of --

17 MR. SALIBRA: Well, I take issue with the fact that
18 they invented that, Your Honor. In fact I would like to get
19 to the point. I will.

20 QUESTION: Well, that's all right. I'm sorry.

21 MR. SALIBRA: The -- we did argue this. Because, you
22 have to understand the impact of the tax to understand the
23 nature of our claim. Okay. Our claim is that none of these
24 impacts would have been visited upon us, nor was there
25 expectation when we invested in the United States through a

1 subsidiary vehicle, if in fact the understanding between our
2 governments had been observed. Now --

3 QUESTION: That goes to the merits of the question,
4 doesn't it, Mr. Salibra?

5 MR. SALIBRA: Well, it -- I think it does not, and let
6 me just answer that by looking what the Seventh Circuit said.
7 The issue is whether or not the choice that we made, that is,
8 are we simply here for seeing some economic impact, or is
9 there some decision that is uniquely our decision that has
10 been infringed? What the Seventh Circuit said is, in the
11 context of the unitary tax, what happens is there is a
12 fundamental choice that needs to be made by foreign operations
13 who wish to invest in international commerce. They have three
14 options. They can either, one, operate in the other foreign
15 company directly. They can, two, operate via a subsidiary.
16 Or, three, they can operate by contract. Different tax
17 considerations, different business considerations, are
18 associated with each choice. You -- the foreign investor
19 looks at the options, makes the decision.

20 What the Seventh Circuit said is that, in the context
21 of Aluminium and Imperial, the California tax takes away one
22 of the options. There was an agreement between nations that
23 we would have three options; California takes away one of the
24 options.

25 QUESTION: But whether they are options or not depends

1 on the merits, doesn't it?

2 MR. SALIBRA: Well, I agree with you. This is why --
3 and this is the case -- the point we made in our brief, it is
4 impossible to determine -- okay -- to really -- to review the
5 share, whether we are being effected by the tax as a
6 shareholder or independently, without in fact addressing the
7 merits. I think it is possible to determine that there is
8 sufficient injury, as the Seventh Circuit did, and say there
9 is sufficient injury but we have not found -- determine
10 whether that injury is elevated that that constitutes a
11 constitutional violation.

12 However, if there is a determination that there is no
13 injury, I think you are forced to the conclusion that there is
14 no constitutional burden. That is, in fact, what the Second
15 Circuit did in our case. It decided, I think incorrectly, and
16 we can all agree, that Mobil decided the constitutional issue
17 with respect to worldwide combined apportionment applied in
18 the foreign parent context. It said so specifically. And
19 then it decided, because of that, there is no injury and there
20 can be no standing. Because the -- any injury that Alcan
21 would see, or Imperial would see, would be derived solely
22 through their status as a shareholder.

23 Here the Seventh Circuit recognized that there is a
24 direct injury, a choice, a choice of how you will invest, how
25 you will conduct foreign commerce, and that choice is a choice

1 that only the foreign parent can make.

2 QUESTION: It seems to me that would give shareholder
3 standing in connection with wholly-owned subsidiaries in an
4 awful lot of areas. If that is a valid principle it seems to
5 me hard to limit it to foreign commerce considerations.
6 Presumably domestic sole owners may have considerations and
7 options as to what they are going to do. And I don't see how
8 you can ever limit that to foreign commerce.

9 MR. SALIBRA: I can understand that concern. I can
10 assure you, Justice Rehnquist, that that doesn't exist. And
11 the reason is simple. The tax --

12 QUESTION: (Inaudible.)

13 MR. SALIBRA: I understand that. I am going to try to
14 explain why --

15 QUESTION: Shouldn't.

16 MR. SALIBRA: Shouldn't exist, yes. It shouldn't exist
17 because the nature of the unitary method of taxation is such
18 that what it does is it ignores the concept of the subsidiary
19 in assessing the tax. It says there is one business, it is
20 operating just like a single entity, and it -- and therefore
21 we are going to compute the tax in effect like it is a single
22 entity. There are no other shareholders, sole shareholder
23 cases, that would fall within that doctrine unless --

24 QUESTION: Well, but wait a minute.

25 MR. SALIBRA: -- they were unitary.

1 QUESTION: But what if it was, what if the parent,
2 instead of being an English or Canadian corporation, was a New
3 York corporation, and had subsidiaries all over the United
4 States, and maybe one or two in Canada.

5 MR. SALIBRA: Yeah, okay. And to the extent that it
6 was unitary, one could argue that, at least with respect to
7 the unitary issue, it would apply. The Seventh Circuit said,
8 we think that standing in this case, and that the shareholder
9 rule in this case, differs to the extent that there is the
10 condition in addition that we impose that it be both unitary
11 and that that impact be on foreign commerce. Because the
12 choice --

13 QUESTION: Well, but the New York corporation might
14 want to build a plant in India too. And its decision might be
15 affected by how much they pay for things, and all the rest, in
16 India.

17 MR. SALIBRA: In guess -- I apologize. I miss seeing
18 the --

19 QUESTION: I am assuming that the parent is not a
20 foreign, not a United -- non-United States corporation; it is
21 a New York corporation.

22 MR. SALIBRA: Okay.

23 QUESTION: It has hundreds of subsidiaries, a few of
24 which may be in India or Great Britain.

25 MR. SALIBRA: Okay.

1 QUESTION: Why isn't your principle applicable to that
2 company?

3 MR. SALIBRA: Why wouldn't -- let me just see if I
4 understand this. Why wouldn't an American company investing
5 in India have standing to challenge the unitary tax
6 independently because the California tax is affecting --

7 QUESTION: Its investment decision in India.

8 MR. SALIBRA: Well, I guess what I don't understand is
9 what level of protection exists. Here the level of
10 protection, the issue --

11 QUESTION: Well, they claim the statute is basically
12 unconstitutional, as I understand you do.

13 MR. SALIBRA: Well, no, no. You see, I think that is
14 where we disagree. I think the point that we are making is
15 that the injury that we are alleging is an agreement between
16 our nation, Canada, the U.K., an agreement between our nation
17 and the United States as to how we will be treated. I don't
18 see, in your example --

19 QUESTION: Well, you rely on, basically on the treaty
20 as -- I don't think --

21 MR. SALIBRA: Well, the agreement of the kind -- I
22 think the answer to that is that there is -- there are two
23 levels. The first level, there are treaties that express the
24 fundamental concept, Canada refers to it in its amicus brief,
25 that investments in the United States will not result in

1 taxation beyond the shareholder role, except --

2 QUESTION: But if you accept the theory of the unitary
3 tax it doesn't. The only thing that is being taxed is the
4 subsidiary. You just measure the tax by its percentage of the
5 total business.

6 MR. SALIBRA: Well, once again, what I am saying is I
7 understand if you accept the philosophy, but I think your
8 example is why isn't -- why wasn't -- why doesn't the U.S.
9 have standing in a claim, and the answer is there is no
10 alleged foreign commerce injury.

11 QUESTION: Well, there is a foreign commerce injury but
12 not a treaty violation.

13 MR. SALIBRA: Well, there is no --

14 QUESTION: Does your case boil down to special standing
15 because you claim a treaty violation?

16 MR. SALIBRA: Well, because we claim that there is a
17 violation of an understanding between the United States, a
18 course of conduct exemplified in some treaties and exemplified
19 in the fact that there is a common understanding among
20 nations, recognized by this Court in Container, that
21 international transactions will be evaluated under Section 42
22 arm's length standards.

23 QUESTION: So something to do with the merits confers
24 standing.

25 MR. SALIBRA: To the -- well, something to do with the

1 merits confers standing to the extent that, yes, it is true
2 there must be a foreign commerce injury.

3 QUESTION: The Seventh Circuit said we are only going
4 to apply this where foreign commerce is involved. But
5 logically, why should it be limited? What is peculiar about
6 foreign commerce to this particular question of standing,
7 other than the arguments on the merits?

8 MR. SALIBRA: Well, I -- my analysis of that would be
9 very simply that it -- that one could, I think, make the
10 argument that you suggested. When you unitize a company with
11 its subsidiary, regardless of whether it is a foreign unity or
12 an American -- or a U.S. unity, the shareholder role no longer
13 exists. The shareholder role has been defeated, because he is
14 not being treated like a shareholder, he is being treated like
15 one common element of a single business. I think that is what
16 you are saying. You are saying why should you add in addition
17 to that -- am I correct?

18 QUESTION: I asked you a question.

19 MR. SALIBRA: Yeah. And, I guess my an -- I guess I am
20 not clear. The question is why is it tied to the merits?

21 QUESTION: Yes. You know, you say the Seventh Circuit
22 says we won't apply this except in the area of foreign
23 commerce. But I don't see anything there that would logically
24 limit that principle to foreign commerce, other than something
25 to do with these treaties you are talking about, which are

1 basically questions of the merits.

2 MR. SALIBRA: Well, Your Honor, I don't disagree with
3 that. I guess I am saying I agree with you. They limit it to
4 foreign commerce. I think it is logically possible to say
5 whenever the shareholder role has been eliminated, whenever
6 the shareholder isn't being treated like a shareholder any
7 longer, then the -- then one is precluded from coming in when
8 he wants to vindicate a right and say you can't come in
9 because you are a shareholder. I agree with that. That is
10 not what the Seventh Circuit said. It said there were reasons
11 why it was limiting it to foreign commerce. But I agree that,
12 to the extent that a shareholder is not -- is suffering an
13 injury that is not derivative through his role as a
14 shareholder, he should have a right of action, is in fact the
15 fundamental principle that all of us recognize. I agree with
16 that. There is established law on that principle that
17 shareholders who suffer injury, Universal -- Schaffer v.
18 Universal Rundle, that shareholders who suffer injury, and
19 that injury is not injury that derives from their shareholder
20 position but is unique and personal to them, have a right of
21 action. And I agree that that is a rational position.

22 The important point, I think, in this case, from the
23 point of view of some of the foreign parents, is that, as I
24 said, is that in this case once you decide we are not a
25 shareholder -- or, I am sorry, that we are a shareholder, and

1 that is the only derivative impact we see from the unitary
2 method of taxation, the ability for us to go in and say this
3 tax affects us in a way that violates the foreign commerce
4 clause requirements is, in our view, lost. We can't make it
5 anymore.

6 QUESTION: Well, I thought I understood counsel for the
7 state to say that the argument can be raised in state court by
8 the domestic subsidiary.

9 MR. SALIBRA: Well, I --

10 QUESTION: I asked specifically about that, and was
11 informed yes, it can be litigated in state court. Now, if
12 that is true, why isn't that sufficient?

13 MR. SALIBRA: Well, I don't believe that is true. I
14 think the issue is if there is a determination by this Court
15 that the worldwide combined apportionment method, as it
16 applies to foreign parents in this case, treats them just like
17 a shareholder, with no other impact. Just derivative
18 shareholder --

19 QUESTION: Suppose the holding here is you don't have
20 standing, you don't have shareholder standing.

21 MR. SALIBRA: Then I believe --

22 QUESTION: Now, they say you can litigate -- that the
23 domestic subsidiary can litigate your concerns about the
24 unitary tax scheme in state court.

25 MR. SALIBRA: And my, I guess my answer to that is you

1 have determined the merits. There is nothing to litigate. We
2 would go in and we would say that the unitary method of
3 taxation is imposing an unconstitutional burden upon us. The
4 court would say what is that burden. The Supreme Court has
5 determined that the only impact that this tax on you has --

6 QUESTION: So, you're telling me that if we find you,
7 your clients have no standing, that you are going to give up
8 any attempt to go to state court and have the domestic
9 subsidiary raise that argument. We are finished.

10 MR. SALIBRA: I am saying that if you hold that there
11 is -- that there is no injury beyond the injury of a normal
12 shareholder, I don't see what claim we could make.

13 QUESTION: The state is quite willing to assume you do
14 have standing. And then it says go ahead and, but
15 nevertheless, the Tax Injunction Act applies and you must go
16 to the state remedies.

17 MR. SALIBRA: It says we do have standing.

18 QUESTION: Well, it says they are willing to assume to
19 have -- they started out arguing the Tax Injunction Act saying
20 let's assume that there is standing, and nevertheless the Tax
21 Injunction Act bars going forward to this suit in the Seventh
22 Circuit.

23 MR. SALIBRA: And we would, we would disagree it
24 doesn't bar that. The Tax Injunction Act applies, and the
25 principle of comity applies, when there is a plain, speedy and

1 efficient remedy. And there is no plain, speedy and efficient
2 --

3 QUESTION: Well, now, why not? The state says that
4 these very issues, even though you have standing, these very
5 issues can be litigated in the state courts.

6 MR. SALIBRA: And the -- and our answer is the fact
7 that the -- assuming that the issues could be litigated,
8 assuming the issues could be litigated, the Tax Injunction Act
9 still wouldn't apply.

10 QUESTION: Why not?

11 MR. SALIBRA: And it wouldn't apply because of the
12 uniform recognition of this Court and those courts, every
13 court in this case which applied that doctrine, that absent
14 the plain, speedy and efficient remedy, the fact that there
15 may be similarities of interest, similarities of claims, does
16 not bar the action of another party without a remedy.

17 QUESTION: Well, why should anybody but the taxpayer
18 have a speedy remedy?

19 MR. SALIBRA: For the very same reason the Ninth
20 Circuit recognized a direct and immediate injury to the
21 foreign parent.

22 QUESTION: Well, the foreign parent then can litigate
23 it through the sub.

24 MR. SALIBRA: Well, I think what we are speaking of is
25 whether that is in fact a principle under the Tax Injunction

1 Act and an intention of Congress. And I think this Court has
2 interpreted that and stated clearly that the fact that another
3 party has a remedy --

4 QUESTION: But the other party is the actual taxpayer
5 here. As Justice Scalia says, your client isn't getting any
6 bill from the California State Tax Commission.

7 MR. SALIBRA: No, but our client --

8 QUESTION: Wait a minute.

9 MR. SALIBRA: I am sorry. I apologize.

10 QUESTION: It is only -- it is only the domestic
11 subsidiary, which your client owns, that gets the bill from
12 the State Tax Commission. And the state says that domestic
13 subsidiary can litigate all the foreign commerce issues it
14 wants to in the California proceedings.

15 MR. SALIBRA: Well, that brings -- I am not convinced
16 they can do that. I -- I believe that the foreign commerce
17 issues, the foreign commerce issue, which is the right we have
18 to select the remedy, is a remedy that we can only argue.
19 California, I don't think -- AlcanCorp, I don't think, can
20 come in and say we are here litigating the fact that our
21 parent Aluminium is being deprived of its choices of how it
22 wants to operate, or --

23 QUESTION: Well, that is what the Seventh Circuit
24 cooked up. But I mean the ordinary foreign commerce rule,
25 that the tax on the domestic subsidiary on a unitary basis

1 violates the foreign commerce clause.

2 MR. SALIBRA: Well, I think it is incorrect to say that
3 they cooked it up. I think what they had said was there is a
4 unique -- they, I think they recognize that there is a unique
5 injury here to Alcan. That that injury is a -- is a injury
6 that we have to evaluate in terms of how we are going to make
7 an investment.

8 QUESTION: (Inaudible) said that there wasn't a plain
9 and speedy remedy.

10 MR. SALIBRA: That is uncontested, Your Honor.

11 QUESTION: What do you mean, it is uncontested?

12 MR. SALIBRA: California, they asked California quite
13 directly, is there a remedy for Alcan --

14 QUESTION: Well, I just heard the state say that you
15 have a plain and speedy remedy through your subsidiary.

16 MR. SALIBRA: And our response to that is --

17 QUESTION: And I would -- I think if this case had come
18 from the Ninth Circuit we might, I might say we ought to give
19 some credence to their holding that there is no such a remedy,
20 but gee, this is the Seventh Circuit. What do they know about
21 California?

22 MR. SALIBRA: Well, I think the answer is there was a
23 question posed to California, is there a remedy for Alcan, and
24 the answer was no, there is no remedy.

25 QUESTION: How could they have -- not for the parent.

1 MR. SALIBRA: Not for the parent.

2 QUESTION: I mean, they can't go in, they can't go in
3 there and litigate themselves, but they can litigate through
4 their subsidiary. They own it.

5 MR. SALIBRA: But that was exactly the issue, Your
6 Honor, that they litigated in EMI 1 in the Ninth Circuit, and
7 the Ninth Circuit said the same thing that the Seventh Circuit
8 said. There is no plain and speedy remedy for EMI. Capitol
9 may have a plain, speedy and efficient remedy, but EMI
10 doesn't. And therefore the Tax Injunction Act and its
11 policies doesn't apply -- don't apply.

12 QUESTION: That's, but that makes the judgment, which
13 we can certainly review here, that a remedy for the sub does
14 not amount to a remedy for the -- for the principal
15 corporation. And if we say that is wrong, then we just say,
16 you know, both the Seventh and the Ninth have been wrong.

17 MR. SALIBRA: That is correct, that is correct. You
18 can say that. But I think it is incorrect to say that the
19 Ninth Circuit held differently. It held --

20 QUESTION: But, on that point the Ninth Circuit isn't
21 describing California law. It is not saying that California
22 will not let the sub raise Alcan's claims. What it is saying
23 is that even if the sub can raise Alcan's claims, that is not
24 enough.

25 MR. SALIBRA: And that is our position. That isn't

1 enough.

2 QUESTION: Right. Okay.

3 MR. SALIBRA: That is precisely our position.

4 QUESTION: But that point is not a point of California
5 law, it is a point --

6 MR. SALIBRA: It is a point of U.S. law, which I think
7 is well established. There is not, in our view and in the
8 Seventh Circuit's view, any dispute about that. Nor is there
9 a dispute by any court that has ever reviewed that issue. And
10 that is why the doctrine doesn't apply.

11 QUESTION: Well, it's just hard for me to understand,
12 if we assume that the sub, your subsidiary can raise all,
13 every question that you want raised there, and you can direct
14 how they do it and who they hire to press it, I can't imagine
15 why that isn't a plain and speedy remedy for the parent.

16 MR. SALIBRA: If we were to -- if AlcanCorp would just
17 be the surrogate, is that what you're saying? That we would
18 go under their name and we would in fact try the case?

19 QUESTION: Well, that's what you will --

20 MR. SALIBRA: That's what you're saying.

21 QUESTION: That is what is going to happen anyway.

22 MR. SALIBRA: And I think, once again, I am going to do
23 it very quickly, but once again --

24 QUESTION: That's probably what is happening now.

25 MR. SALIBRA: I think the answer to that is, once again

1 you assume that they can raise all -- that when this case is
2 adjudicated, resolved under California, they can resolve all
3 the claims. I don't think that is true.

4 QUESTION: But let's assume it is. Just assume it is.

5 MR. SALIBRA: Okay, I assume that it is.

6 QUESTION: Then how about the Tax Injunction Act?

7 MR. SALIBRA: That still doesn't apply.

8 QUESTION: Why not?

9 MR. SALIBRA: And it doesn't apply because of the
10 continued holdings of this Court --

11 QUESTION: Because you mean that --

12 MR. SALIBRA: You're saying is there a policy why it
13 shouldn't apply?

14 QUESTION: You mean because the, there is no way that
15 the parent itself can file for a refund?

16 MR. SALIBRA: No, no. They have that, there is no
17 remedy for itself, right. I think there is, you can either
18 file for a refund of you can, as the Ninth Circuit suggested,
19 permit them to have access to the court indirectly, through
20 the same procedure that the --

21 QUESTION: Mr. Salibra, can you tell me a specific
22 argument that you think you can make to Judge Williams in
23 Chicago that you cannot make in California?

24 MR. SALIBRA: Yes, yes. Well, that I couldn't make in
25 California?

1 QUESTION: That you could not -- one you could make to
2 Judge Williams but not to the California forum.

3 MR. SALIBRA: Yes. I would argue that I think that I
4 could argue to Judge Williams that this, that the burden that
5 we are litigating here is the impact on our, Alcan
6 Aluminium's, ability to conduct its foreign commerce through
7 the vehicles that there has been agreement were available to
8 them. California has preempted that.

9 QUESTION: But why -- how do you know you can't make
10 that argument in California?

11 MR. SALIBRA: I believe we cannot make that argument in
12 California because California would say that argument is not
13 an argument for Alcan to make; you are not the right party.
14 The right party, the real party in interest, the injured party
15 with respect to that claim is not here.

16 QUESTION: Well, they can't say that --

17 QUESTION: He means can you make it through the sub, I
18 thought.

19 QUESTION: Yeah, make it through the sub.

20 MR. SALIBRA: Through the sub.

21 QUESTION: The sub make it on the ground that you,
22 California, are treating the sub and the parent as a unitary
23 business. This is an injury to the unitary business, which
24 happens to impact directly on the parent, which I can describe
25 to you.

1 MR. SALIBRA: I understand what you are saying.

2 QUESTION: Ergo, I want to make the argument. And you
3 are telling me California won't listen to it. It seems
4 inconsistent with their posture that you are all one business.

5 MR. SALIBRA: Well, I understand that. But if you
6 assume that we're all one business, then we should be able to
7 come in anyway.

8 QUESTION: You should be able to make any argument that
9 would tend to show that the California procedures are
10 unconstitutional in the California forum.

11 MR. SALIBRA: Your Honor, we could make it. The -- I,
12 I think there is a serious risk that they will say --

13 QUESTION: Well, there is always risk.

14 MR. SALIBRA: -- you're wrong, you're not the right
15 party.

16 QUESTION: Well, maybe you can read back to the person
17 making that argument the transcript of the oral argument today
18 when Mr. Laddish conceded that you could.

19 MR. SALIBRA: Well, it's -- it's interesting, the only,
20 I guess my response to that, Justice O'Connor, is that courts
21 sometimes decide that, regardless of what the other side
22 concedes, it, they are going to apply the doctrine as they see
23 it and is appropriate. In fact the entire standing issue that
24 we are discussing here today was raised not by California --

25 QUESTION: But that determination in itself would

1 result in a judgment from the state court that could be
2 reviewable here.

3 MR. SALIBRA: That would be true.

4 QUESTION: Yes.

5 MR. SALIBRA: That would be true. We would, we are
6 trying to avoid, however, coming back too many times.

7 I would just like to conclude by saying that this case
8 involves, in our view, very serious interests, that are
9 interests that the nations of the world have recognized are
10 interests of foreign nationals. The foreign nationals have no
11 remedy. The Seventh Circuit indicated that there is a sound
12 basis in international comity for recognizing a need for
13 foreign nationals to have their own independent remedy to
14 recognize the injury to them, and not a derivative injury, and
15 that that is another sound basis for this Court to hold the
16 Seventh Circuit's reasoning is in fact rational, and in fact
17 makes sense in the context of the unitary method of taxation.

18 There is, in our view, really no doubt that there is a
19 substantial and overwhelming burden on foreign companies
20 imposing this tax, on which this tax is imposed. The problem
21 is not --

22 QUESTION: Why is it that a foreign corporation has
23 standing to object to a violation of the United States
24 Constitution if it is not doing business here? Is it only
25 because you are doing business here that you get that

1 standing?

2 MR. SALIBRA: No, I think every -- I think it is
3 recognized that we have a right to object to a constitutional
4 violation.

5 QUESTION: Why? Because you are doing business here?

6 MR. SALIBRA: Because I think this Court has recognized
7 that the right, constitutional rights that are available under
8 the constitution are available to anyone in the position to
9 argue them. We have come here to argue those rights.

10 QUESTION: You mean someone in India can argue that
11 there is a violation of the Constitution of the United States
12 that affects them?

13 MR. SALIBRA: If there is some injury to someone in
14 India for which there is a remedy in this Court, for which
15 there is a constitutional violation that is cognizable in the
16 constitutional law, it could come here and argue that.

17 QUESTION: Thank you, Mr. Salibra.

18 Mr. Laddish, do you have rebuttal? You have three
19 minutes.

20 REBUTTAL ARGUMENT OF TIMOTHY G. LADDISH

21 ON BEHALF OF THE PETITIONERS

22 MR. LADDISH: Just a couple of points, Your Honor.

23 The argument for the other side basically is arguing
24 the merits as to the validity of California's method of
25 taxation. These are not properly before the Court today, and

1 I will not counter with our own counterarguments.

2 I would point out a few things that this Court has held
3 in the past, and that is, in Amerada Hess just last term, this
4 Court held that you -- a taxpayer cannot meet the burden of
5 demonstrating no rational relationship between the income
6 attributed to California and the inter -- intra-state values
7 of the enterprise in California, if the unitary method --
8 unitary nature of the activities are established, which they
9 are stipulated in this case, and if the benchmark three factor
10 apportionment formula is used, which the stipulations show it
11 was used in this case.

12 QUESTION: But, Mr. Laddish, I guess I don't agree with
13 you that it's not fair game to argue the merits along with the
14 standing issue. It is not at all unusual that the merits
15 issue and the standing issue boil down to one and the same
16 thing. It happens all the time.

17 MR. LADDISH: I think that --

18 QUESTION: Now, a chilling effect, whether someone who
19 is chilled by a First Amendment or something else, the
20 question whether the person has standing to sue and the
21 question whether he wins by reason of a chill, whether a chill
22 would be enough to give him victory, are one and the same
23 question. So, you know, --

24 MR. LADDISH: There are certainly times, Your Honor,
25 when that is true, but I think when you are dealing with the

1 foreign commerce clause in the situation we are here, for the
2 reasons that I stated before, they are not one and the same.
3 Certainly there are statutes that create injuries, and if you
4 violate that statute you are injured. And it would be very
5 hard to separate out the standing injury from the -- from the
6 decision on the merits. But that is not the case today. If
7 it is determined that they do not have standing here, that
8 does not mean that that does away with all the arguments that
9 they are making as far as it being invalid under the foreign
10 commerce clause. The taxpayers can make that argument and, as
11 pointed out by one of the amici supporting the Respondents
12 today, there are -- there is litigation in the California
13 courts that are raising these issues now, and one of the
14 litigants is a subsidiary and the other one is an intervening
15 parent, but the ultimate parent is not a part of the
16 litigation.

17 QUESTION: I understand from your adversary to say the
18 Ninth Circuit has decided that these issues can't be raised.

19 MR. LADDISH: The Ninth Circuit has only decided that
20 as to the -- the Ninth Circuit first decided that there was no
21 standing. But as to the Tax Injunction Act, the Ninth Circuit
22 decided, in a rather mechanical version, that the control that
23 the sole stockholder would have over its taxpayer should not
24 be considered by the court as giving it an effective remedy in
25 the California courts. It just said since they cannot proceed

1 in their own name --

2 QUESTION: Well, you're arguing that it is an effective
3 remedy.

4 MR. LADDISH: Yes, I certainly am, Your Honor.

5 QUESTION: So you are arguing the Ninth Circuit is
6 wrong, as well as the Seventh?

7 MR. LADDISH: On that, yes. Thank you very much.

8 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Laddish. The
9 case is submitted.

10 (Whereupon, at 1:52 p.m., the case in the above-
11 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:

No. 88-1400 - FRANCHISE TAX BOARD OF CALIFORNIA, ET AL., Petitioners V.

ALCAN ALUMINUM LIMITED, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY alan friedman

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