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**THE SUPREME COURT**  
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**SUPREME COURT, U.S.**  
**WASHINGTON, D.C. 20543**  
**UNITED STATES**

CAPTION: ITEL CONTAINERS INTERNATIONAL  
CORPORATION, Petitioner v.  
JOE HUDDLESTON, COMMISSIONER  
OF REVENUE OF TENNESSEE

CASE NO: 91-321

PLACE: Washington, D.C.

DATE: October 14, 1992

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1                    IN THE SUPREME COURT OF THE UNITED STATES

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3     ITEL CONTAINERS INTERNATIONAL     :

4     CORPORATION,                             :

5                    Petitioner                             :

6                    v.     :     No. 91-321

7     JOE HUDDLESTON, COMMISSIONER     :

8     OF REVENUE OF TENNESSEE             :

9     - - - - - X

10     Washington, D.C.

11     Wednesday, October 14, 1992

12                    The above-entitled matter came on for oral  
13     argument before the Supreme Court of the United States at  
14     11:04 a.m.

15     APPEARANCES:

16     PHILIP W. COLLIER, ESQ., Louisville, Kentucky; on behalf  
17                    of the Petitioner.

18     CHARLES W. BURSON, ESQ., Attorney General of Tennessee,  
19                    Nashville, Tennessee; on behalf of the Respondent.

20     EDWIN S. KNEEDLER, ESQ., Assistant to the Solicitor  
21                    General, Department of Justice, Washington, D.C.; on  
22                    behalf of the United States, as amicus curiae,  
23                    supporting the Respondent.

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

2 (11:04 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 next in No. 91-321, Itel Containers International  
5 Corporation v. Joe Huddleston.

6 Mr. Collier, you may proceed whenever you are  
7 ready.

8 ORAL ARGUMENT OF PHILIP W. COLLIER

9 ON BEHALF OF THE PETITIONER

10 MR. COLLIER: Mr. Chief Justice, may it please  
11 the Court:

12 The issue in this case is whether Tennessee's  
13 sales tax imposed on Itel's Federally bonded containers  
14 dedicated exclusively to use in foreign commerce is  
15 prohibited by the 1956 and 1972 treaties on containers, as  
16 well as the body of Federal implementing regulation, and  
17 the foreign commerce and import-export clauses of the  
18 Constitution.

19 At the time Tennessee imposed its tax, Itel was  
20 one of the largest container leasing companies in the  
21 world. Itel delivered its containers at 98 locations  
22 across the United States and an additional 129 locations  
23 around the globe; but only one government in the world  
24 imposed a tax on Itel's containers, Tennessee. As the  
25 United Kingdom and other nations have noted, none of the

1 59 nations which have signed the two container treaties  
2 impose any form of sales or use taxation on containers.

3 But it is not the language here of Tennessee's  
4 taxing statute which is unique. Instead, it is the  
5 application of that statute to tax container leases.  
6 Indeed, 44 of Tennessee's sister States and many of the  
7 signatory nations to the container treaties impose some  
8 form of sales or use taxation on lease transactions.

9 But it not mere coincidence that no other  
10 government in the world imposes sales or use tax  
11 equivalents on containers. The reason that Tennessee acts  
12 alone here is that the imposition of its tax is prohibited  
13 by the container treaties, runs counter to the custom of  
14 nations, and is at odds with this Court's logic in the  
15 Japan Line decision.

16 There are three related, but independent grounds  
17 for reversal here. Each ground shares in common the  
18 special transitory nature of Federally bonded containers  
19 dedicated exclusively to use in foreign commerce. First,  
20 both the terms and the policies of the container treaties  
21 and the implementing Federal regulation prohibit the tax,  
22 and the application of the tax by Tennessee offends the  
23 principles of the foreign commerce clause by creating a  
24 substantial and genuine threat of foreign retaliation and  
25 because of the risk of multiple taxation. Finally,

1 Tennessee's tax is a prohibited tax on goods in transit  
2 under the logic of the import-export clause of the  
3 Constitution.

4 Now, the issue of whether the terms of the  
5 container treaties prohibit Tennessee's tax presents a  
6 direct confrontation between the United States and 14  
7 nations, including three of the United States' largest  
8 five trading partners, Japan, Germany, and the United  
9 Kingdom. The United Kingdom, a primary drafter of the  
10 1956 treaty, and the other protesting nations concur with  
11 ITEL's reading of the express terms of the convention that  
12 Tennessee's tax is prohibited because it is imposed in  
13 connection with or by reason of the containers'  
14 importation. These protesting nations point out that they  
15 have withheld the application of their taxes in reliance  
16 upon these treaties' obligations.

17 Now, the position taken by the United States  
18 today, that the treaties prohibit only the imposition of  
19 customs duties and not State taxes, is at odds and is a  
20 complete reversal of its position taken in 1978 before  
21 this Court in Japan Line. So, certainly the reading given  
22 today of the treaties' language must be viewed and  
23 consider -- must be viewed and considered in light of that  
24 interpretation.

25 QUESTION: How do you interpret this tax to be

1 imposed to be chargeable by reason of importation? That's  
2 the language of the conventions that we're dealing with.

3 MR. COLLIER: Yes, Justice Scalia. The concept  
4 of importation, as described in the convention, not only  
5 connotes a temporal event, such as the crossing of a  
6 border, but indeed, the status of the containers as they  
7 remain within the borders of a signatory nation.

8 QUESTION: You cannot tax anything that has been  
9 imported?

10 MR. COLLIER: You cannot tax a container once it  
11 has been temporarily imported and remains subject to the  
12 protection of the treaties.

13 QUESTION: It doesn't say by reason of temporary  
14 importation. It says by reason of importation, chargeable  
15 by reason of importation.

16 Now, there are two ways to read it, it seems to  
17 me. One is, the tax is upon the act of importing. It is  
18 upon the importing. And the other way to read it is  
19 it -- importing is a but-for cause of the tax. You  
20 wouldn't have been hit with the tax if you hadn't  
21 imported. But if you read it the latter way, my goodness,  
22 all imported goods are free from property taxes, sales  
23 taxes, all sorts of taxes. You can't read it that way,  
24 can you?

25 MR. COLLIER: First of all, I would agree with



1 you, Justice Scalia, that there are two readings which  
2 might be given to this tax. You've identified each of  
3 them, but both meanings are incorporated into the treaty  
4 provisions. First, the treaty does not prohibit the  
5 imposition of all taxes on imported goods, but addresses  
6 containers which are crossing borders and moving into the  
7 interior of a nation.

8 QUESTION: Where does it address those? Does it  
9 mention them?

10 MR. COLLIER: Yes. The 1956 treaty tax  
11 prohibition covers -- and I quote -- not only customs  
12 duties, but also all duties and taxes whatsoever  
13 chargeable by reason of importation. And the definition  
14 of temporary admission given in the 1956 treaty applies to  
15 containers and the importation of those containers into  
16 the interior pass -- crossing the border of a nation.

17 QUESTION: Well, that just proves that they're  
18 imported. A lot of other things are imported as well.

19 MR. COLLIER: A number of other things are  
20 imported, but the treaties on containers cover taxes on  
21 containers, not merely the goods imported in containers.  
22 And so, the treaties' application is limited to those  
23 containers and a tax on those containers.

24 The definition of temporary admission, set forth  
25 in article 1(b) of the treaty of '72, describes temporary

1 admission to mean temporary importation subject to  
2 reexportation.

3 QUESTION: Is a general property tax permissible  
4 if the container happens to be there on the lien date?

5 MR. COLLIER: If the tax is imposed by reason of  
6 importation --

7 QUESTION: Well, I'm -- that's what I'm trying  
8 to test. Suppose the State says that all personal  
9 property here on March the 15th shall be taxed.

10 MR. COLLIER: Yes.

11 QUESTION: And the container is assessed a tax.

12 MR. COLLIER: Yes, Justice Kennedy, I do believe  
13 that under the treaties a property tax based upon presence  
14 would be by reason of importation to that jurisdiction.

15 QUESTION: And that's because the container  
16 couldn't have been there but for the importation and,  
17 therefore, this tax must be by reason of importation. Is  
18 that your train of logic?

19 MR. COLLIER: Yes, Justice Kennedy. I think  
20 that's a fair summary.

21 And, indeed, the United States in 1978 in its  
22 brief pointed out to this Court that containers which have  
23 crossed the international border and entered the domestic  
24 commerce of a nation are considered to be absent. They're  
25 not subject to State taxation once they're in the interior

1 of a nation.

2 QUESTION: Well, the Government is certainly  
3 taking a different position today, and it's saying that  
4 the convention means that Tennessee's tax is collected in  
5 connection with and chargeable by reason of sales, not by  
6 reason of importation. Now, do we owe any deference to  
7 the Government's interpretation of this treaty?

8 MR. COLLIER: I think it has been recognized  
9 many times by this Court that the interpretation of an  
10 international treaty by the executive branch is due  
11 deference.

12 My only point, Justice O'Connor, is simply that  
13 they have expressed one interpretation in 1978 and the  
14 other at this time, and I would point out that this Court  
15 ruled in Nielsen v. Johnson that where a treaty fairly  
16 admits two interpretations, the one restricting and the  
17 other enlarging rights provided for in that treaty, then  
18 the liberal interpretation is to be preferred. And  
19 certainly the United States cannot disagree that the  
20 interpretation placed on this treaty by eight of the  
21 original 12 drafters and in harmony with its  
22 interpretation in 1978 is unreasonable.

23 QUESTION: Mr. Collier, let me try to put my  
24 earlier question more precisely. What kind of a tax upon  
25 these containers would not be a tax chargeable by reason

1 of importation?

2 I mean, I am pressed with the fact that these  
3 treaties do not say containers may not be taxed. It  
4 doesn't say that. It says that there may not be imposed  
5 upon them any taxes chargeable by reason of importation.  
6 Now, why that narrowing? What has been excluded by saying  
7 only those taxes chargeable by reason of importation?

8 MR. COLLIER: The 1972 treaty clarified that  
9 issue when it provided a limited exception to the type of  
10 taxes that could be imposed on containers, and that  
11 exception is set forth in article 1(a) of the container  
12 treaty of 1972 where the treaty excluded fees and charges  
13 limited in amount to the approximate cost of services  
14 rendered.

15 Now, I might point out that an exception which  
16 is provided to a prohibition of taxes in a treaty need not  
17 have been provided unless that was prohibited by the  
18 general prohibition in the first place. So, there is an  
19 exception. If Tennessee, for instance, operates a  
20 container terminal where it provides a crane and services  
21 to a container, it may then tax or charge a fee on the  
22 containers in that setting.

23 QUESTION: What -- so, you say -- and it meant  
24 that even before that provision was added in the later  
25 treaty?



1 MR. COLLIER: It did. In fact, there is  
2 legislative history to the 1956 convention which discusses  
3 the permissibility of user fees of this kind. So, the --

4 QUESTION: Isn't the Tennessee tax -- what do  
5 they call it? A use tax or --

6 MR. COLLIER: A sales tax.

7 QUESTION: -- a sales tax?

8 Well, don't they measure it by the number of  
9 days in Tennessee and the cost of services rendered?

10 MR. COLLIER: They do not. Tennessee's tax  
11 bears no relationship to the length of the lease, the  
12 number of days that the container is on lease. It is  
13 based simply on the transfer of possession within the  
14 jurisdiction. Indeed, Itel's leases, as is noted in the  
15 record, are 6 months or more. They're per diem leases,  
16 and these containers during the lease term are in  
17 Tennessee for only a fraction, a very small fraction, of  
18 the lease term. So it is not charged on that basis.

19 QUESTION: But are they not in Tennessee at the  
20 time of the transaction?

21 MR. COLLIER: It is true that the containers are  
22 present and have been imported into Tennessee at the time  
23 of the tax.

24 QUESTION: How is this different from a case in  
25 which, say, the containers were manufactured in Tennessee,

1 and then sold to the person who was going to use them?  
2 Could you then put a sales tax on it?

3 MR. COLLIER: In the limited situation that you  
4 have posed, Justice Stevens, yes, there is some argument  
5 that could be made that a purely domestic transaction, the  
6 sale of a container --

7 QUESTION: For use in foreign commerce and after  
8 that they never do anything but travel the world.

9 MR. COLLIER: As long as --

10 QUESTION: What if they're warehoused in  
11 Tennessee and then they're leased, and then you tax the  
12 consideration for the lease at the time of the lease  
13 transaction?

14 MR. COLLIER: In the event that they were  
15 warehoused in Tennessee, as long as they were continuously  
16 dedicated to the use in foreign commerce, they would still  
17 be exempted under the tax treaty prohibition.

18 QUESTION: Well, let me just be -- say I'm  
19 talking about a new container now, to keep it simple. If  
20 I have a new container and I sell it to the user of the  
21 container, that's taxable, but if I have the same  
22 used -- new container and I lease it to them for a period  
23 of time that it takes to ship it to Japan and back to San  
24 Francisco, that's not taxable.

25 MR. COLLIER: I'm not sure I understand your

1 hypothetical.

2 QUESTION: The hypothetical is I have a  
3 brand-new container, and I have a customer who wants to  
4 lease it, take some merchandise to the Japan, and bring  
5 that merchandise back to San Francisco. And it will take  
6 9 months to do it, so that the charge will be X dollars  
7 and the sales tax is 2 percent of X dollars. Is that --  
8 could you -- would that transaction be taxable?

9 MR. COLLIER: That transaction would not be  
10 taxable, Your Honor.

11 QUESTION: Now, what's the difference between  
12 the sale and the lease?

13 MR. COLLIER: The sale is the container as an  
14 article of trade as opposed to an instrument of  
15 international traffic.

16 QUESTION: Well, but as far as the leasing  
17 company is concerned, it's still an article of trade.  
18 He's only interested in getting paid for the container.

19 MR. COLLIER: In the situation of the sale of  
20 the goods purely in domestic commerce, if it has not been  
21 bonded and if it's not exclusively used in foreign  
22 commerce, then it is not entitled to the protections.

23 QUESTION: No. It becomes bonded as soon as he  
24 buys it because the purchaser is going to use it  
25 exclusively in commerce. He's going lose it -- use it for

1 the life of the container in one case, and the other he's  
2 going to use it for a tenth of the life of the container.

3 MR. COLLIER: I'm sorry I misunderstood your  
4 question earlier. If it, in fact, was in the stream of  
5 foreign commerce and was sold as an --

6 QUESTION: It goes into the stream of commerce.  
7 Immediately upon the consummation of the transaction, they  
8 seek to tax.

9 MR. COLLIER: In that situation, Justice  
10 Stevens, I would say that the treaty does prohibit the  
11 imposition of such a tax.

12 QUESTION: Even a sales tax.

13 MR. COLLIER: Yes, Your Honor.

14 And in this case, we --

15 QUESTION: How could the language of the treaty  
16 possibly cover the sales tax? Because it isn't there by  
17 reason of importation. It's there by reason of having  
18 been manufactured there and sold.

19 MR. COLLIER: I think that's a good point,  
20 Justice Stevens, and I suppose I simply haven't considered  
21 it well enough.

22 Indeed, in this case, all of ITEL's  
23 containers -- and it's stipulated -- were all manufactured  
24 abroad and brought in as instruments of international  
25 traffic. So, that situation would not obtain in this



1 situation.

2 In any event, putting aside for a moment the  
3 precise language and terms of the container treaties, this  
4 Court has consistently invalidated the imposition of State  
5 taxes on goods dedicated to use in foreign commerce where  
6 the imposition of that State tax removes the benefit from  
7 the imposition from the waiver of Federal customs duties.

8 In Xerox Corporation v. Harris County, Texas,  
9 and McGoldrick v. Gulf Oil Corporation, the Court  
10 considered the preemptive effect of Federal statutes which  
11 merely excepted goods from customs duty. In the first  
12 case, it was copiers transshipped to Houston, Texas. In  
13 the second case, it was fuel oil which had been refined  
14 after importation from Venezuela and was on its way out to  
15 be sold to ship stores in New York Harbor.

16 In each case, despite the fact the congressional  
17 statute did not address the imposition of State taxes,  
18 this Court invalidated the State tax because it posed the  
19 same obstacle that was posed by the imposition of a  
20 customs duty. In McGoldrick, it was the New York City  
21 sales tax on fuel oil to be exported as ship stores in  
22 vessels that were laid in New York Harbor, and in the  
23 Xerox case, it was copiers, which were manufactured in  
24 Mexico, were brought into Houston, and were intended to be  
25 sold outside of the Nation.

1           This case is essentially a replica of that  
2 situation. First, the objectives of the container  
3 treaties are three-fold.

4           QUESTION: What position had the United States  
5 taken in those cases, do you know?

6           MR. COLLIER: I'm sorry. In Japan Line or  
7 in --

8           QUESTION: In the two cases you've just described.  
9 Did the United States favor the State taxes or disfavor  
10 them?

11          MR. COLLIER: I simply don't know the answer to  
12 that.

13          In the situation in our case, the United States  
14 reasoned that McGoldrick did apply to containers under the  
15 treaty and under the Federal regulation, and indeed, the  
16 United States in Japan Line pointed out to this Court that  
17 not only the treaties, but the implementing Federal  
18 regulation created a circumstance where the containers  
19 were simply not present for purposes of State taxation,  
20 and that the tax on containers should be invalidated under  
21 the reasoning of McGoldrick.

22          There are three objectives to the treaties here.  
23 The first is the overarching objective of the treaties to  
24 encourage the selection of containers for carrying goods  
25 in foreign commerce. The reason behind the treaty was

1 that this would simply reduce the unit transport cost of  
2 goods as they travel in an increasing international  
3 market.

4 Now, there were two other purposes, though, to  
5 this treaty adopted and articulated by the United States.  
6 First, President Johnson in 1966, in recommending the  
7 adoption of the 1956 treaty, noted that the purpose of the  
8 conventions were to aid the American export drive by  
9 reducing the cost of carrying American goods by container  
10 to foreign markets. And finally, the U.S. Senate  
11 Committee on Foreign Relations, in recommending the  
12 adoption of the 1972 treaty, pointed out that the purpose  
13 of the treaty was to benefit United States owned and  
14 operated containers.

15 QUESTION: Do all of those things if it  
16 eliminates them from customs duties and import taxes, but  
17 it's -- it does benefit them that way. And that's an  
18 additional tax that these containers would constantly and  
19 repetitively be subjected to. It achieves that objective,  
20 but it doesn't have to in addition eliminate sales taxes  
21 on leases, which are not repetitive and which all property  
22 is subject to whether it's property that's constantly used  
23 in commerce or not. It seems quite reasonable to me.

24 MR. COLLIER: Certainly the same arguments were  
25 made in both McGoldrick and Xerox, and in McGoldrick, in

1 particular, the tax imposed was a sales tax. It was a  
2 sales tax on fuel oil sold to ship stores which could have  
3 been taxed in other jurisdictions under consumption taxes.

4 In addition, in this particular situation, both  
5 McGoldrick and Xerox pointed out that, of course, the  
6 State sales tax and the State property tax were not  
7 customs duties, but nevertheless, the same objectives are  
8 stricken by the tax. First, there really is little  
9 difference in the impact of a State sales tax on container  
10 leases from a customs duty on the goods moving across the  
11 borders.

12 QUESTION: What was the language in those cases?  
13 Was it language that even approached chargeable by reason  
14 of importation?

15 MR. COLLIER: Neither of those cases involved  
16 international treaties. They were simply involving  
17 Federal statutes.

18 QUESTION: I understand. Did the statute say  
19 anything about chargeable by reason of importation?

20 MR. COLLIER: The statutes I don't think had  
21 language of that kind in them. They excepted the fuel oil  
22 and the transshipped goods from customs duties.

23 QUESTION: But, I mean -- but then why are they  
24 relevant? I mean, we're talking about a text here,  
25 chargeable by reason of importation.



1 MR. COLLIER: Well, we're not only talking about  
2 the treaties. We're talking about the implementing  
3 Federal regulation which excepts them from customs duties  
4 and the amendment to 19 U.S.C. 1202, the harmonized tariff  
5 schedules of the United States. So, we're talking about  
6 not only the language of two treaties, but the Federal  
7 implementing regulation.

8 QUESTION: Well, if you're talking about a  
9 Federal regulation, surely there you also give deference  
10 to the executive branch in construing the regulation, do  
11 you not?

12 MR. COLLIER: I think the same deference is  
13 applied to the interpretation of a regulation, as long as  
14 that regulation is not at odds with the delegated power  
15 from Congress. And again, I would point out that the  
16 opposite position was taken by the United States in 1978.

17 The Tennessee tax --

18 QUESTION: Can you help me a little more with  
19 the facts? All these containers are manufactured abroad,  
20 and they're shipped to different places in the United  
21 States, including Tennessee. When they arrive in  
22 Tennessee, is there any duty to get them out of Tennessee  
23 within a limited period of time?

24 MR. COLLIER: The treaty provides that the  
25 containers should be reexported within 3 months. That's

1 to provide the benefit of temporary admission.

2 QUESTION: Well, does the record show that all  
3 the containers at issue here were in Tennessee for less  
4 than 3 months?

5 MR. COLLIER: I believe that the record  
6 indicates that, though I would also point out to this  
7 Court that the Federal Customs Bureau has waived that  
8 particular requirement and no longer requires 3 months as  
9 a matter of regulation. That's what the treaty sets  
10 forth, but the U.S. Customs regulations allow the  
11 containers to remain for a longer period of time.

12 QUESTION: When these containers come into the  
13 United States, are some of them empty or are they all  
14 full?

15 MR. COLLIER: Some can come in empty, and some  
16 can arrive full.

17 QUESTION: Do some come empty to Tennessee and  
18 sit in a warehouse for a while before they're leased to a  
19 entity who used them to ship goods?

20 MR. COLLIER: There's no question, Justice  
21 Stevens, that some of the containers were present at one  
22 of the terminals either in Memphis or Chattanooga or  
23 Knoxville for some time in a yard. These containers are  
24 stackable and are set out in a container yard.

25 QUESTION: And they're empty at that time.

1 MR. COLLIER: Yes, while they'll be staying  
2 there --

3 QUESTION: And there is no time limit. There's  
4 no legal requirement that they be shipped out of Tennessee  
5 within a fixed period of time.

6 MR. COLLIER: That's regulated by the Customs  
7 Service. I'm not certain whether the current regulation  
8 is on that. The treaties talk about 3 months, but allow  
9 them --

10 QUESTION: See, if you acknowledge that, I'm not  
11 quite clear on why the fact they're manufactured abroad  
12 makes this a different case from if they had been -- a  
13 case in which they had been manufactured in Tennessee  
14 empty and then sold. That's what's troubling me. Maybe  
15 you're right, but I have some difficulty factually seeing  
16 the difference.

17 MR. COLLIER: It has been stipulated in this  
18 case that all of ITEL's containers during the audit period  
19 were continuously bonded and in the stream of foreign  
20 commerce whether or not they were temporarily stored.

21 QUESTION: Yes, but I don't know what that  
22 means. That's my problem.

23 MR. COLLIER: What that means is, of course,  
24 there is going to be the necessary interruption of the  
25 movement of an instrument of international traffic as it

1 is moved around the world and engages in a series of  
2 leases and multiple import-export moves.

3 What Congress sought through the waiver of  
4 customs duties in this case was to allow the free movement  
5 of containers without reducing their cost, either due to  
6 the crossing of a border or the imposition of tax, and  
7 certainly in this case, Congress has waived the benefit of  
8 quite a bit of customs duties: \$178,000 approximately in  
9 this case. And Tennessee's tax of \$158,000 nearly  
10 completely offsets that tax.

11 QUESTION: Well, I suppose that Tennessee could  
12 impose some sort of a tax if it had a reasonable formula  
13 for determining what services the State of Tennessee  
14 were -- was rendering.

15 MR. COLLIER: In the event -- yes, yes, that's  
16 true. In the event that Tennessee measured a particular  
17 service provided to a container, both under the treaties  
18 and under this Court's constitutional law --

19 QUESTION: Well, the State generally provides  
20 services for almost any kind of property that's within the  
21 State: fire and police protection, things like that.

22 MR. COLLIER: This Court has consistently held,  
23 in considering whether or not a particular tax is a user  
24 fee or whether it's a general tax, whether or not that tax  
25 is measured by the particular benefits that are allocated



1 to that individual. The Keokuk Packett case, some of the  
2 other cases of this Court decided in the last century,  
3 indicate that a user fee has to be collected in regard to  
4 particular services, not police or fire protection.

5 QUESTION: Well, how was the tax -- sales tax  
6 measured in this case?

7 MR. COLLIER: The sales tax in this case was  
8 measured by 100 percent of the gross lease proceeds under  
9 the lease, and since these containers were charged on  
10 a -- lease was charged on a per diem basis, the total  
11 amount under the lease wasn't known until the journey was  
12 ended. So it would be billed on a monthly basis.

13 QUESTION: It was -- I thought it was by the  
14 average. Was there --

15 MR. COLLIER: That was in estimating. What  
16 you're referring to, Justice White, is the estimation of  
17 the number of containers that were, in fact, leased within  
18 the jurisdiction. There was a projection done calculating  
19 the average container days leased in the audit.

20 QUESTION: But it wasn't measured by  
21 any -- anything related to the time the container was in  
22 Tennessee.

23 MR. COLLIER: Tennessee has made no effort to  
24 apportion its tax.

25 QUESTION: Is there anything in the record from

1 which it can be determined the average amount of time  
2 these containers were in Tennessee?

3 MR. COLLIER: I'm trying to think back, Chief  
4 Justice Rehnquist, whether or not there is something in  
5 that regard. Perhaps I can provide that on rebuttal.

6 QUESTION: Very well. Thank you.

7 QUESTION: Could you tell us how the operation  
8 of foreign tax systems becomes relevant to your case?  
9 There is a submission that the European Community does not  
10 impose this kind of tax. Why is that relevant? Because  
11 it shows an interpretation of the convention or because it  
12 shows the danger of multiple taxations if we rule against  
13 you, or both?

14 MR. COLLIER: Both, Justice Kennedy. The fact  
15 that there are, in fact, taxes which could be imposed on  
16 these containers and the fact that there is an  
17 international custom which respects these treaties and  
18 their meaning, as set forth in the protest of nations and  
19 in the brief of the United Kingdom.

20 At this point, if I can --

21 QUESTION: We look on that fact as evidence of  
22 how to interpret the treaty?

23 MR. COLLIER: Yes, Justice Kennedy. That's  
24 evidence like in the Franklin Mint case. The consistent  
25 interpretation of treaties by signatory nations is

1 certainly compelling evidence.

2 QUESTION: So, you reject this statement in the  
3 Government's brief: There is no uniform international  
4 custom or practice of exempting container leases from the  
5 effect of generally applicable tax laws.

6 MR. COLLIER: Yes. We certainly dispute and  
7 have indicated in our reply brief the reasons for that  
8 dispute. The only tax identified by the Solicitor General  
9 as being supposedly the same is a tax on the goods  
10 imported in a container which is paid only by a person who  
11 buys the goods as a consumer in the European communities.

12 At this time, I'd like to reserve the rest of my  
13 time for rebuttal.

14 QUESTION: Very well, Mr. Collier.

15 General Burson, we'll hear from you.

16 ORAL ARGUMENT OF CHARLES W. BURSON, ESQ.

17 ON BEHALF OF THE RESPONDENT

18 MR. BURSON: Mr. Chief Justice, and may it  
19 please the Court:

20 Petitioner raises three challenges to  
21 Tennessee's sales tax as applied to leases of intermodal  
22 containers delivered to lessees in the State. The tax is  
23 preempted by the terms of the 1956 and 1972 customs  
24 conventions. The tax impermissibly impinges upon the  
25 foreign commerce clause, and the tax frustrates the

1 purposes of the export-import clause. It's the State's  
2 contention that the following two propositions dispose of  
3 these arguments.

4 One, the tax is a generally applicable,  
5 nondiscriminatory sales tax. It's, thus, beyond the scope  
6 of the customs conventions' prescriptions of duties and  
7 taxes imposed by reason of or in connection with  
8 importation.

9 Two, the tax as applied isn't at variance with  
10 any doctrine or principle of international taxation  
11 accepted by the United States. This principle disposes of  
12 foreign commerce concerns, for if the tax doesn't conflict  
13 with international principles recognized by the United  
14 States, there can be no State interference with the  
15 Federal Government's regulation of foreign commerce. The  
16 two principles together establish that the tax doesn't  
17 frustrate the purposes of the export-import clause, as  
18 articulated in Michelin.

19 The tax at issue is not a duty imposed by reason  
20 of or in connection with importation. It's a garden  
21 variety sales tax. It's a source of general revenue for  
22 Tennessee. As virtually all generally applicable sales  
23 taxes, it applies to the sale of goods and to leases of  
24 personal property wherein delivery occurs within the  
25 State.



1                   QUESTION: Suppose we were to find as a  
2 definitive matter that no country in Europe under its  
3 interpretation of the treaty could levy the tax that was  
4 being levied here, that this was their interpretation.  
5 It's not our interpretation, but it's theirs -- and that  
6 were definitive. I know that's in dispute. Would you  
7 then lose this case?

8                   MR. BURSON: No, sir. What we say is essential  
9 is what this Nation recognizes. That's the voice with  
10 which -- the voices with which the United States speak as  
11 the principles that we have to be in compliance with. The  
12 foreign commerce clause doesn't tell Tennessee it has to  
13 comply with the dictates of foreign nations and their  
14 practices. What it tells us is we have to comply with and  
15 be uniform with expression of our national policies in  
16 regard to international trade.

17                   QUESTION: Well, suppose we were to find that a  
18 ruling in your favor would cause the levies of multiple  
19 taxes in other countries, particularly Europe, and that  
20 this would be burdensome on foreign commerce. Would you  
21 then lose the case?

22                   MR. BURSON: If you were to find that it would  
23 be burdensome on foreign commerce and this Court  
24 recognized some uniform doctrine that was recognized by  
25 this Nation, yes, but in a vacuum, Your Honor --

1 QUESTION: Well, but that's quite liable to  
2 happen. If we rule in your favor -- and that's a  
3 definitive interpretation of the treaty -- I take it  
4 European countries could look upon that as very persuasive  
5 evidence of what the convention means, and they could all  
6 begin to levy this precise kind of tax.

7 MR. BURSON: Specific --

8 QUESTION: And there would then be multiple  
9 taxation on Itel, would there not?

10 MR. BURSON: Specifically there would be  
11 similar -- perhaps similar taxation, not necessarily  
12 multiple taxation, and we would suggest that's not the  
13 type of impediment that the conventions addressed it to.  
14 That's not the type of concern that the United States has  
15 expressed. So, even with that finding, we would say  
16 there's no principle which would say Tennessee's tax  
17 should fail --

18 QUESTION: Well, General Burson, I suppose the  
19 hardest question presented here is the meaning of the  
20 conventions dealing with these containers, which clearly  
21 were entered into for the very purpose of encouraging the  
22 use of them and keeping the cost down of the users of  
23 those containers.

24 Now, you do agree, do you, that the  
25 interpretation of the conventions by other nations who are

1 signatories to it is relevant in our interpretation of the  
2 meaning of the convention?

3 MR. BURSON: Justice O'Connor, it's our  
4 contention that you don't need to get to the practice for  
5 interpretation, that the textual --

6 QUESTION: Well, suppose we do. Is it relevant?

7 MR. BURSON: If you do, it is relevant, but we  
8 would contend that what is more relevant is the position  
9 of the United States in its interpretation of the treaty  
10 to determine whether Tennessee is violative of the foreign  
11 commerce clause. That's what we're looking at.

12 QUESTION: Well, suppose what we're looking at  
13 is the meaning of the convention itself. We have to look  
14 at the language, and I suppose consider the interpretation  
15 of all parties to the convention --

16 MR. BURSON: Yes, and we would suggest --

17 QUESTION: -- not just the United States.

18 MR. BURSON: Yes. Excuse me. Yes. We would  
19 suggest, though, that great deference -- this Court would  
20 give great deference to the interpretation of that treaty  
21 by the United States. This is in this instance a voice  
22 that we're looking to be consistent with.

23 QUESTION: Well, certainly Tennessee's tax here  
24 does have an effect very similar to a customs duty, as  
25 it's imposed on these containers that apparently are in

1 Tennessee only a very short time.

2 MR. BURSON: Now, we would disagree with that  
3 proposition, Justice O'Connor. If you look at the  
4 purposes of what they're trying to free these containers  
5 from, it's more than just the economic -- the incidence of  
6 a tax in the form of a customs duty. What they're trying  
7 to free these containers up for -- and it's in their  
8 brief, footnote 3. One of the main things is to enable  
9 these containers to flow across national boundaries  
10 without having to get unloaded, without having to comply  
11 with customs.

12 In the United States, we have, in effect, given  
13 effect to this treaty and the interpretation, our  
14 interpretation by our Federal statutes, and by our Federal  
15 regulations, is that they are only relieved in the statute  
16 from the customs laws, that in our Federal regulations  
17 they are only relieved from duties and from complying with  
18 the necessary paperwork when they cross the territorial  
19 boundaries. So, the United States is not only here before  
20 this Court asserting that the conventions don't mean what  
21 petitioner contends, but in our very enactments, in our  
22 statutory enactments and regulations, it's reflected that  
23 we're only talking about matters of a customs nature and  
24 customs laws.

25 QUESTION: Well, I suppose your State puts an



1 income tax on Intel -- is that the name?

2 MR. BURSON: Itel.

3 QUESTION: Itel?

4 MR. BURSON: Yes, sir.

5 QUESTION: Measured by the income it gets in  
6 Arkansas.

7 MR. BURSON: Well, I think we would have an  
8 apportioned income tax -- excise tax on Itel's business,  
9 yes, sir.

10 Let me mention one thing. Justice Kennedy  
11 raised the question about property taxes, and in testing  
12 this theory, in fact, really the premise in Japan Line was  
13 that Japan, who is a -- I think a party to these  
14 treaties -- the premise was they could impose the property  
15 tax. That's the reason California couldn't, because Japan  
16 was imposing a personal property tax on those articles.  
17 In that case, California was trying to do it on a foreign  
18 corporation, but here we have a domestic corporation.

19 Now, if the principle is and if this Court has  
20 recognized the principle that personal property  
21 tax -- taxes are assessable on these containers, it flies  
22 right in the face of the contention that this treaty means  
23 that no taxes can be imposed on these containers by virtue  
24 of their mere presence.

25 QUESTION: Well, suppose Itel has a 2-year lease

1 and this container is going to go first to England and  
2 then to India and then to Japan, but it's not -- the  
3 destination is not fixed for certain as of the time it  
4 goes to England. It goes first to England. In England,  
5 Itel then does some telephone calls and soliciting and  
6 it's determined that the direction of that container will  
7 be diverted and it will go back to Canada. Can England  
8 tax the transaction that resulted in that container being  
9 diverted and assigned to a new destination?

10 MR. BURSON: It would be our position that there  
11 is nothing in the treaty or in international principle  
12 that would say it couldn't.

13 QUESTION: That would be a multiple tax on the  
14 same transaction, though, would it not? Because your tax  
15 extends for the whole 2-year period, and England has taxed  
16 it once again, that portion of the transaction which was  
17 the reassignment of the container.

18 MR. BURSON: Yes.

19 QUESTION: General Burson, as I understand it,  
20 the incidence of your tax is upon the lease. It's not  
21 upon the containers themselves. It's not even a property  
22 tax on the containers.

23 MR. BURSON: That's correct.

24 QUESTION: And as I understand it, the foreign  
25 countries also have some exactions that affect the

1 containers, as your tax does. It's your contention that  
2 the VAT tax amounts to that, doesn't it?

3 MR. BURSON: Yes.

4 QUESTION: Because the VAT tax is upon the  
5 contents of the containers, but the value of those  
6 contents is increased for purposes of the VAT by the  
7 leasing cost that's attributable to them. So that, in  
8 effect, the lease is being taxed through the VAT anyway.

9 MR. BURSON: Yes. The -- they're using the same  
10 economic measure of the tax. Tennessee uses, as its  
11 measure for its tax, the consideration. The VAT tax, when  
12 it taxes the goods, uses at least a portion of the cost of  
13 the lease as a measure of its VAT tax.

14 QUESTION: And do you know whether foreign  
15 countries, other signatories to the treaty, would be  
16 tempted to impose the same kind of a tax as Tennessee? I  
17 mean, that is, do they generally have sales taxes?

18 MR. BURSON: This is one of the difficulties  
19 with trying to -- even looking at the multiple taxation  
20 situation in the absence of a uniform principle, we're  
21 talking about nations with entirely different tax  
22 structures. Europe doesn't have a sales tax structure.  
23 They have a VAT tax. Japan --

24 QUESTION: What would they do if an empty  
25 container were shipped to England? There would be no VAT

1 tax then.

2 MR. BURSON: Well, there would be no goods. So,  
3 there would be no VAT tax I assume on that.

4 QUESTION: And empty containers are shipped in  
5 the course of Itel's regular business, are they not?

6 MR. BURSON: Yes, sir.

7 The foreign commerce clause precludes States  
8 from engaging in practices which are at variance with the  
9 regulation of foreign commerce by the Federal Government.

10 QUESTION: General Burson, before you get off  
11 the last point, you would not -- empty containers can be  
12 shipped out of Tennessee as much as Itel wants so long as  
13 they don't lease it to somebody. Isn't that right?

14 MR. BURSON: That's exactly right, Justice --

15 QUESTION: And they can ship those empty  
16 containers all around the world so long as they don't  
17 enter a lease in Tennessee.

18 MR. BURSON: That's exactly right, Justice  
19 Scalia. In fact, that was the case on this record, that  
20 there are containers that they interchange and don't enter  
21 into leases that come in and out of Tennessee that are  
22 not -- that no tax applies to.

23 QUESTION: Some -- are any leases executed  
24 abroad, or are they all made in Tennessee?

25 MR. BURSON: The -- all the -- the taxes here



1 are where delivery has occurred in Tennessee.

2 QUESTION: Oh, I understand, but does ITEL, in  
3 fact, conclude some leases abroad?

4 MR. BURSON: It's my understanding that all  
5 leases are concluded in San Francisco or are executed in  
6 San Francisco. There are cases where they deliver, yes,  
7 where delivery occurs in other jurisdictions.

8 QUESTION: So that you don't reach -- you don't  
9 even reach the value of the leases at all.

10 MR. BURSON: No.

11 QUESTION: But you tax based on the delivery,  
12 not the execution of the lease.

13 MR. BURSON: That's correct. Tennessee's whole  
14 sales tax scheme -- in fact, in most jurisdictions in this  
15 country, the sales tax is based upon delivery.

16 And let me make a point. These containers come  
17 into Tennessee and then they are competing for transport  
18 business within Tennessee with other commercial activity  
19 in that State, and it's this commercial activity that  
20 Tennessee is taxing, not the mere presence or even the  
21 mere transit through the State of these container leases.

22 Quite frankly, it's much less of a tax, say, on  
23 importation than is the VAT tax, which is -- really taxes  
24 the goods because they're imported and gets, within the  
25 economic measure of that tax, the cost of the lease.

1           We would contend that controlling -- let me go  
2 back to the textual aspect of the treaty one second, and  
3 that is, if everything is -- our statutes, our  
4 regulations, the language of the treaty itself -- says  
5 this is intended to apply to customs duties. Under the  
6 protocol of signatures, they -- which is a part of the  
7 treaty, they specifically say: The terms of the present  
8 convention shall not preclude the application of national  
9 provisions or of international agreements not of a Customs  
10 nature, regulating the use of these containers. We would  
11 just contend that's further evidence that what the  
12 treaties are getting at are actually the customs -- a  
13 customs type of a tax.

14           QUESTION: Where was that language you just read  
15 from?

16           MR. BURSON: That's under the protocol of  
17 signature, which is a part -- incorporates a part of the  
18 convention, and --

19           QUESTION: Where do we find that in the  
20 materials before us?

21           MR. BURSON: Well, I think that -- supposedly  
22 the convention language is in the joint appendix, but it  
23 is represented in the joint appendix to be the entire  
24 convention, but I'm not sure that it is. I could furnish  
25 the Court a copy of that. It's the United Nations treaty

1 series dealing with the 1972 container convention.

2 QUESTION: Why don't you furnish the Court a  
3 copy if you --

4 MR. BURSON: What the concern of the foreign  
5 commerce clause is, it's our contention, is the uniformity  
6 between the States and the Federal Government, our actions  
7 in regard to policies recognized by the Federal  
8 Government. This Court's jurisprudence instructs us that  
9 in identifying those principles, the Court looks to  
10 treaties or conventions, as we're doing here, to Federal  
11 statutes, to the manner in which national laws are  
12 applied, to this Court's recognition of established  
13 doctrine of international law, and to the positions taken  
14 by the United States in proceedings before this Court.

15 In Japan Line, there was a custom of nations  
16 against which you could measure the deviation of the  
17 California tax. In this case, we have no such recognized  
18 custom of nations. The only thing that petitioners point  
19 to, one way or another, either as a policy or as  
20 preemption doctrine, is the treaty. We would suggest that  
21 the plain language --

22 QUESTION: And the practice, which may consist  
23 of nothing more than that other countries don't have a  
24 sales tax, period, on containers or anything else.

25 MR. BURSON: Yes, yes. And it seems they're



1 making the argument that the practice informs us about the  
2 meaning of the treaty, but they also seem to be suggesting  
3 that the practice in some way establishes a recognized  
4 uniform principle of international taxation, and we would  
5 contend that is just not the case. There is no such  
6 principle in relation to this form of taxation that  
7 would -- in which Tennessee's -- or to which Tennessee's  
8 tax is asymmetrical.

9 QUESTION: But apparently -- is it also true  
10 that Tennessee is the only one of the 50 States in the  
11 United States that does this?

12 MR. BURSON: Well, you know, the record  
13 is -- not necessarily. The record is very skimpy on this.  
14 In fact, it's based upon one statement by a director of  
15 marketing that says, to your knowledge has any State other  
16 than Tennessee stopped to impose a sales tax on the  
17 proceeds of international cargo containers. And the  
18 director of marketing said, not to my knowledge. Their  
19 statement that no other State imposes is based upon that.

20 In fact, there is a letter ruling from  
21 Massachusetts back in '79 after Japan Line in which that  
22 very question was posed to them, and they said their tax  
23 did apply to leases and sales of containers, and again,  
24 we'd be happy to furnish that to the Court upon request.

25 QUESTION: We didn't get any amicus briefs from



1 any other States, I don't think, did we?

2 MR. BURSON: No, but I don't -- Your Honor, we  
3 would contend, Justice Stevens, that nothing should be  
4 read into that. We have plenty of experience either of  
5 getting -- hustling up amicus briefs or not, and again, we  
6 think that the position of Tennessee supported by the  
7 United States amply addresses the questions raised by  
8 petitioner in this case.

9 Again, it's a generally applicable sales tax,  
10 nondiscriminatory, and there is no recognized principle of  
11 international law in which our actions are deviated.

12 QUESTION: Thank you, General Burson.

13 Mr. Kneedler, we'll hear now from you.

14 ORAL ARGUMENT OF EDWIN S. KNEEDLER

15 ON BEHALF OF THE UNITED STATES

16 AS AMICUS CURIAE, SUPPORTING THE RESPONDENT

17 MR. KNEEDLER: Thank you, Mr. Chief Justice, and  
18 may it please the Court:

19 The United States agrees with Tennessee that  
20 application of that State's sales tax to the lease  
21 transactions taking place entirely within its borders is  
22 not barred by either the customs conventions on containers  
23 or the foreign commerce and import-export clauses of the  
24 Constitution. A holding by this Court to that effect  
25 would be consistent with both of the national interests

1 that are implicated in a case such as this.

2 First, it would serve the important national  
3 interest, the interest of the Nation as a whole, of  
4 protecting the rights of the individual sovereign States  
5 to impose taxes on matters within their borders, and  
6 thereby to ensure that those engaged in foreign commerce,  
7 no less than those engaged in interstate and domestic  
8 commerce, bear their fair share of the burden of  
9 supporting State and local governments.

10 Secondly, in the view of the United States, a  
11 holding by this Court to that effect would be consistent  
12 with the United States' interests in international  
13 relations and in foreign commerce.

14 Our position rests on two principal points.  
15 First, the conventions on containers, the implementing  
16 statutes and regulations, as construed by the executive  
17 branch, do not bar generally applicable sales taxes of  
18 this nature. Secondly, independent of the convention,  
19 unlike in Japan Lines, there is no rule or principle of  
20 international taxation that has been accepted and  
21 recognized by the United States that bars taxes.

22 QUESTION: Mr. Kneedler, Mr. Collier says that  
23 the Government has changed its position in one aspect of  
24 this case since its appearance in Japan Line in 1978. Do  
25 you agree with that contention?

40

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1 MR. KNEEDLER: In -- to some extent, yes. In  
2 Japan Line, the thrust of the Government's argument,  
3 though, was not primarily on the convention, but on the  
4 implementing statutes and regulations, which I can address  
5 in a moment.

6 But basically the bonded warehouse statutes  
7 involved in McGoldrick and Xerox -- there was a suggestion  
8 in our brief that those same rationales would apply under  
9 the particular statute, 1322(a), that is at issue in this  
10 case. On further reflection, we think it's clear that  
11 the -- that there really is not an analogy between those  
12 two provisions.

13 QUESTION: Well, would Japan Lines have -- come  
14 out the other way? Or do you think that Japan Lines  
15 should have come out the other way under your current  
16 view?

17 MR. KNEEDLER: Not at all, and we think  
18 pointedly the Court in Japan Line did not rely either on  
19 the convention or on the statutes that petitioner relies  
20 on here to invalidate the tax. The Court went beyond  
21 that. Logically they would have been antecedent to  
22 reaching the constitutional question of whether the taxes  
23 violated the commerce clause. The Court instead resolved  
24 it on that ground and, therefore, must have  
25 concluded -- and did not accept the invitation of Japan



1 Lines that the taxes violated the principle of McGoldrick  
2 or the conventions.

3 QUESTION: And how about McGoldrick itself?  
4 Under your present view, would it still have come out the  
5 same?

6 MR. KNEEDLER: Yes, it would. That -- the  
7 statutes involved in McGoldrick and Xerox are quite  
8 different. Those statutes involved bonded warehouses in  
9 which goods come and are essentially held at the border  
10 and are under the custody of the Customs Service, along  
11 with the warehouse person, and while they're in that  
12 custody, they are accepted -- subject to extensive  
13 regulation.

14 The statute at issue here is really quite  
15 different. It allows the goods to pierce through the  
16 border to be admitted for the delivery and pickup of goods  
17 within the United States, and they are manifestly not  
18 within the custody of the Customs Service. It's logical,  
19 just under a straightforward sense of the supremacy  
20 clause, that a State could not tax goods that are under  
21 the custody at the border of the Customs Service, but  
22 that --

23 QUESTION: We certainly have briefs in this case  
24 from amici who think that the convention should be  
25 interpreted differently.



1 MR. KNEEDLER: Right, and at the moment I was  
2 just interpreting or -- excuse me -- addressing McGoldrick  
3 and the Xerox --

4 QUESTION: Yes.

5 MR. KNEEDLER: -- and the Xerox cases.

6 One last point I would like to make about the  
7 statutory point before I move on to the conventions. The  
8 statute at issue is quoted at page 10 of our brief, and it  
9 reads -- it provides that instruments of international  
10 traffic, which includes containers, are exempt from the  
11 application of the customs laws to such extent and subject  
12 to such terms and conditions as may be prescribed in  
13 regulations or instructions of the Secretary. The statute  
14 itself contains no exemption even from the customs laws.  
15 You're referred to the regulations of the Secretary to  
16 determine what exemptions there are. The regulations of  
17 the Secretary in this case exempt containers from the  
18 customs laws and duties, both the entry and the duties  
19 requirements, but they do not -- there's nothing in the  
20 regulations to which this Court should defer that would  
21 exempt the containers from State taxes.

22 Turning to the convention now, if I may, this  
23 Court has described the conventions as designed to remove  
24 impediments to the use of containers. That's what the  
25 Court said in Japan Lines. And the conventions themselves

1 make clear what sort of impediments were being spoken of,  
2 and those impediments are ones of a customs nature. These  
3 are, after all, conventions called customs conventions on  
4 containers, and the central obligation of the parties  
5 under the conventions is to allow temporary admission,  
6 which is admission defined in both conventions free of  
7 import duties and taxes, free of import prohibitions and  
8 restrictions. And the phrase import duties and taxes is,  
9 in turn, defined as custom duties or other taxes  
10 chargeable by reason of importation under the '56  
11 convention or in connection with importation of goods. At  
12 every turn, there is a specific reference to importation,  
13 and the impediments to be removed are customs.

14 The protocol of signatures reinforces that  
15 point. The protocol, by the way, is reproduced at  
16 footnote 8 of our brief. It specifically reserves to the  
17 parties the right to impose restrictions not of a customs  
18 nature.

19 QUESTION: So, your submission is that this  
20 State tax is not by reason of or in connection with --

21 MR. KNEEDLER: Precisely. The petitioner argues  
22 that because the containers may be present in the country  
23 by reason of importation that that's enough, but the  
24 convention refers to the premise for the tax. Is the tax  
25 chargeable by reason of importation or imposed? It looks

1 at it from the perspective of government levying the tax,  
2 not the reason why the container may be within the  
3 country.

4 QUESTION: So, a property tax should also be  
5 valid under your view.

6 MR. KNEEDLER: Yes, and in fact, presumably the  
7 Court -- I think the Court implicitly so concluded in  
8 Japan Line itself.

9 QUESTION: Do I understand that the British  
10 Government disagrees with that proposition?

11 MR. KNEEDLER: Yes. As I understand the UK's  
12 position, it is that a tax -- any tax -- and they simply  
13 pick up the same point that petitioner does, that because  
14 the containers are present by reason of importation, that  
15 that's sufficient.

16 They also rely on the purposes of the  
17 convention. But the purposes are implemented according to  
18 the specific terms of the convention. If the purposes  
19 were to be given the full scope that petitioner argues,  
20 income taxes on these would be prohibited. The tax on the  
21 repairs of the containers that petitioner doesn't even  
22 challenge would be prohibited.

23 QUESTION: It says there's another provision in  
24 the later convention that allows taxes on the basis of  
25 services provided.

1 MR. KNEEDLER: Right, but that is something that  
2 would focus largely on the moment of importation, wharfage  
3 fees and something like that, as the goods were being  
4 entered into. That's something different from the sales  
5 tax within the United States.

6 There's another reason why the conventions are  
7 inapplicable, and that is that they do not apply at all to  
8 the actions of the parties of the contracting State, which  
9 we've set that forth -- that in our brief.

10 And also to the extent the negotiating history  
11 of the conventions are relevant on this point, petitioners  
12 cite in their reply brief some excerpts from the  
13 negotiating history. Fairly read as a whole, those -- the  
14 negotiating history cuts precisely the other way, and I  
15 would refer the Court to that if the Court addresses that  
16 question.

17 Turning to the UK's position on the VAT tax, our  
18 point there is that the VAT tax does -- the VAT does tax  
19 the value of the lease. That's our simple point. And so,  
20 if the conventions are to be given the broad scope that  
21 the UK would argue for to serve their policies, then  
22 taxing the value of the lease as included in the value of  
23 the goods should be equally preempted.

24 QUESTION: And I suppose that would be true even  
25 if, as often happens, the lessee ships an empty container.



1 MR. KNEEDLER: Well, right.

2 QUESTION: Because ultimately it would be in the  
3 cost of the goods.

4 MR. KNEEDLER: Precisely so. Precisely so.

5 And you mentioned, Justice Kennedy, earlier the  
6 question that the UK might respond by imposing a tax on  
7 lease transactions there. Our position is that that's not  
8 the sort of retaliation that the commerce clause is  
9 referring to, because just as it is our position that the  
10 United States or a State may impose a tax on a discrete  
11 transaction, so may -- when delivery occurs in the United  
12 States, so may a foreign country.

13 That's not multiple taxation. It's just the UK  
14 saying we might do what Tennessee is doing, and our  
15 position on that is fine because as in Wardair, the  
16 transaction being taxed, in that case sale of fuels --  
17 fuel, takes place entirely within the taxing jurisdiction.  
18 So that is not a threat of multiple taxation.

19 QUESTION: Thank you, Mr. Kneedler.

20 Mr. Collier, you have 3 minutes remaining.

21 REBUTTAL ARGUMENT OF PHILIP W. COLLIER

22 ON BEHALF OF THE PETITIONER

23 MR. COLLIER: As pointed out by the United  
24 Kingdom in its brief, the signatory nations to this  
25 convention have followed the uniform practice of failing

1 to impose taxes like Tennessee's for 36 years. The  
2 position of the United Kingdom and the other protesting  
3 nations, which include 8 of the original 12 nations which  
4 drafted the 1956 treaty, have posed the interpretation of  
5 the convention that is followed by Itel. So the deference  
6 that would be ordinarily given the executive branch in  
7 interpreting international law is informed by the  
8 interpretations of those nations.

9 QUESTION: I'm not aware of -- is it a principle  
10 of contract law, for example, that if eight out of nine  
11 parties to the contract interpret it a certain way, that's  
12 what it must mean? I'm not sure I agree with you.

13 MR. COLLIER: Certainly, Justice Scalia, it's  
14 not simply a head count. The United States was not even a  
15 participant in the drafting of the language to this  
16 convention. They acceded 13 years later. We're not  
17 contending that it's just a principle of contract law.

18 QUESTION: But surely we're bound by what it  
19 means, and if our understanding is the correct one, that  
20 ought to be it.

21 QUESTION: Are there cases in which they have  
22 held, in effect, that by reason of means just being  
23 present in the jurisdiction?

24 MR. COLLIER: There are no cases construing that  
25 language.

1 QUESTION: It's just they take this position in  
2 this litigation.

3 MR. COLLIER: They take that position in this  
4 litigation, and they have prevented containers from being  
5 taxed by their own statutes. There is a uniform practice  
6 in this case, and I would point out that the only example  
7 given by the United States wasn't even alluded to by  
8 Tennessee in their brief, is the imposition of a tax on  
9 goods imported in a container. And I would like to make  
10 this for an example.

11 If a British steamship line leases a container  
12 which is delivered in Tennessee to export a case or cases  
13 of Jack Daniels whiskey to London, certainly the taxes  
14 imposed on the container lessee by Tennessee has to be by  
15 the lessor and paid by the lessee. But the import VAT  
16 that the United States has raised in Britain only means  
17 that when a customer at a pub purchases a fifth of Jack  
18 Daniels, he has to pay an import VAT on the base price as  
19 determined under cost, insurance, and freight. There is  
20 simply no connection in that tax. There is no  
21 disincentive in that tax to the use of containers. It  
22 simply doesn't strike at the container or the container  
23 selection decision.

24 I would also like to respond --

25 QUESTION: Excuse me. Isn't the -- doesn't the

1 cost include the cost of leasing the containers to get the  
2 beer there?

3 MR. COLLIER: The cost under the CIF method of  
4 valuation, which is adopted, does include the fraction --

5 QUESTION: Right.

6 MR. COLLIER: -- of the lease which is involved  
7 from the travel from Tennessee to the United Kingdom, but  
8 that has never been -- that is not a tax in connection  
9 with the importation of containers. It doesn't fall on  
10 the choice. It doesn't affect the use of containers.

11 QUESTION: There is a sales tax technically, but  
12 the question is you say it is in effect, and so is the VAT  
13 in effect. Now, it's divvied up among all of the States  
14 that use the container over time, but in effect it reaches  
15 the leases just as the Tennessee sales tax does.

16 MR. COLLIER: It does not fall on the container  
17 lessors or lessees.

18 Thank you, Justice Scalia.

19 CHIEF JUSTICE REHNQUIST: Thank you, Mr.  
20 Collier.

21 The case is submitted.

22 (Whereupon, at 12:03 p.m., the case in the  
23 above-entitled matter was submitted.)

24

25



## 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:*

Itel Containers International Corporation v. Joe Huddleston, Commissioner  
of Revenue of Tennessee

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

BY *Lona M. May*

(REPORTER)