

OFFICIAL TRANSCRIPT  
PROCEEDINGS BEFORE  
**THE SUPREME COURT**  
**OF THE**  
**UNITED STATES**

CAPTION: UNITED STATES, Petitioner v. INTERNATIONAL  
BUSINESS MACHINES CORPORATION

CASE NO: 95-591

PLACE: Washington, D.C.

DATE: Monday, March 18, 1996

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3 UNITED STATES, :

4 Petitioner :

5 v. : No. 95-591

6 INTERNATIONAL BUSINESS :

7 MACHINES CORPORATION :

8 - - - - -X

9 Washington, D.C.

10 Monday, March 18, 1996

11 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States at  
13 10:02 a.m.

14 APPEARANCES:

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16 General, Department of Justice, Washington, D.C.; on  
17 behalf of the Petitioner.

18 JAMES R. ATWOOD, ESQ., Washington, D.C.; on behalf of the  
19 Respondent.

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

2 (10:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument  
4 now in Number 95-591, the United States v. International  
5 Business Machines Corporation.

6 Mr. Minear.

7 ORAL ARGUMENT OF JEFFREY P. MINEAR

8 ON BEHALF OF THE PETITIONER

9 MR. MINEAR: Thank you, Mr. Chief Justice, and  
10 may it please the Court:

11 The issue in this case is whether section 4371  
12 of the Internal Revenue Code runs afoul of the Export  
13 Clause of the Constitution. Section 4371 imposes a  
14 generally applicable tax not limited to exports on  
15 premiums paid by foreign insurers for risks that occur  
16 wholly or partly within the United States. It eliminates  
17 a competitive advantage that foreign insurers would  
18 otherwise enjoy by virtue of their exemption from the  
19 Federal income tax.

20 The Federal Circuit ruled that the Export Clause  
21 prohibits the application of that tax to insurance  
22 associated with exports. They concluded that this Court's  
23 decision in *Thames & Mersey v. United States* compelled  
24 that result.

25 We submit that this Court's ruling in *Thames &*

1 Mersey is no longer viable. That decision was a departure  
2 from precedent when it was decided 80 years ago, and it  
3 rested on a Commerce-Clause rationale this Court has since  
4 repudiated.

5 But perhaps most important, Thames cannot be  
6 reconciled with this Court's modern tax decisions, which  
7 have worked a basic change in the law. Those decisions,  
8 Michelin Tire and Washington Stevedoring, have, in the  
9 words of the Court, abandoned the past practice of  
10 examining when goods lose their character as imports or  
11 exports, and has refocused the inquiry on the nature of  
12 the tax at issue.

13 Using that approach, the Court has concluded  
14 that the Import-Export Clause does not prohibit the  
15 application of generally applicable taxes, but rather  
16 prohibits --

17 QUESTION: Well, Mr. Minear, we're dealing here  
18 with the Export Clause, not the Import-Export Clause,  
19 isn't that right?

20 MR. MINEAR: That is correct, Your Honor.

21 QUESTION: And it certainly is possible that the  
22 Export Clause has different purposes than the Import-  
23 Export Clause.

24 MR. MINEAR: That is possible, but we do not  
25 think it is borne out by either the language or the

1 content of the clause itself.

2 QUESTION: You do concede that if we do not  
3 overrule the Thames case that you lose?

4 MR. MINEAR: That is correct. We have made that  
5 concession in the briefs.

6 QUESTION: And it obviously would require  
7 ultimately overruling more than just Thames & Mersey.  
8 There are some other cases that are of the same genre, are  
9 they not?

10 MR. MINEAR: But relatively few, Your Honor. In  
11 fact, there were four cases that were decided before  
12 Thames and Mersey --

13 QUESTION: Well, why should we do that at all?  
14 Why not leave them in place? What harm does it do?

15 MR. MINEAR: The harm that it does is, it  
16 results in a lack of coherence in this Court's overall  
17 approach to the problem in this area.

18 QUESTION: Well, occasionally one has that. We  
19 certainly have the precedents out there, and I just --  
20 you're going to have to persuade me that there are some  
21 very important reasons for overturning these longstanding  
22 precedents.

23 QUESTION: And this is a separate provisions,  
24 too. It's not as if it's based on the Commerce Clause.  
25 It's based on a separate prohibition against taxes on

1 imports, on exports, which is -- the language is different  
2 even in the Export-Import Clause.

3 MR. MINEAR: Your Honor, I'd like to answer both  
4 of the questions, both of the points that you made there.

5 First, this Court has consistently interpreted  
6 the Export Clause and the Import-Export Clause as imposing  
7 a parallel limitation on the Federal and State Governments  
8 with respect to exports. If there's one element of  
9 consistency that has run through this Court's cases in the  
10 past 175 years, it is that those two clauses should be  
11 interpreted consistently.

12 And secondly, there is a question of the  
13 language difference. Respondent asserts that the Export  
14 Clause should be read as a more extensive prohibition  
15 because it uses the term, tax or duty, rather than the  
16 term, impost or duty, but the terms tax and impost are  
17 synonymous, and the operative phrase in this context is  
18 functionally identical.

19 QUESTION: Well, why are they synonymous?

20 QUESTION: Why did the Framers use different  
21 language, then?

22 MR. MINEAR: The Framers frequently used  
23 synonymous terms to express the same idea. For example,  
24 the Framers stated that Congress would have the power to  
25 raise and support armies, but also to provide and maintain

1 a Navy. It said that Congress would have the power to  
2 establish post offices, but to constitute tribunals. The  
3 very nature of a synonym is, frequently it can be used  
4 interchangeably with no change in meaning.

5 QUESTION: Well, I don't think that carries you  
6 very -- to provide and maintain a Navy, you're providing  
7 ships, whereas to raise and support armies, you're  
8 conscripting troops.

9 MR. MINEAR: But this -- the overall content of  
10 those phrases, they convey the same general meaning, and  
11 that's the point that Chief Justice Marshall made in 1827  
12 in the case of Brown v. Maryland. As he stated, there is  
13 some diversity in language, but the act that is  
14 prohibited is the same, and that provision, that statement  
15 has been followed by this Court, as I say, in numerous  
16 cases.

17 QUESTION: Yes, even though the case itself  
18 hasn't been followed.

19 MR. MINEAR: The case itself has been followed  
20 in significant part. It's true that the aspect of the  
21 case originally -- relating to the original package  
22 doctrine has not been followed. At least it has not been  
23 seen as a restriction, but one of the ironies of this case  
24 is that what the respondent's position would do is  
25 actually reintroduce the very notion of the original



1 package doctrine, or at least the converse of it in the  
2 sense of taxes on exports.

3 QUESTION: Are you concerned that the original  
4 package doctrine has to be introduced, or something like  
5 it, if we attempt some halfway solution where we rule in  
6 your favor saying there cannot be a tax on the export, but  
7 that if there is an indirect tax, then the discrimination  
8 rule applies?

9 MR. MINEAR: Yes. That is a problem, that we  
10 believe that one of the basic points in this Court's  
11 decision in Michelin Tire and Washington Stevedoring was  
12 to abandon that type of inquiry, this inquiry --

13 QUESTION: Mr. Minear, you mentioned Washington  
14 Stevedoring, which involved the cost of loading, and --

15 MR. MINEAR: Yes. The tax was applied to  
16 loading and unloading the ships.

17 QUESTION: And I thought that the whole idea of  
18 that is that that was a discrete item, that you could  
19 separate the stevedoring, the loading of the vessel from  
20 the goods, and I was struck by your brief that you don't  
21 make any lesser argument. You don't say, this tax is okay  
22 because it's on the insurance and not on the goods. You  
23 seem to concede that the tax should be treated as though  
24 it were on the goods.

25 MR. MINEAR: Well, we believe that that's a

1 separate problem with Thames & Mersey. It's another  
2 problem that was introduced by that case.

3 QUESTION: But you've conceded that.

4 QUESTION: You've conceded --

5 QUESTION: You've conceded that.

6 MR. MINEAR: But that is --

7 QUESTION: So that problem's over the falls,  
8 right? We don't have to worry about that.

9 MR. MINEAR: The bigger problem is the one that  
10 we're concerned with, and that was the application -- yes.

11 QUESTION: Excuse me. It seems to me that you  
12 could, in this case, say this is not a tax on the goods  
13 themselves, and then invoke your antidiscrimination  
14 principle, leaving a tax on the goods themselves for  
15 another day.

16 MR. MINEAR: That's correct.

17 QUESTION: The Spalding case, et cetera.

18 MR. MINEAR: And the problem, the reason why we  
19 chose not to do that is because it is -- it requires us to  
20 fall back onto an analysis similar to the original package  
21 doctrine. What is an export, and what is not an export?

22 QUESTION: But is it so hard in this case to do  
23 that? Can't we reserve the difficult question for a later  
24 case?

25 MR. MINEAR: Well, of course you could do that,

1 but it seems to me that the issue ought to be addressed  
2 now, that this is a problem that has continued to plague  
3 this area --

4 QUESTION: Well, how does your theory not  
5 require us to figure out what are imports and what aren't  
6 imports? Even to decide whether a tax is discriminatorily  
7 placed on imports you have to decide the same question.  
8 Let's assume you have a task that is only placed upon  
9 insurance of exports. Wouldn't you still have to decide  
10 whether that's, in effect, a tax upon exports?

11 MR. MINEAR: Then you might well have to face  
12 that question, but the test --

13 QUESTION: Of course. I don't see how that  
14 question is eliminated by adopting the theory that you're  
15 pressing upon us.

16 MR. MINEAR: The test that we propose will  
17 eliminate that inquiry in most every case, because the  
18 initial question will be, is this tax discriminatory, and  
19 that's a question that can usually be answered quite  
20 easily.

21 QUESTION: Oh, but you've got to say  
22 discriminatory against what, and to determine the what,  
23 you've got to decide whether the subject of the tax should  
24 be treated as an export. I don't see how you can get away  
25 from it.

1 MR. MINEAR: Well, on the other hand, Your  
2 Honor, if a tax applies across the board to all types of  
3 transactions, it is not discriminatory, so you do not need  
4 to get into the question of what is an export and what  
5 isn't, as long as --

6 QUESTION: So if the South, in other words,  
7 exports 100 percent of its indigo crop -- no, let's say  
8 only 99.99 percent, and Congress were to pass a tax saying  
9 all shipments of indigo pay a 10 percent tax, in your view  
10 that's nondiscriminatory and, therefore, at the time this  
11 Constitution was enacted, the court should have upheld it?

12 MR. MINEAR: I think that the question of  
13 whether any particular tax is going to be discriminatory  
14 may require a further analysis.

15 QUESTION: What about the case I put?

16 MR. MINEAR: At the moment that that tax is  
17 imposed, perhaps it is a tax on exports, but you must  
18 remember that markets constantly change.

19 QUESTION: The question I think that was being  
20 asked is, isn't -- don't you have to figure out whether  
21 the tax is on an export or not even under your analysis?

22 MR. MINEAR: You do, but you can -- the analysis  
23 we propose simplifies this area in the same way that it  
24 has simplified the area in the Import-Export Clause cases  
25 by focusing on the nature of the tax. If the tax is a

1 general tax, if it applies across the board to all of the  
2 products, then it would not fall within the purview of the  
3 Export Clause.

4 QUESTION: Mr. Minear --

5 QUESTION: No, but that's --

6 QUESTION: -- would you explain to me why you  
7 don't make the argument, the simple argument that what  
8 Congress had in mind was evening out the situation for  
9 domestic insurers, because this would apply to the --  
10 suppose there were a foreign company that was insuring  
11 entirely domestic transport, the tax would apply, right?

12 MR. MINEAR: Yes.

13 QUESTION: And yet that seems such a simple  
14 argument that you avoid, and I'm not clear on why you're  
15 doing that.

16 MR. MINEAR: We do not mean to avoid that  
17 argument. That's part of our argument of why this is a  
18 tax of general application.

19 In this particular context, in fact, the tax  
20 appears to be more an import tax than an export tax.

21 Remember, this is a tax that is being imposed on  
22 the basis of foreign insurers selling insurance in this  
23 country on the basis -- to protect against risks that  
24 occur wholly or partly in the United States, but our  
25 argument is addressed to the broader problem here, and

1 that's why we think that you need to reconsider Thames &  
2 Mersey.

3 The -- our concerns here are not limited to just  
4 this case, but rather to add incoherence to the overall  
5 body of law here.

6 QUESTION: Mr. Minear, I'm just skeptical that  
7 the canny southerners who got this provision included in  
8 the Constitution were resigned to the notion that if a tax  
9 were placed upon indigo, it would be up to the courts as  
10 to whether that was a discriminatory -- you know, upon  
11 shipments of indigo. It would depend upon what percentage  
12 was being exported, and that's your analysis, right, that  
13 if, in fact, almost all indigo was being exported, that  
14 would be a discriminatory tax.

15 MR. MINEAR: It could be. I'm not saying that  
16 it would be.

17 QUESTION: I --

18 MR. MINEAR: Your Honor --

19 QUESTION: I'm skeptical that that's all the  
20 protection the southerners thought they got when they got  
21 the Export Clause included in the Constitution.

22 MR. MINEAR: Well, if we're looking to what the  
23 Framers were concerned about, I think that the Convention  
24 debates indicate they were concerned about export taxes.  
25 At that period, they were familiar with the types of taxes

1 that were commonly imposed on trade and, during that era,  
2 it was very common to impose a tax on exports.

3 In fact, the Convention debates make specific  
4 reference to the tax that France imposed upon her wines  
5 and brandies that were exported and the tax that England  
6 imposed on its woollen products as well. That is what  
7 they saw as the danger -- a tax that would be imposed upon  
8 exports that would fall disproportionately on the southern  
9 States which had developed an export economy.

10 QUESTION: Well, it isn't just  
11 disproportionality, is it? Weren't they concerned with  
12 the fact that, if there was a tax on the exports, they  
13 would go broke one way or the other?

14 Either they wouldn't be able to make any money  
15 on their exports or -- because the Government would take  
16 their profit, or they couldn't, conversely, sell on the  
17 world market because the price would be too high, and it  
18 wouldn't have been any consolation to them whatsoever to  
19 find that, in fact, they were not being discriminated  
20 against within sort of the general field of taxation in  
21 the United States.

22 They -- if they couldn't do business, they  
23 couldn't do business, and as a region that was a --  
24 basically a net exporter of raw materials, it was the  
25 ultimate economic effect that they were worried about, not

1 discrimination, isn't that fair to say?

2 MR. MINEAR: I think that they were -- they  
3 realized that their ultimate protection from taxation in  
4 the southern States, as well in the North, lie in the  
5 establishment of a Congress composed of two Houses that  
6 would provide the representation that would give weight to  
7 their concerns.

8 QUESTION: Well, if that's all they were  
9 concerned about, then they didn't need the clause in the  
10 first place. I mean, they wanted that clause. They were  
11 not taking this on faith, and the reason they wanted that  
12 clause ultimately turned on the economic effect of the  
13 tax, and I suppose the economic effect of the tax is going  
14 to be exactly the same, or was expected to be exactly the  
15 same whether you or I called it discriminatory or not.

16 I mean, isn't that a fair objection?

17 MR. MINEAR: I think that their objection was  
18 actually more pointed. It was to the notion of the export  
19 tax, the export tax that they were familiar with that they  
20 saw posing a serious threat to their economies as they  
21 existed --

22 QUESTION: You're -- well, then you're being  
23 inconsistent in your analysis. Then you shouldn't say  
24 that if 99 percent of indigo is exported, a tax generally  
25 on the sale of indigo would be a discriminatory tax.



1 MR. MINEAR: My view on that is --

2 QUESTION: Which is it? If they're concerned  
3 only with taxes on exports, then that hypothetical should  
4 not be a dis -- should not come within the Export Clause.

5 MR. MINEAR: I'd like to clarify my answer on  
6 that, and that is that the tax on an object that is 100  
7 percent exported might very well be a discriminatory tax  
8 if it's a pretext for imposing a tax on exports.

9 But there are other types of taxes that would,  
10 in fact, fall exclusively on an exported product, yet we  
11 would hesitate to call them an export tax, and let me give  
12 you the example of a medicine, for instance, that is not  
13 approved for use in the United States but is approved for  
14 use elsewhere, and as a result it is -- tends to be  
15 exported.

16 Congress could impose a tax on that, I believe,  
17 without violating the Export Clause to cover the specific  
18 cost that the Government incurs in going through the FDA  
19 approval process, and that's why I say you need to look to  
20 the actual purpose of the tax --

21 QUESTION: Well --

22 MR. MINEAR: -- that's being rendered in any  
23 particular case.

24 QUESTION: -- what leads you to that conclusion,  
25 that the Government can levy a tax on medicine being

1 exported if it has gone to some expense to test it in this  
2 country?

3 MR. MINEAR: By -- the reason for that is  
4 because, even now, the Congress can levy that type of tax  
5 if it's a tax on the manufacturer rather than at some  
6 later point.

7 QUESTION: Well, but you say it can levy a tax  
8 on the medicine itself being exported?

9 MR. MINEAR: It can levy a tax on the medicine,  
10 not on the medicine -- what I'm saying -- my point here,  
11 Your Honor, is that you have to focus on the specific tax  
12 that's at issue.

13 QUESTION: Well, of course, the constitutional  
14 language says no tax or duty. Now, presumably that  
15 includes more than just a tax.

16 MR. MINEAR: Yes. I -- oh, I think that it  
17 can -- it embraces the same types of imposts and duties as  
18 are included within the Import-Export Clause. Our view is  
19 that there was no difference in meaning in the tax and  
20 duty in the Export Clause and the impost and duty in the  
21 Import-Export Clause.

22 QUESTION: But it seems to me your answer to the  
23 Chief Justice betrays what is the -- betrays your argument  
24 and what's of concern to the Court.

25 You say, well, that's a tax on manufacturing.

1 We're right back into asking the difference between a tax  
2 on an export and the tax on manufacturing. Your  
3 discrimination rationale does not save us that inquiry.

4 MR. MINEAR: It eliminates the inquiry in most  
5 cases, is my point here. In virtually all cases it will  
6 eliminate that inquiry. We look to whether -- excuse me,  
7 Your Honor.

8 You look to whether the tax is, in fact,  
9 nondiscriminatory, and if the tax is nondiscriminatory,  
10 then it will not run afoul of those concerns that are  
11 indicated by the Export Clause.

12 QUESTION: And nondiscriminatory means what?

13 MR. MINEAR: It's a tax of general application  
14 that's applied to goods across the board.

15 QUESTION: Well, do we have to, then, look at  
16 the percentage of the thing that's exported as opposed to  
17 the percentage that isn't?

18 MR. MINEAR: No. I think that in the usual case  
19 you'll be able, as in this case, simply to look to the  
20 character of the tax.

21 QUESTION: The character of the tax?

22 You always phrase -- you know, all --  
23 nondiscriminatory, rich and poor can sleep under the  
24 bridges of Paris. Nondiscriminatory. All indigo is  
25 taxed, even though it happens to be the case that 99.999

1 percent is exported. Is that -- how do you avoid looking  
2 at the percentages? I --

3 MR. MINEAR: My point to you on the indigo  
4 example is, we would not say that you are -- that a party  
5 is precluded from challenging even a nondiscriminatory, a  
6 tax that on it's face is nondiscriminatory --

7 QUESTION: All right, let me ask you a  
8 different --

9 MR. MINEAR: -- on the basis --

10 QUESTION: Can I ask you a different question --

11 MR. MINEAR: Yes.

12 QUESTION: -- because this is what is actually  
13 worrying me, but I can't -- if, it seems to me, if -- if,  
14 and it's a very big if, a tax on premiums paid to foreign  
15 insurers who have no U.S. offices for casualty insurance  
16 is in fact a tax on the item that is insured, then we are  
17 to look to this as a tax on the item insured.

18 Then I would guess it is relevant as to how  
19 many, what the percent of items is that buys this kind of  
20 insurance that is exported, and I would imagine it's very,  
21 very high, and therefore we're back to the 99.9 percent  
22 indigo.

23 What's wrong with the reasoning I just said, and  
24 I said it's a very big if, because it sounds to me as if  
25 your brief has assumed the if, and if we're supposed to go

1 into the if, or not go into the if, how do we go into it,  
2 given the arguments in front of us and our lack of  
3 knowledge of the empirical facts that underlie them?

4 MR. MINEAR: My view on how you approach the  
5 question is as follows. You look at the tax, and how the  
6 tax is phrased.

7 The tax in this case is phrased to cover all  
8 casualty insurance that's issued by a foreign insurer that  
9 involves a risk --

10 QUESTION: No. I take it, foreign insurer who  
11 has no U.S. office, is that right?

12 MR. MINEAR: Yes. It applies to an insurer that  
13 has no U.S. office.

14 QUESTION: So that must not be very normal that  
15 an American buys insurance casualty from an insurer who  
16 has no U.S. office but does not intend to ship the goods  
17 so insured abroad. I mean, I don't know.

18 MR. MINEAR: This tax applies not simply to  
19 export insurance but across the board to all types of  
20 casualty insurance, but again, to get back to the problem  
21 that you're postulating here, the approach is to look at  
22 the tax and determine whether or not it discriminates  
23 against exports. If it does not discriminate against  
24 exports, then the tax is valid.

25 I would not rule out the possibility that a

1 party could say that, even though the tax on its face is  
2 nondiscriminatory and therefore valid, that in fact it has  
3 a pretext or a different motive that requires a further  
4 analysis.

5 QUESTION: Mr. Minear, do we have any --

6 MR. MINEAR: But that's a very small number of  
7 cases.

8 QUESTION: Do we have any idea whether there is  
9 any business of insuring domestic transport by foreign  
10 insurance companies that have no office in the U.S.?

11 MR. MINEAR: I believe that there is. The total  
12 amount of tax revenue that is collected each year from  
13 section 4371 is about \$100 million, and we don't know what  
14 proportion of that tax relates to export insurance and  
15 which portion relates to flood insurance, fire insurance,  
16 or any other type of casualty insurance that might be  
17 imposed under this tax.

18 QUESTION: Well, I suppose the tax covers  
19 reinsurance so that things like insurance carried by  
20 Lloyd's would be covered by this tax --

21 MR. MINEAR: Yes.

22 QUESTION: -- is that right?

23 MR. MINEAR: It does cover reinsurance at a  
24 different rate. It does provide for a 1-cent rather a 4-  
25 cent --

1 QUESTION: But that could explain the large  
2 revenues.

3 MR. MINEAR: That might explain it, that's true.  
4 We simply don't know the answer to that.

5 QUESTION: Let me ask you this. I thought that  
6 under cases like this stevedoring case we wouldn't say  
7 that a tax is nondiscriminatory unless it bears a  
8 reasonable relationship with the privilege of doing  
9 business within the taxing jurisdiction.

10 I'm not certain that a tax imposed on insurance  
11 on goods traveling overseas bears a reasonable  
12 relationship to the United States under that test.

13 MR. MINEAR: Oh, I believe that the tax here is  
14 designed to eliminate the competitive advantage that  
15 foreign insurers enjoy in this market by their exemption  
16 from the Federal income tax, and this Court has recognized  
17 that that type of tax is permissible. It's very similar  
18 to a tariff tax for, as I say, a service that's being  
19 provided in this country.

20 I think overall it's -- that viewed from the  
21 Framers' perspective the Thames decision would be viewed  
22 as an anomaly, and --

23 QUESTION: Mr. Minear, to come back to the  
24 Framers' perspective, I note in your reply brief even  
25 Justice Story's description of the word impost -- I'm

1 coming back to the difference between the -- in the  
2 phrasing of the two clauses.

3 Story's -- observes that it is sometimes used in  
4 the large sense of taxes, and sometimes in the more  
5 restrained sense of a duty on imported goods and  
6 merchandise. That's what he says --

7 MR. MINEAR: Yes.

8 QUESTION: -- in 1833. Merriam Webster's 1828  
9 dictionary says the same thing, that it could be used --  
10 well, I'll read it.

11 Any tax or tribute imposed by authority,  
12 particularly a duty or a tax laid by a Government on goods  
13 imported. Imposts are also called customs.

14 I think, given the difference in the language,  
15 why -- wouldn't it be normal to give -- that is, between  
16 taxes in one clause and imports and exports in the other,  
17 duties in the other. Wouldn't it be normal for us to give  
18 it its more limited meaning here? It can bear a more  
19 limited meaning.

20 MR. MINEAR: No, I don't believe that it is  
21 appropriate, first of all because it has a more general  
22 meaning, second, because even Justice --

23 QUESTION: Well, I --

24 MR. MINEAR: -- Story recognizes --

25 QUESTION: No, of course it has a more



1 general --

2 MR. MINEAR: Yes, and Justice --

3 QUESTION: But as between giving it the more  
4 general or giving it the narrower, giving it the narrower  
5 meaning makes it different.

6 MR. MINEAR: But you've already given it a  
7 broader meaning than that in Justice Marshall's, Chief  
8 Justice Marshall's first opinion, where he felt that  
9 impost reached a licensing fee, which would never have  
10 been viewed as an impost in the normal, limited meaning of  
11 that term.

12 I think these terms have really become, in a  
13 sense, terms of art that are tied to the objectives that  
14 the Framers sought to convey through the Constitution.

15 I would also point out that this Court has used  
16 the term tax and impost interchangeably. In a 1906  
17 decision called *New Jersey v. Anderson*, this Court  
18 described a tax as an impost for the support of the  
19 Government. That appears at 203 U.S. at 492.

20 So I don't think that a word search will really  
21 provide us the answer here. Instead, I think we have to  
22 take a look at the broader perspective and make sure that  
23 the Export-Clause jurisprudence is consistent with the  
24 Import-Export-Clause jurisprudence.

25 QUESTION: Well, why should we do that, when

1 they're two different clauses and different language?

2 MR. MINEAR: Because that is the one source of  
3 consistency in this area of law in the past 170 years, and  
4 even in Washington Stevedores, this Court cited Export  
5 Clause cases -- the Spalding case in particular, as a case  
6 that it viewed as taking the wrong approach in this area  
7 of law.

8 I'd like to reserve the remainder of my time for  
9 rebuttal.

10 QUESTION: Very well, Mr. Minear.  
11 Mr. Atwood, we'll hear from you.

12 ORAL ARGUMENT OF JAMES R. ATWOOD  
13 ON BEHALF OF THE RESPONDENT

14 MR. ATWOOD: Mr. Chief Justice, and may it  
15 please the Court:

16 The holding of Michelin and Washington  
17 Stevedoring which the Government is relying on so heavily  
18 in this case is that impost did not mean tax. The key  
19 holding in Michelin was that impost referred to a  
20 subcategory of taxes, those taxes which are of a customs  
21 nature. Those are the cases the Government's relying  
22 upon, and now they're turning the rationale of that case  
23 inside-out.

24 Impost and tax in some instances are used  
25 synonymously, but rarely, and certainly the jurisprudence

1 under these clauses has been absolutely to the contrary.  
2 Even Chief --

3 QUESTION: Absolutely -- I mean, you have John  
4 Marshall, for starters, as saying that the two clauses  
5 mean the same thing.

6 MR. ATWOOD: Not on this point, Justice Scalia,  
7 and I think this is very important. I think the  
8 Government has put together in a way that ends up being  
9 misleading two different things that John Marshall said,  
10 Chief Justice Marshall.

11 In the -- where he said the clauses are similar,  
12 he was addressing the issue of whether a tax imposed on an  
13 occupation is a tax on an import, and it was in that  
14 context that he drew an analogy to the Export Clause and  
15 said both clauses are similar in that they use similar  
16 language as to what's prohibited, what act is prohibited,  
17 the laying on of a tax. That's where he said the clauses  
18 were similar.

19 Separately, eight pages earlier, he addressed  
20 the difference between tax and imports. Justice  
21 Thompson -- you may remember the Senate in that case  
22 saying the Maryland tax was a tax, not an impost, and  
23 therefore was outside the scope of the Import-Export  
24 Clause.

25 Marshall rejected that argument and concluded

1 there, to quote the Government's reply brief on page 12,  
2 the Court concluded that the term impost is not used in a  
3 narrow or fixed manner, but generally signifies a tax  
4 levied on articles brought into the country, so we agree  
5 with Marshall's statement. I think his statement is  
6 consistent with Michelin that in the context of these  
7 clauses, impost had a rather specific meaning.

8 Thames & Mersey was not a departure from  
9 existing law at the time. The Court's decisions on the  
10 Export Clause have been perfectly consistent. They have  
11 said from the beginning that Federal taxes may not be  
12 applied to the export process itself.

13 They've also said that if the export journey has  
14 not begun, such as in a manufacturing tax, then the issue  
15 of discrimination is important. But all of the cases,  
16 starting with Turpin v. Burgess, have said that you can --  
17 the Federal Government cannot tax the export process  
18 itself, and Thames & Mersey is squarely within that line  
19 of authority.

20 Now, concerning the questions, I guess Justice  
21 Kennedy raised and perhaps Justice Ginsburg, as to whether  
22 this is sufficiently indirect that it's not a tax on  
23 exports, the record doesn't reveal the sort of statistical  
24 information Justice Breyer was suggesting might be  
25 relevant because the Government has conceded throughout

1 that they are not disputing that this tax, if  
2 discriminatory, is in violation of the Constitution.

3 They are not challenging that aspect of Thames &  
4 Mersey. They haven't challenged it throughout. To do so,  
5 they would have to challenge not just Thames & Mersey,  
6 they'd have to go back and challenge Chief Justice  
7 Marshall's holding in Brown v. Maryland that a tax on  
8 occupation is a tax on an import, they'd have to challenge  
9 the Fairbank decision, which they've embraced throughout  
10 their briefs, which involved a indirect tax, they'd have  
11 to challenge Hvoslef, they'd have to challenge Thames &  
12 Mersey.

13 And the reality is that a tax on insurance is  
14 very -- is about as close as you can come to an ad valorem  
15 tax on the property.

16 QUESTION: Why? Just satisfy my curiosity.

17 MR. ATWOOD: There is a separate premium --

18 QUESTION: My particular question would be, why  
19 is a tax on a premium --

20 MR. ATWOOD: Right.

21 QUESTION: It's a tax on a premium that paid for  
22 an insurance policy of a sort that exporters might buy and  
23 also people who are not exporters might buy.

24 MR. ATWOOD: Well --

25 QUESTION: And so why is a tax that is applied

1 to an item that both exporters and nonexporters might buy,  
2 in some proportion we know not what, why is that a tax on  
3 the good that is exported?

4 MR. ATWOOD: Because when it is purchased for a  
5 shipment of goods, as in the case here, there is a  
6 separate premium charged for every shipment. Every box,  
7 every computer that's boxed up, a separate premium is  
8 charged for that shipment from the time it leaves IBM's  
9 plant to the time it's delivered abroad.

10 That premium varies directly with the value of  
11 that product, because if it's an expensive machine it has  
12 a higher premium than if it's an inexpensive --

13 QUESTION: But that's not the only variable. If  
14 you ship from Chicago to Toronto I'm sure that the value  
15 of the good is the predominant part of the premium, but if  
16 you ship from an IBM headquarters to India by steamship,  
17 I'm sure those other factors are much more significant in  
18 calculating the premium than the value of the goods.

19 MR. ATWOOD: The extent to which the value of  
20 the good determines the premium will vary with the length  
21 of shipment, but you know, the longer shipments, longer  
22 exports are taxed more than shorter shipments. That seems  
23 to us, again, to get back to a direct tax on the export  
24 process -- separate premium for each product, it varies  
25 with the value, it varies with the distance. That's a tax

1 on the export process. It's slightly different --

2 QUESTION: Well, that's the way you characterize  
3 it. You might also say that that's a tax on the insurance  
4 aspect, which brings us back to what we're arguing about.

5 QUESTION: I suppose that's an interesting  
6 philosophical question, whether you continue to export  
7 until you reach India, or has your export stopped at least  
8 when you reach the territorial waters of the United  
9 States? I'm not sure where the exporting stops.

10 MR. ATWOOD: I guess the way this tax has been  
11 administered is, it goes from one -- from where the good  
12 takes off from where the good lands, and in terms of the  
13 Court's jurisprudence under the Export Clause and under  
14 the Import Clause, I think they treat that entire journey  
15 as an integrated whole.

16 The Spalding case says the export process starts  
17 when you turn over the goods to a common carrier.

18 Marshall, you recall, in *Brown v. Maryland*,  
19 addressed the question, does the import and export only  
20 occur when the goods cross the border? He said, no, it's  
21 a longer process than that.

22 You can't apply and prohibit an import tax even  
23 though the goods are now in the United States, and you  
24 can't apply -- this was his hypothetical under the Export  
25 Clause. You can't apply the Export clause to a later

1 point once the goods have left. The trip is an integrated  
2 journey.

3 QUESTION: Is a tax on diesel fuel exempt if  
4 that's a major portion of the cost of exporting the item,  
5 say bulk goods such as wheat or corn?

6 MR. ATWOOD: I think that would be a very good  
7 argument that that tax would be unconstitutional. This, I  
8 think, is a stronger case, because you're taxing the  
9 shipper, and clearly the premium does vary --

10 QUESTION: Well, that's a very good reason for  
11 me to worry about your rationale.

12 MR. ATWOOD: It's not my rationale, Your Honor.  
13 This is what the Court held in Thames & Mersey. This has  
14 been the Court's consistent theory of how the Export  
15 Clause applies, and it has not proven to be a problem.

16 We're not suggesting some novel theory that's  
17 going to disrupt the Republic. The Export Clause has been  
18 consistently interpreted for more than 200 years, and the  
19 Republic has survived quite well. I don't think this is  
20 going to create enormous problems of administration for  
21 the courts. It hasn't so far.

22 QUESTION: Mr. Atwood, the concern of Congress  
23 was with domestic insurers, and I take it from your  
24 argument that there couldn't be this tax as to exports,  
25 but to the extent that they are insuring or reinsuring



1 risks in the United States, the premiums could be taxed.  
2 That's certainly inconsistent with what Congress was  
3 trying to regulate in the interest of domestic insurers.

4 MR. ATWOOD: Well, we understand Congress'  
5 objective. It was twofold. It was to raise revenue and  
6 it was to plug what was perceived as a loophole.

7 QUESTION: But your response has got to be that  
8 Congress can't -- it's just too bad for these domestic  
9 insurers. They'll fall by the wayside and business will  
10 go to the foreign companies.

11 MR. ATWOOD: We don't think the perceived  
12 problem in effect authorizes a tax in violation of the  
13 Constitution, that's right. There are --

14 QUESTION: Your response is that it's the fault  
15 of the Constitution. The Constitution favors exports,  
16 doesn't it?

17 MR. ATWOOD: It does, and there are a lot of tax  
18 exemptions in our laws. You can make arguments for or  
19 against almost any tax exemption. The one thing that's  
20 different about this tax exemption --

21 QUESTION: But --

22 MR. ATWOOD: -- is it's in the Constitution --

23 QUESTION: Can Congress --

24 MR. ATWOOD: -- and it's in the Constitution  
25 because the Framers thought it was important.

1 QUESTION: Why is it inevitable that this must  
2 be classed as a tax on the goods rather than a tax on the  
3 service of providing insurance?

4 MR. ATWOOD: Well, I -- it seems to me the  
5 Court's decision on that aspect in Thames & Mersey is  
6 correct and has been conceded by the Government, that this  
7 is -- this bears so closely to the export process that it  
8 is a tax on goods.

9 Now, Congress had other means of addressing this  
10 perceived inequality.

11 QUESTION: Could it say, "Buy American"?

12 MR. ATWOOD: Yes, it probably could say, "Buy  
13 American." It could also provide tax relief for American  
14 insurers.

15 It could also -- I mean, this tax was passed  
16 many years ago. They could rethink their jurisdiction  
17 over foreign insurers and whether or not they could apply  
18 the income tax to foreign insurers, which, of course,  
19 would be constitutional under Peck v. Lowe, so Congress'  
20 hands aren't completely tied, but they -- it seems to us  
21 they're not entitled to adopt a provision contrary to the  
22 Constitution to try to solve that particular problem.

23 The Court has, as the Government said, construed  
24 the Import-Export Clause and the Export Clause  
25 consistently for many years. Going back to Chief Justice

1 Marshall's point, I think there the consistency is not one  
2 that's at odds here.

3           The whole point of the Export-Import Clause  
4 cases, though, was to break that link between the two  
5 clauses. One applies to taxes, the other only applies to  
6 imports and duties, and that was the holding of the cases,  
7 that under the Import-Export Clause we will look at  
8 whether the tax is of a customs nature, and you cannot  
9 apply that analysis to the Export Clause and come to the  
10 Government's conclusion here.

11           And at the Constitution, there was -- there were  
12 strong, compelling reasons advanced and fought over very  
13 hard as to whether or not exports should be exempt. It  
14 was one of the closest votes at the Constitutional  
15 Convention, and there were several reasons to coalesce  
16 behind this tax exemption.

17           One was the concern of the southern States that  
18 were dependent upon the export economy. There were also  
19 those from New England that thought an export exemption  
20 would benefit domestic industries, would encourage the  
21 development of domestic industries, and there were others  
22 that were simply concerned about the scope of taxing  
23 authority being given to the United States, which, of  
24 course, was happening now the first time at the  
25 convention.

1           That came together to result in a tax exemption,  
2           which is clearly written and was intended by the Framers  
3           to be very broad, and there's no contemporary evidence  
4           from that Constitutional Convention that impost was  
5           intended to be synonymous with tax.

6           QUESTION: Well, we could make it very broad and  
7           still adopt the manner of analysis that we've used for the  
8           Import-Export Clause.

9           That is to say, there's no necessary connection  
10          between insisting upon discrimination on the one hand and  
11          applying it only to customslike impositions on the other  
12          hand. It seems to me that distinction doesn't come from  
13          the text of the two clauses, does it?

14          I mean, I can apply it broadly to all sorts of  
15          taxes, but still insist, as we do under the Import-Export  
16          Clause, that it discriminate.

17          MR. ATWOOD: Well, I think the -- at least under  
18          this Court's holding in Michelin and Washington  
19          Stevedoring, the concept of discrimination is in the  
20          Import-Export clause, and it's in it because of the words  
21          duty and impost.

22          The Court read those terms to mean taxes that  
23          tax imports and exports, qua imports and exports that are  
24          focused on, that discriminated against them as opposed to  
25          general taxes, so that's how there is a respectable,

1 indeed, perhaps strong constitutional basis to limit the  
2 Import-Export Clause to discriminatory taxes. That same  
3 analysis just doesn't carry forward when the Framers used  
4 the generic term, tax, in the Export Clause.

5 And you go back to Franklin's testimony, Ben  
6 Franklin's testimony to the House of Commons when he went  
7 over as part of the delegation to protest the Stamp Act,  
8 and he reminded Members of the House of Commons that in  
9 the United States tax and duty very often had different  
10 meanings, that while the colonists recognized the  
11 authority of Parliament to impose duties, now for the  
12 first time they were imposing internal taxes, and that,  
13 Franklin said, crossed the line and, of course, Franklin  
14 was there at the convention --

15 QUESTION: I must say, I just don't see that.  
16 It seems to me if -- we're getting the discriminatory  
17 notion not from the words imports or imposts or duties but  
18 from the discrimination, articles exported. Is it a tax  
19 on articles exported from any State if it's a general tax?

20 If the answer to that is no, it's not because of  
21 the use of the word tax, it's because of the phrase,  
22 laid-on articles exported. That's where you get the  
23 discriminatory content, not from the word tax versus  
24 impost.

25 MR. ATWOOD: That was not the analysis the Court

1 applied in Michelin and Washington Stevedoring. They did  
2 not focus on the laid-on language that's in the Import-  
3 Export Clause as well. They said, that clause is narrower  
4 and different because -- and this is cited on page 31 of  
5 our brief. It's from 423 U.S. at 287.

6 Imposts or duties mean essentially taxes on the  
7 commercial privilege of bringing goods into a country, and  
8 then they applied the same analysis to exports in  
9 Washington Stevedoring.

10 That's the textual basis the Court relied upon,  
11 and they spent a good deal of time analyzing Marshall's  
12 opinion in Brown v. Maryland to reach that specific,  
13 narrower definition of impost, and that's why one  
14 clause -- and again, the background as well, if you look  
15 back at the Constitutional Convention, clearly the Import-  
16 Export Clause was intended to prevent discrimination. The  
17 Export Clause was intended to provide a broad tax  
18 immunity.

19 The Framers simply did not think it proper that  
20 the Federal Government burden the export process. That's  
21 what this tax does.

22 If there are no further questions, Mr. Chief  
23 Justice, that concludes.

24 QUESTION: Very well, Mr. Atwood.

25 Mr. Minear, you have 5 minutes remaining.

1 REBUTTAL ARGUMENT OF JEFFREY P. MINEAR

2 ON BEHALF OF THE PETITIONER

3 MR. MINEAR: Thank you, Mr. Chief Justice.

4 I would like to point out, first, that what  
5 respondent is arguing for here is something that is truly  
6 peculiar.

7 In this one area under the Constitution the  
8 States would have broader authority than the Federal  
9 Government on a matter respecting foreign commerce. That  
10 is the result of their interpretation, their differing  
11 interpretations of the Export Clause and the Import-Export  
12 Clause. I think that strikes one as surprising.

13 QUESTION: Well, but that's certainly the result  
14 of the cases decided under the Export Clause. It's true  
15 in Fairbank, is it not, and certainly in Mersey?

16 MR. MINEAR: No, I think if we look at the  
17 actual cases -- now, Fairbanks was the only -- the first  
18 case in which this Court struck down a Federal tax on an  
19 Export Clause theory, and that was a discriminatory tax,  
20 and that tax would have been viewed as violative of the  
21 Import-Export Clause as well at that time.

22 What we're arguing is the same prohibition  
23 basically applies with respect to exports whether the  
24 taxes are Federal or State taxes.

25 QUESTION: But certainly it was true in Thames &

1 Mersey.

2 MR. MINEAR: The tax there, I think that under  
3 the Import-Export Clause, until this Court's reasoning,  
4 new reasoning in Michelin Tires and Washington Stevedores,  
5 a State tax on insurance related to exports would have  
6 also been struck down. So in other words, the tax -- the  
7 extent of the prohibition would have been the same under  
8 either clause.

9 Now that the prohibition has -- this Court has  
10 recognized that the Import-Export Clause involves a  
11 narrower prohibition, it's time to reconsider whether the  
12 Export Clause ought to be read as a broader prohibition  
13 itself.

14 Respondent --

15 QUESTION: Even if that weren't so, I take it  
16 that the tax in Washington Stevedoring was a tax that  
17 wasn't related directly to the value of the goods. It was  
18 on --

19 MR. MINEAR: It was on --

20 QUESTION: -- services and, moreover, the tax in  
21 Michelin, I guess, was a tax on goods that weren't in  
22 transit.

23 MR. MINEAR: Yes, that's correct.

24 QUESTION: And so I'm not certain that those  
25 cases really are contrary to Thames & Mersey if you look



1 at Thames & Mersey as a case where the incidence of the  
2 tax fell directly on the export.

3 MR. MINEAR: I think that they are, though, if  
4 you look at the cases in combination. To be sure, the  
5 goods in Michelin involve goods not in transit, but the  
6 tax in Washington Stevedores did, and the tax in  
7 Michelin --

8 QUESTION: Yes, but the tax in Washington  
9 Stevedores was on the service, and thus wasn't directly  
10 related to the value of the good, and it's therefore a tax  
11 on the service, not on the good, and here the "big if"  
12 clause that I said before means we have to assume it's a  
13 tax on the good.

14 MR. MINEAR: And I believe it's -- excuse me,  
15 Your Honor.

16 I would say I think it's problematic to describe  
17 a tax on insurance as a tax on the good. I think that's a  
18 problem, as I said, in Thames & Mersey --

19 QUESTION: Yes, I agree that we're foreclosed on  
20 that, because you conceded it, according to your  
21 opponents.

22 MR. MINEAR: I don't believe you're foreclosed  
23 from -- by our concession from addressing that issue as  
24 you see fit.

25 But I think that there's another problem I'd

1 like to turn to, too, and that is this whole notion of  
2 trying to determine when a tax is laid upon the export  
3 process. This has been a problem that bedeviled the Court  
4 for many years under the Import-Export Clause, and you  
5 look at the line of cases that came through here, and  
6 there is no consistency here.

7 Spalding said that the tax applied when the  
8 product was handed to a common carrier, but Joy Petroleum  
9 said that if a product stops along the way and is put in  
10 storage, then it is subject to a local tax.

11 QUESTION: Well, Thames & Mersey was decided in  
12 1915, and I don't see any great trouble having resulted  
13 between then and now in applying the Export Clause.

14 MR. MINEAR: Well, there have been very few  
15 cases since Spalding simply because the effect of the  
16 Export Clause is so draconian, and it is this case that we  
17 have chosen to ask the Court to review its thinking in  
18 this area, and to bring it in line with the Import-Export  
19 Clause.

20 QUESTION: Well, once again, Mr. Minear, as I  
21 think we established earlier, you will enable us to avoid  
22 that question usually, at most, because we can decide the  
23 question simply on the basis that the tax is not  
24 discriminatory, but where it is discriminatory we are  
25 going to have to address this same question anyway. You

1 are not eliminating that difficulty from our  
2 jurisprudence.

3 MR. MINEAR: But that's not an unusual problem,  
4 that the taxpayer will bear the burden of showing that a  
5 tax that appears to be fair on its face is discriminatory  
6 in a particular context, and --

7 QUESTION: No, but once you decide it's  
8 discriminatory, you are then going to have to decide  
9 whether it is laid upon the process of export, so that,  
10 you know, that difficulty that you're now addressing, it  
11 isn't eliminated from our jurisprudence entirely. All you  
12 can say is you won't have to face it as often as you now  
13 do.

14 MR. MINEAR: That's right, but the same thing  
15 was true with regard to the Import-Export Clause. For  
16 instance, there is still the question of what happens if a  
17 State imposes a property tax on property that is in  
18 transit through the State without stopping, on the  
19 property that's being transported on the rail cars as it  
20 moves through the State? Can they tax that?

21 That question is still one of the questions that  
22 has been left open in Michelin Tire, and likewise there  
23 will be some issues that will be left open here.

24 Thank you, Your Honor.

25 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Minear.

1                   The case is submitted.

2                   (Whereupon, at 10:49 a.m., the case in the  
3 above-entitled matter was submitted.)

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## CERTIFICATION

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

UNITED STATES, Petitioner v. INTERNATIONAL BUSINESS MACHINES CORPORATION

CASE NO:      95-591

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

BY Ann Marie Federico

(REPORTER)