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Recent Developments

RECENT DEVELOPMENT

Customs Law—Countervailing Duties—Nonexcessive Remission of Excise Tax by Japanese Government Is Not a Bounty or Grant Within Section 303 of the Tariff Act of 1930, *as Amended by* 19 U.S.C. § 1303 (Supp. V 1975).—On April 3, 1970, Zenith Radio Corporation, an American manufacturer of various consumer electronic products, filed a petition with the Commissioner of Customs[1] alleging that the Japanese Government was subsidizing, directly or indirectly, the manufacture or production of certain consumer electronic products[2] made in Japan and subsequently exported into the United States.[3] The Japanese Government imposed a single-stage consumption tax on a fairly extensive list of goods similar to those manufactured by Zenith. Upon exportation from Japan, the products were either exempted from the consumption tax, or if it had already been paid, the tax was remitted.[4] Zenith alleged that such tax remissions constituted bounties or grants in violation of section 303 of the Tariff Act of 1930 in its presently amended form.[5] After publication of a Notice of Countervailing Duty Pro-

1. The petition was filed pursuant to 19 C.F.R. § 16.24(b) (1970): "Any person outside the Customs Service who has reason to believe that any bounty or grant is being paid or bestowed with respect to dutiable merchandise imported into the United States may communicate his belief to any appraiser or the Commissioner of Customs. Every such communication shall contain, or be accompanied by, (1) a full statement of the reasons for the belief, (2) a detailed description or sample of the merchandise, (3) all pertinent facts obtainable as to any bounty or grant being paid or bestowed with respect to such merchandise." This provision was subsequently amended and recodified without significant change, and now appears at 19 C.F.R. § 159.47(b)(1) (1977).

2. The products at issue included "[t]elevision receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio-tape recorder combinations, record players and phonographs complete with amplifiers and speakers, tape recorders, tape players, and color television picture tubes." Zenith Radio Corp. v. United States, 430 F. Supp. 242, 242 n.2 (Cust. Ct.), *rev'd*, 11 Cust. B. & Dec. No. 33, at 6 (C.C.P.A. 1977).

3. Zenith has been involved in a significant number of cases in an attempt to nullify what it deems to be the adverse effects upon domestic industry in the United States of foreign trade practices: Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, *rehearing denied*, 401 U.S. 1015 (1970) (Sherman and Clayton Acts); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) (patent law and Sherman Act); Tokyo Shibaura Elec. Co. v. Zenith Radio Corp., 404 F. Supp. 547 (D. Del. 1975), *aff'd*, 548 F.2d 88 (3d Cir. 1977) (patent law); Zenith Radio Corp. v. Matsushita Elec. Ind. Co., 402 F. Supp. 262 (E.D. Pa. 1975) (Clayton Act); Zenith Radio Corp. v. Matsushita Elec. Ind. Co., 402 F. Supp. 251 (E.D. Pa.), *appeal dismissed*, 521 F.2d 1399 (3rd Cir. 1975) (Antidumping Act).

4. 430 F. Supp. at 243.

5. 19 U.S.C. § 1303(a)(1) (Supp. V 1975) (amending Tariff Act of 1930, ch. 497, § 303, 46 Stat. 590, 687). The present law, in pertinent part, states: "Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of

ceeding,[6] and upon completion of an investigation of the merits,[7] the Assistant Secretary of the Treasury approved,[8] and the Commissioner of Customs caused to be published, a Notice of Preliminary Determination which held that three specific Japanese programs,[9] none of which encompassed the tax remission at issue, constituted bounties or grants within the meaning of section 303 of the Tariff Act.[10] Further, benefits from these programs were deemed, both separately and in the aggregate, to be de minimis.[11] An amendment to the Notice of Preliminary Determination added a general catch-all paragraph which provided:

Any other programs alleged to result in the payment or bestowal of a bounty or grant within the meaning of section 303 of the Act have been terminated by the Japanese

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production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed." *Id.*

6. 19 C.F.R. § 16.24(d) (1972) provides: "Upon receipt by the Commissioner of Customs of any communication submitted pursuant to paragraph (a), (b), or (c), of this section and found to comply with the requirements of the pertinent paragraph the Commissioner will cause such investigation to be made as appears to be warranted by the circumstances of the case. If he determines that the information presented in such communication is patently in error, he shall so advise the person who submitted the information and the case shall be closed. Otherwise, the Commissioner, with the approval of the Secretary of the Treasury, shall publish a notice in the Federal Register that a communication has been submitted pursuant to paragraph (a), (b), or (c) of this section. The notice shall invite interested persons to submit written comments with respect to the matter within such time as is specified in the notice." The pertinent material now appears, in substantially the same form, in 19 C.F.R. § 159.47(c) (1977).

In this case, notice was approved by an Assistant Secretary of the Treasury on May 17, 1972. 37 Fed. Reg. 10,087, *as amended by* 37 Fed. Reg. 11,487 (1972). The Notice stated that "[i]nformation has been received . . . which raises a question as to whether certain payments, bestowals, rebates, or refunds granted by the Government of Japan upon the manufacture, production, or exportation of certain consumer electronic products constitute the payment or bestowal of a bounty or grant, directly or indirectly, within the meaning of section 303 of the Tariff Act of 1930, upon the manufacture, production, or exportation of the merchandise to which the payments, bestowals, rebates or refunds apply." *Id.* at 10,087 (citations omitted).

7. This investigation was conducted pursuant to 19 C.F.R. § 16.24(d) (1972) (now 19 C.F.R. § 159.47(c) (1977)). *See* note 6 *supra*.

8. The Assistant Secretary of the Treasury so approved on January 30, 1975. 40 Fed. Reg. 5,378 (1975).

9. The three specific Japanese programs investigated by the Treasury Department consisted of "[1] preferential interest rate loans from the Japanese Development Bank, [2] promotional assistance from the Japan External Trade Organization (JETRO), and [3] tax deferrals under the Overseas Market Development Reserve." *Id.* Since the Overseas Market Development Reserve program is available only to those Japanese firms capitalized at less than one billion yen, significant benefits from the program could conceivably be reaped only by smaller exporting firms. The Commissioner of Customs, in order to safeguard against any eventual receipt of such significant benefits, required reports from Japanese firms eligible for tax deferrals under the Overseas Market Development Reserve program to ascertain whether and to what extent they benefited from the program. *Id.*

10. *Id.*

11. *Id.*

Government and/or are preliminarily determined not to result in the payment or bestowal of a bounty or grant.[12]

The tax remission on Japanese electronic products imported into the United States was covered by this paragraph.

The Final Negative Countervailing Duty Determination, as approved by the Acting Secretary of the Treasury,[13] was published by the Commissioner of Customs[14] on January 7, 1976. The Final Determination repeated the finding of the amended Notice of Preliminary Determination and concluded that no bounty or grant under section 303 was being paid or bestowed by the Japanese Government upon the manufacture, production, or exportation of the Japanese electronic products.[15] Thereupon Zenith served timely notice of its desire to contest the findings contained in the Final Determination.[16] The

12. 40 Fed. Reg. 19,853 (1975).

13. The Acting Assistant Secretary of the Treasury so approved on December 31, 1975. 41 Fed. Reg. 1,298 (1976).

14. *Id.*

15. *Id.*

16. 19 U.S.C. § 1516(d) (Supp. V 1975) provides: "within 30 days after a determination by the Secretary . . . (2) under section 1303 of this title, that a bounty or grant is not being paid or bestowed, an American manufacturer, producer, or wholesaler of merchandise of the same class or kind as that described in such determination may file with the Secretary a written notice of a desire to contest such determination. Upon receipt of such notice the Secretary shall cause publication to be made thereof and of such manufacturer's, producer's, or wholesaler's desire to contest the determination. Within 30 days after such publication, such manufacturer, producer, or wholesaler may commence an action in the United States Customs Court contesting such determination."

Section 1516 was the legislative reaction to the decision in United States v. Hammond Lead Prods., Inc., 306 F. Supp. 460 (Cust. Ct. 1969), *rev'd on other grounds*, 440 F.2d 1024 (C.C.P.A.), *cert. denied*, 404 U.S. 1005 (1971). In *Hammond*, the Customs Court reversed a Treasury Decision to refrain from imposing countervailing duties against Mexican exports of litharge, a lead oxide. T.D. 67-142, 1 Cust. B. & Dec. 292 (1967). At the time, Mexico had a surplus of lead and a currency situation that made exports inexpensive. It consequently increased its export taxes on lead to protect its domestic supply of that resource, while offering it for domestic consumption far below the world price. Since no excise tax was imposed on litharge exports, and since Mexican litharge producers could obtain lead at less than the world price, litharge could be exported to the United States at a competitive advantage. The Customs Court held that this situation constituted a bounty or grant within the meaning of § 303 of the Tariff Act of 1930. 306 F. Supp. at 465-71. The Court of Customs and Patent Appeals (C.C.P.A.) reversed without reaching the issue, because it determined that the United States customs courts were without jurisdiction to review negative countervailing duty determinations at the request of an American. 440 F.2d at 1027. The ironic result of *Hammond* was that United States customs courts could review a negative countervailing duty determination when it was challenged by an foreign importer, but could not similarly respond to a challenge presented by an American manufacturer or producer. Comment, *United States Countervailing Duty Law: Renewed, Revamped and Revisited—Trade Act of 1974*, 17 B.C. Indus. & Com. L. Rev. 832, 845 (1976) [hereinafter cited as *Countervailing Duty Law*]. "In the absence of such a right to review, the mandatory nature of section 303 and its remedial impact were largely illusory . . . ." *Id.* In response to *Hammond*, Congress enacted a special provision in the Trade Act of 1974 to provide for review of negative countervailing duty determinations. Trade Act of 1974, ch. 3, § 331(a), 88

Assistant Secretary of the Treasury published the notice and announced Zenith's desire to contest the Final Determination.[17] Trial ensued in the Customs Court.[18]

A three-judge panel[19] unanimously granted Zenith's motion for summary judgment. The Court further ordered the Secretary of the Treasury to determine or estimate the net amounts of bounties or grants paid by the Japanese Government and to order the appropriate customs officials throughout the United States to assess countervailing duties equal to such bounty or grant.[20] It is to be noted that the Customs Court decided *Zenith* as a matter of law.[21] A sharply divided[22] Court of Customs and Patent Appeals (C.C.P.A.) reversed the decision of the Customs Court and held that the Japanese Commodity Tax Law did not provide for the payment or bestowal of a bounty or grant within the meaning of section 303 of the Tariff Act of 1930. *United States v. Zenith Radio Corp.*, 11 Cust. B. & Dec. No. 33, at 6 (C.C.P.A. 1977).

It is a truism that the practice of encouraging commercial exports can be achieved through governmental subsidies to the production, manufacture or exportation of domestic goods. It is equally evident that such practice poses a serious threat to the natural and most efficient allocation of resources in international trade. As early as 1776, Adam Smith condemned such artificial governmental stimulation in his treatise *Wealth of Nations*,[23] stating that "the effect of bounties, like that of all other expedients of the mercantile system, can only be to force the trade of a country into a channel much less advantageous than that in which it would naturally run of its own accord."[24] In order to protect the "natural channels" of international trade and to protect American industry, Congress, since 1890, has enacted countervailing duty schemes.[25] These statutes have provided for the imposition of countervailing

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Stat. 1978, 2049-52. *See generally American Manufacturer's Contest of Treasury Decision Not To Assess Countervailing or Anti-Dumping Duties, Third Annual Judicial Conference of the United States Court of Customs and Patent Appeals*, 72 F.R.D. 239, 397-441 (1976); *see also* notes 39-43 *infra* and accompanying text.

17. 41 Fed. Reg. 10,235 (1976).

18. Zenith Radio Corp. v. United States, 430 F. Supp. 242 (Cust. Ct. 1977).

19. The three-judge panel in this case was designated by the chief judge of the Customs Court upon defendant's application pursuant to § 108 of the Customs Courts Act of 1970, which provides: "Upon application of any party to a civil action . . . the chief judge of the Customs Court shall designate any three judges of the court to hear and determine any civil action which the chief judge finds . . . has broad or significant implications in the administration or interpretation of the customs laws." 28 U.S.C. § 225(a) (1970).

20. 430 F. Supp. at 265.

21. *Id.*

22. The C.C.P.A. rendered a 3-2 decision.

23. 2 A. Smith, An Inquiry into the Nature and Causes of the Wealth of Nations 8 (6th ed. London 1896).

24. *Id.*

25. Tariff Act of 1930, ch. 497, § 303, 46 Stat. 590, 687, *as amended by* Trade Act of 1974, 19 U.S.C. § 1303 (Supp. V 1975); Tariff Act of 1922, ch. 356, § 303, 42 Stat. 858, 935-36; Tariff Act of 1913, ch. 16, § IV, para. E, 38 Stat. 114, 193-94; Tariff Act of 1909, ch. 6, § 6, 36 Stat. 11, 85;

duties upon goods exported into the United States in an amount equal to the "net amount" of subsidies received from a foreign government by a manufacturer for the exportation of those goods.[26] The rationale of the countervailing duty laws in the United States is to reestablish the "natural channels" of international economic trade.[27] The Tariff Acts of 1890[28] and 1894[29] were the earliest enactments of a countervailing duty scheme in the United States. These statutes dealt specifically with the importation of sugar and contained special provisos whereby the foreign exporter of sugar would not be obliged to pay a countervailing duty if it could prove that the subsidization or "bounty" it received from the foreign government did not exceed the quantum of tax collected by that government upon the beet or sugar from which the sugar was produced.[30] With the enactment of the Tariff Act of 1897,[31] Congress expanded the scope of the countervailing duty provisions to include *all* dutiable products and *any* bounty or grant, direct or indirect, regardless of the method of bestowal.[32] Under this Act, the Secretary of the Treasury was directed to impose countervailing duties at a level equal to the "net amount" of any bounty or grant found to have been given.[33]

Congress reenacted, without significant alteration, the provisions of the 1897 statute in 1909[34] and again in 1913.[35] In 1922, Congress extended the scope of the statute to afford similar treatment to bounties or grants on the manufacture or production, as well as on the exportation, of all dutiable foreign products, whether or not such bounties or grants were derived from governmental or private sources.[36] Notwithstanding this statutory revision, the Treasury Department's administrative policy was to impose countervailing duties exclusively against benefits designed as artificial stimulants to exportation; by refraining from countervailing against bounties or grants upon either manufacture or production, the Treasury Department was able to avoid imprudently interfering with programs designed by foreign governments to have solely domestic ramifications.[37] Under section 303 of the Tariff Act of

Tariff Act of 1897, ch. 11, § 5, 30 Stat. 151, 205; Tariff Act of 1894, ch. 349, sched. E, para. 182½, 28 Stat. 509, 521; Tariff Act of 1890, ch. 1244, § 237, 26 Stat. 567, 584.

26. *See* sources cited note 25 *supra*.

27. *Countervailing Duty Law, supra* note 16, at 868.

28. Ch. 1244, § 237, 26 Stat. 567, 584.

29. Ch. 349, sched. E, para. 182½, 28 Stat. 509, 521.

30. *See* sources cited notes 28-29 *supra*.

31. Ch. 11, § 5, 30 Stat. 151, 205.

32. *Id.*

33. *Id.*

34. Ch. 6, § 6, 36 Stat. 11, 85. This statute added the phrase "province or other political subdivision," thus extending the statute's reach to bounties or grants provided from these sources. *Id.*

35. Ch. 16, § IV, para. E, 38 Stat. 114, 193-94.

36. Ch. 356, § 303, 42 Stat. 858, 935-36.

37. Feller, *Mutiny Against the Bounty: An Examination of Subsidies, Border Tax Adjustments, and the Resurgence of the Countervailing Duty Law*, 1 Law & Pol'y Int'l Bus. 17, 27 (1969) [hereinafter cited as *Mutiny*.] "One can readily imagine that countervailing on the basis of a production subsidy might be viewed as interference in the domestic affairs of the exporting country, particularly if the production subsidies neither yield an appreciable increase in exports,

1930, the antecedent provisions were repeated.[38] However, in 1974, the Tariff Act of 1930 was amended[39] in three principle ways:[40] first, by fixing time limits for Treasury Department action on complaints;[41] second, by expanding the remedy to duty-free products;[42] and third, by providing for judicial review of determinations denying relief to domestic complainants.[43] These amendments significantly strengthened the existing countervailing duty provisions against imports into the United States which had benefited from foreign subsidization.[44]

Viewed in its proper perspective, the concept of a countervailing duty was engendered by the "dominant protectionist" posture assumed by Congress in 1897.[45] In essence, Congress sought to insure that foreign and domestic products would compete in the American market according to their relative merits, without the benefit of artificial price reductions made possible by the receipt of government bounties or grants.[46] Unfortunately, no Congress has

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nor were intended to do so." *Id.* at 64. *See also* King, *Countervailing Duties—An Old Remedy with New Appeal,* 24 Bus. Law. 1179, 1181 (1969) [hereinafter cited as King].

38. Ch. 497, § 303, 46 Stat. 590, 687. Upon a showing by a domestic industry that a foreign commodity has received a bounty or grant, the Secretary of the Treasury is ordered either to ascertain or to estimate the net amount of such foreign subsidy and to impose countervailing duties equal to such amount. *Id.*

39. Ch. 3, § 331(a), 88 Stat. 1978, 2049-52, originally proposed as the Trade Reform Act of 1973, 119 Cong. Rec. 11,691, 11,691-95 (1975).

40. Silbiger, *Trade Act of 1974: New Remedies Against Unfair Trade Practices in International Trade,* 5 Den. J. Int'l & Pol'y 77, 101 (1975) [hereinafter cited as Silbiger].

41. Congress "has amended section 303(a) to require a six-month maximum time limit for preliminary determination and a twelve-month maximum time limit for a final determination beginning on the date of filing of a petition setting forth a belief that a bounty or grant is being paid or bestowed, or, in the absence of such a petition, from the date of publication of a notice of initiation of an investigation." S. Rep. No. 93-1298, 93d Cong., 2d Sess. 184 (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 7186, 7319.

42. The Act has the effect of expanding the scope of the countervailing duty law to include duty-free articles. "Under this provision, no additional duty could be imposed with respect to any duty-free article unless there is a determination by the International Trade Commission . . . that a domestic producer of like or directly competitive articles is being or is likely to be injured, or is prevented from being established by reason of importation of such article." S. Rep. No. 93-1298, 93d Cong., 2d Sess. 184, 185 (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 7186, 7320. It should be noted that § 303, which was at issue in the *Zenith* case, did not require such a determination because the articles involved therein were dutiable. *See* 19 U.S.C. § 1202, Tariff Sched. 6, part 5, items 684.70-685.50 (1970).

43. The Act provides to American manufacturers, producers, or wholesalers, "so as to assure effective protection under the countervailing duty laws . . . the right to judicial review of negative countervailing duty determinations by the Secretary of the Treasury." S. Rep. No. 93-1298, 93d Cong., 2d Sess. 184, 185 (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 7186, 7320. See note 16 *supra* and accompanying text for a discussion of *Hammond,* the decision of the C.C.P.A. which prompted this provision of the Act.

44. Silbiger, *supra* note 40, at 101.

45. *Mutiny, supra* note 37, at 21-22. While the congressional posture of 1897 can indeed be termed "protectionist," it should be noted that the countervailing duty provisions of the United States only seek to reestablish the "natural channels" of world trade.

46. *See* notes 23-27 *supra* and accompanying text.

defined the concept of "bounty or grant" since the countervailing duty provisions were originally enacted. This omission has forced the courts to interpret, and indeed define, these terms.

While the majority for the C.C.P.A. considered *Zenith* to be a case of first impression and thus distinguished the authority cited by respondent,[47] the dissent in the C.C.P.A.[48] and the unanimous Customs Court[49] felt that the issue in *Zenith* was governed by long-standing precedents which interpreted the countervailing duty law in force at the time.[50] The earliest case relied upon by the dissent and the Customs Court was *United States v. Passavant.*[51] *Passavant* did not require the interpretation of a countervailing duty statute. Instead it focused on whether the quantum of remission of an excise tax imposed on certain cotton velvet goods by the German Government should be included in the "actual value" of such goods for purposes of levying United States customs duties. In relation to *Zenith, Passavant* should be persuasive in that it entailed a determination, under the United States customs laws,[52] that remitted foreign excise taxes will not be ignored when American courts interpret the customs laws. The German tax remission scheme specifically provided that an ad valorem tax, levied on certain cotton velvet goods at the time of their sale by the manufacturer, was to be remitted by the German Government under the rubric "bonification of tax"[53] if such goods were purchased in bond, or consigned in bond, for exportation to a foreign country.[54] The Court noted that the purpose of the remission was "to encourage exportation and the introduction of German goods into other markets."[55] In holding that the quantum of remitted tax should be included in the dutiable "actual market value," the Court established the principle that internal taxing procedures of foreign governments, their purposes, and their effect on American customs practices will be closely scrutinized.[56]

The first landmark countervailing duty decision, and the case upon which the unanimous Customs Court and the dissent in the C.C.P.A. relied heavily, was *Downs v. United States.*[57] *Downs* involved the applicability of the Tariff Act of 1897[58] to a complicated scheme devised by the Russian Government to

47. United States v. Zenith Radio Corp. 11 Cust. B. & Dec. No. 33, at 6, 14 (C.C.P.A. 1977).

48. *Id.* at 28-33 (Miller, J., dissenting).

49. 430 F. Supp. at 244-45 (Richardson, J.), 252 (Newman, J., concurring), 260-62 (Boe, J., concurring).

50. The Trade Act of 1974, ch. 3, § 331(a), 88 Stat. 1978 (1974), is the most recent enactment pertaining to the countervailing duty provisions. See notes 28-45 *supra* and accompanying text for the history of congressionally imposed countervailing duties.

51. 169 U.S. 16 (1898).

52. Customs Administrative Act of June 10, 1890, ch. 407, §§ 14-15, 26 Stat. 131, 137-38.

53. 169 U.S. at 23.

54. *Id.*

55. *Id.*

56. *Id.* at 22-23.

57. T.D. 22984, 4 Treas. Dec. 405 (1901), *aff'd,* 113 F. 144 (4th Cir. 1902), *aff'd,* 187 U.S. 496 (1903).

58. Ch. 11, § 5, 30 Stat. 205.

regulate the production and control of domestic sugar. The Russian Government, through a series of regulations, classified all sugar produced in Russia as either (1) "free sugar"—sugar destined for domestic consumption, upon which a tax of 1.75 rubles per pood[59] was levied, (2) "obligatory or indivertible reserve"—sugar held on reserve at the factory which could not be sold without special permission of the government, and (3) "free reserve or free surplus"—sugar produced in excess of the above two categories which could not be sold domestically except upon payment of a double excise tax, or 3.5 rubles per pood.[60] If the sugar manufacturer exported sugar, he obtained an "export certificate" which could be used to obtain the transfer of an equal amount of sugar from the category of "free surplus" to "free sugar," which in turn could be sold domestically at the tax rate of 1.75 rubles per pood. The exported sugar was not taxed at all. Hence, the exporter not only avoided the 1.75 rubles per pood tax on all sugar he exported, but also received a certificate worth 1.75 rubles, which was freely transferable and could be applied to domestically sold "free sugar." The Board of General Appraisers held that an exporter received two bounties for exporting—the direct bounty on all sugar he exported and an indirect bounty consisting of the "export certificate."[61] The Court of Appeals for the Fourth Circuit affirmed.[62]

On appeal, the Supreme Court reviewed the maze of regulations that constituted the Russian tax scheme in order to determine the economic effect of the program on goods exported to the United States. Reasoning that the language of the 1897 statute required the imposition of countervailing duties whenever *any* type of bounty or grant was bestowed upon *any* dutiable product—such as sugar—the Court relied upon *Passavant*[63] and affirmed. "When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then, by whatever process, or in whatever manner, or under whatever name it is disguised, it is a bounty upon exportation."[64] Clearly, the fundamental issue presented to the Court in *Downs* was the interpretation of the statutory term "bounty." In resolving that issue, the Court had occasion to take judicial notice of a determination reached by an 1898 conference of European powers in Brussels which defined bounties as "all the advantages conceded to manufacturers and refiners by the fiscal legislation of the States, and that, directly or indirectly, are borne by the public treasury."[65] *Downs* therefore stands for the principle that the remission, either direct or indirect, of a tax upon exportation constitutes the conferral of a bounty or grant under the United States countervailing duty laws. Almost immediately after its promulgation, the *Downs* decision was cited by the Board of General Appraisers for that very proposition.[66]

59. The pood is a Russian measurement of weight equal to 36.113 pounds avoirdupois. 6 Law & Pol'y Int'l Bus. 237, 243 (1974).

60. 187 U.S. at 504.

61. T.D. 22984, 4 Treas. Dec. at 413-14.

62. 113 F. at 144.

63. 187 U.S. at 502.

64. *Id.* at 515.

65. *Id.* at 501.

66. *In re* F.W. Meyers & Co., T.D. 24306, 6 Treas. Dec. 260, 264-65 (1903).

The next major case in which the Supreme Court interpreted the then existing countervailing duty law[67] was *G. S. Nicholas & Co. v. United States*.[68] The controversy in that case concerned a British statute[69] that subjected all potable spirits distilled and sold in the United Kingdom to a domestic revenue tax of 14s. 9d. per proof gallon.[70] Exporters, however, were not only exempted from the domestic tax, but in addition, were paid an allowance from the public treasury of 3d. per gallon for pure spirits and 5d. per gallon for compounded spirits.[71] The statute as originally enacted indicated that the allowance was to serve as compensation to manufacturers and distillers, whether or not they exported, for the added cost and hindrance created by the "excise regulations in the distillation and rectification of spirits in the United Kingdom."[72] However, amendments to the statute[73] provided that the allowance was to be paid, to the manufacturer or distiller, only if he was an exporter as well.[74] The result of the amendment was to grant a remedial allowance to exporters, while depriving the manufacturers and distillers who did not export of this benefit.[75]

The Court of Customs Appeals considered that the statute gave unequivocal aid or advantage to British exporters of spirits so that their goods could be sold for less in competition with similar goods on the world market.[76] The court reasoned that it must look to the net effect of a foreign scheme to determine the economic ramifications upon American industry.[77] In order for countervailing duties to attach, the court argued, it was not necessary to inquire into the motives of a foreign government in subsidizing exportation; subsidization of all producers, when coupled with the remission of excise taxes upon exportation mandates the imposition of countervailing duties.[78]

In *Nicholas* the issue was, in fact, not one of subsidization at all, but rather of the final effect of remission of, or exemption from excise taxes. The Supreme Court, in recognition of that fact, centered its attention upon the net result of the British statute: "[T]he sale of spirits to other countries is relieved

67. Ch. 16, § IV, 38 Stat. 193.

68. T.D. 35595, 29 Treas. Dec. 59 (1915), *aff'd*, 7 Ct. Cust. App. 97 (1916), *aff'd*, 249 U.S. 34 (1919).

69. Supreme Court of Judicature Act, 1860, 23 & 24 Vict., c. 129, §§ 1, 4.

70. 7 Ct. Cust. App. at 103-04.

71. *Id.* at 98.

72. *Id.* at 99.

73. Supreme Court of Judicature Act, 1906, 6 Edw. 7, c. 20, § 1(1); Supreme Court of Judicature Act, 1902, 2 Edw. 7, c. 7, § 5; Supreme Court of Judicature Act, 1895, 58 & 59 Vict., c. 16, §§ 6 & 7; Supreme Court of Judicature Act, 1885, 48 & 49 Vict., c. 5(1), § 3; Supreme Court of Judicature Act, 1880, 43 § 44 Vict., c. 24, §§ 13, 45, 49, 50, 54, 57, 62, 63, 72, 75, 79-83, 95, 117, 123; Supreme Court of Judicature Act, 1865, 28 & 29 Vict., c. 98, § 12; *see* 7 Ct. Cust. App. at 99-104.

74. 7 Ct. Cust. App. at 103.

75. *Id.* at 107-08.

76. *Id.* at 106.

77. *Id.* at 107.

78. *Id.* at 113-14.

from a burden that their sale in the United Kingdom must bear. There is a benefit, therefore, in exportation, an inducement to seek the foreign market."[79] In order to compensate for such a benefit, countervailing duties were ordered.[80]

More recently, in *American Express Co. v. United States* the Customs Court held, and the C.C.P.A. affirmed,[81] that Italy's practice of refunding "basic rate taxes"[82] levied on electronic transmission tower components to manufacturers who exported such products constituted a bounty or grant within the meaning of section 303. The court reached this conclusion even though the rebate involved remission of "hidden" or indirect taxes;[83] that is, there was no direct relationship between the rebated taxes and the exported tower units.[84] *American Express* established the principle that, in the broad sense, *all* taxes paid by a producer are passed forward to the consumer.[85] Hence, consideration of both direct and indirect taxes should be pertinent in determining whether a remission thereof upon exportation constitutes a bounty or grant within the meaning of section 303. It should be noted that the decision in this case was based upon a tax remission, and that no additional factors were present such as the export certificate in *Downs*[86] or the allowance

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79. 249 U.S. at 37. It is interesting to note that the Court, in so affirming, explicitly relied upon the prior decisions of *Passavant* and *Downs*. *Id.* at 40-41.

80. *Id.* at 41.

81. T.D. 67-102, 1 Cust. B. & Dec. 212 (1967), *aff'd*, 332 F. Supp. 191 (Cust. Ct. 1971), *aff'd*, 472 F.2d 1050 (C.C.P.A. 1973). *See generally* 7 Vand. J. Transnat'l L. 235 (1973).

82. The "basic rate taxes" were levied pursuant to Italian Law No. 639. 332 F. Supp. at 195-96. The remitted taxes can be broken down into the following categories: "(1) customs duties and other imports charges, (2) registration taxes, (3) stamp taxes, (4) stamp taxes on transportation documents, (5) insurance taxes, (6) mortgage taxes, (7) advertising and publicity taxes, (8) government licenses and authorizations, (9) taxes for registration of motor vehicles, (10) surtaxes on the above." *Id.*

83. "In international parlance [such taxes are deemed] 'taxe occulte.' " 472 F.2d at 1058.

84. "Stamp taxes required upon the purchase of the plant and equipment and taxes on mortgages on real property, examples of the hidden taxes involved here, are not directly related to the steel tower units. The effect of the rebate based on them on home market and export charges for the units cannot be ascertained in the same comparatively straightforward manner as rebates of ordinary excise taxes." *Id.*

85. *Id.*

86. *See* notes 57-66 *supra* and accompanying text. The contention was made that the Treasury Department's ability to make countervailing duty determinations was nugatory "because its promulgation constituted a rule-making activity within the purview of the APA [Administrative Procedure Act, 5 U.S.C. §§ 551-559 (1970)] that was carried out 'without compliance with the procedural requirements of . . . [that Act] and of the Customs Regulations.' " 472 F.2d at 1055. The C.C.P.A. disagreed, stating that decisions under § 303 of the Tariff Act of 1930 were not rulemaking under the APA. *Id.* at 1055-56. "While this conclusion went to the nature of Treasury's decision, it did not address the issue of decisional *process*, and what discretion, if any, there was available to the Secretary. The court did, however, make a finding on this point, stating that 'an investigation for the purpose of determining the existence of a bounty is in the nature of a *fact-finding* activity rather than rule-making.' " *Countervailing Duty Law, supra* note 16, at 851-52 (emphasis in original).

in *Nicholas*.[87] Hence, the facts of *American Express* are indeed similar to those in *Zenith*, and provide support for the notion that a pure tax remission may constitute a bounty or grant.

It was against this background that the C.C.P.A. rendered its decision in *Zenith*. The majority held that the remission by the Japanese government of the commodity tax did not constitute a bounty or grant within the meaning of section 303.[88] The court first addressed the prior case history which did not permit conclusive characterization of a mere tax remission as a bounty or grant. The court held that the *Downs*[89] decision was not controlling because the "bounty" in that case was essentially bipartite; that is, it involved both a remission of tax and the issuance of an export certificate. Accordingly, the *Downs* decision was based on the effect of the *entire* Russian scheme, rather than on the separate impact of any one element. Hence, the C.C.P.A. concluded that any language in *Downs* which purportedly established either a tax remission or the issuance of an export certificate as sufficient ground, standing alone, for the imposition of countervailing duties, was dictum and not binding.[90] The C.C.P.A. also stated that in all other cases dealing with the remission of excise taxes, the bounties involved in each consisted of something more than the mere remission of excise taxes.[91]

From analysis of the legislative history of section 303, the court concluded that the consecutive reenactment of countervailing duty statutes since 1890[92] had left the terms "bounty or grant" and "net amount" intentionally undefined in order to permit a more flexible application of the statute.[93] Further, the C.C.P.A. found that the repeated reenactment of section 303 by Congress since 1890 did not necessarily imply congressional approbation of the judicial analysis contained in *Downs* or its progeny.[94] The court stated that it was uncertain how Congress interpreted *Downs*, or even if Congress had been adequately apprised of the scope and ramifications of the existing judicial decisions on the issue of what constituted a bounty or grant within the countervailing duty statute.[95] Consequently, the court reasoned that the theory of implied ratification by Congress of judicial interpretation upon reenactment of a statute could not be applied.[96] In the absence of both controlling judicial precedent and of illuminating legislative history, the court

87. *See* notes 67-80 *supra* and accompanying text.

88. 11 Cust. B. & Dec. No. 33, at 24.

89. *See* notes 57-66 *supra* and accompanying text.

90. 11 Cust. B. & Dec. No. 33, at 13.

91. *Id.* at 14 n.12. *American Express* and *Nicholas* were summarily dismissed in a footnote. *Id.*

92. *See* notes 28-45 *supra* and accompanying text.

93. 11 Cust. B. & Dec. No. 33, at 16-17.

94. It is to be noted that the C.C.P.A. did not feel it necessary to reach the issue of legislative history because it felt that *Downs* was not controlling. However, the court stated that if *arguendo Downs* were to be considered, the theory of congressional ratification would not apply. *Id.* at 17.

95. *Id.*

96. *Id.*

turned to the "long-continued"[97] administrative practice of the Treasury Department, whereby it uniformly refused to impose countervailing duties when the mere remission of excise taxes by a foreign government was at issue.[98]

The dissent in the C.C.P.A. agreed with the unanimous Customs Court below and concluded that the remission of the Japanese Commodity Tax did constitute a bounty or grant within the meaning of section 303 and that consequently the imposition of countervailing duties was required by statute.[99] The dissent argued that the majority had decided *Zenith* on the *factual* basis of the "net amount" of benefits conferred upon Japanese manufacturers who sell consumer electronic goods in the United States.[100] However, *Zenith* was before the C.C.P.A. on appeal and, said the dissent, the question presented should be whether the remission of a nonexcessive excise tax, as a matter of law, constitutes a bounty or grant within section 303.[101] In the view of the dissenters, the majority had erroneously concentrated on the economic impact of the Japanese Commodity Tax remission.[102] The absence of a factual determination by the court below undermined the legitimacy of the majority's approach. All that was shown in the record was the Secretary of the Treasury's Preliminary[103] and Final Determinations,[104] which dealt specifically with three programs, none of which encompassed the commodity tax at issue.[105] That tax was instead reached by resort to a general catch-all paragraph added to the Determinations.[106] It was therefore clear that the Secretary of the Treasury had made no economic determination concerning the Japanese Commodity Tax, not even that the benefits were de minimis,[107] as was the case with the three other programs. The dissent submitted that if the majority must characterize the issue in *Zenith* as one of factual economic result, *Zenith* should at least be remanded for a more complete exposition of the facts.[108]

The majority's contention that the Supreme Court in *Downs* had based its

97. *Id.* at 19.

98. King, *supra* note 37, at 1181. *See generally* note 37 *supra* and accompanying text.

99. 11 Cust. B. & Dec. No. 33, at 26-27 (Miller, J., dissenting).

100. *Id.* at 26 (Miller, J., dissenting).

101. *Id.* at 26-27 (Miller, J., dissenting). It is easy to argue both sides on the issue whether the majority of the C.C.P.A. in *Zenith* decided the issue as a matter of law or fact. The decision in *Zenith* can, for example, be seen as affirming the principle that all remissions of nonexcessive indirect taxes are *not* a bounty or grant within the meaning of § 303, as a matter of law. It may also be interpreted as holding that the particular Japanese scheme in question *did* constitute a bounty or grant although such bounty or grant was de minimis. The possibility of alternative interpretations is unfortunate.

102. *Id.* at 26 (Miller, J., dissenting).

103. *See* notes 7-12 *supra* and accompanying text.

104. *See* notes 13-15 *supra* and accompanying text.

105. *See* notes 9-10 *supra* and accompanying text.

106. *See* notes 12-15 *supra* and accompanying text.

107. *See* note 11 *supra* and accompanying text.

108. 11 Cust. B. & Dec. No. 33, at 27 n.6 (Miller, J., dissenting).

decision on the combined effects of the two inseparable parts of the bounty bestowed by the Russian tax scheme was also rejected by the dissent.[109] There was language in *Downs*, the dissent argued, to the effect that *either* the remission of the excise tax *or* the issuance of an export certificate was sufficient to support the holding in the case.[110] The *Zenith* dissenters did not consider this dictum. It supported its position by stressing that the *Downs* Court had referred to the certificate as an "*additional* bounty":

> If the additional bounty paid by Russia upon exported sugar were the result of a higher protective tariff upon foreign sugar, and a further enhancement of prices by a limitation of the amount of free sugar put upon the market, we should regard the effect of such regulations as being simply a bounty upon production, although it might incidentally and remotely foster an increased exportation of sugar; *but where in addition to that these regulations exempt sugar exported from excise taxation altogether,* we think it clearly falls within the definition of an indirect bounty upon exportation.[111]

The dissent asserted, moreover, that the majority had misconstrued the role of the judiciary by ignoring the Supreme Court's own recognition of *Downs'* precedential value[112] and by following instead the contrary administrative practices of the Treasury Department.[113] Finally, the dissent felt that the majority had erroneously underestimated Congress by stating that it may have been ill apprised of existing judicial pronouncements when reenacting the countervailing duty statute.[114]

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109. *Id.* at 29 (Miller, J., dissenting).

110. *Id.* at 31 (Miller, J., dissenting). Many cases have held that "where a decision rests on two or more grounds, none can be relegated to the category of *obiter dictum.*" Woods v. Interstate Realty Co., 337 U.S. 535, 537 (1949); *accord,* Massachusetts v. United States, 333 U.S. 611, 623 (1948); Richmond Co. v. United States, 275 U.S. 331, 340 (1928).

111. 11 Cust. B. & Dec. No. 33, at 30 (Miller, J., dissenting) (*quoting* Downs v. United States, T.D. 22984, 4 Treas. Dec. 405 (1901), *aff'd,* 113 F. 144 (4th Cir. 1902), *aff'd,* 187 U.S. 496 (1903) (emphasis supplied by C.C.P.A.)).

112. *Id.* at 32 (Miller, J., dissenting) (*citing* G.S. Nicholas & Co. v. United States, 249 U.S. 34 (1919)).

113. *Id.* at 34 (Miller, J., dissenting). The dissent in the C.C.P.A. argued for the proposition that when administrative practice and judicial pronouncements are in conflict and the question presented is whether the Congress followed the former or the latter, *"it is the latter authoritative decision which the Congress must be presumed to have followed rather than the administrative practice." Id.* at 34-35 (Miller, J., dissenting) (emphasis in original) (*quoting* United States v. Douglas & Berry, T.D. 35342, 6 Ct. Cust. App. 100 (1915)). "The fact that the executive branch does not follow the interpretation of a law by the judicial branch does not render that interpretation any less the law." *Id.* at 35 (Miller, J., dissenting).

114. *Id.* at 35-38 (Miller, J., dissenting); *see* notes 28-46 *supra* and accompanying text. The dissent in the C.C.P.A. also addressed the issue of the effective date of the countervailing duty order issued by the Customs Court below. Only those goods entered for consumption after the date of *publication* of a Customs Court's decision are subject to countervailing duties. 19 U.S.C. § 1516(g) (Supp. V 1975). The issue presented to the court was whether there was "publication" upon the entry of the Customs Court's decision. Brief for Appellant at 63, United States v. Zenith Radio Corp., 11 Cust. B. & Dec. No. 33, at 6 (C.C.P.A. 1977). The dissent stated that "publication" was effected on the day after the Customs Court's decision was published in the

Beyond the evaluation made by the dissent of the *Zenith* opinion, the C.C.P.A. majority may be further chastized for quoting language in *Downs* relating to the remission of the Russian excise tax *in vacuo*. The majority, in criticizing the court below, specifically stated that language must *always* be understood in context, and that the lower court had failed in this regard.[115] However, the C.C.P.A. itself is susceptible to the same criticism.[116] With the obvious intent to maximize the importance of the export certificate at the expense of the remission of the excise tax, the C.C.P.A., in quoting from *Downs*,[117] stopped short before reaching the Supreme Court's declaration in reference to a similar case.[118] The Court had explicitly stated that "it was the fact *alone* of the remission of the excise tax by the Dutch government which brought into operation the bounty . . . ."[119] Clearly, the Supreme Court in *Downs* cast the export certificate aspect of the Russian scheme in a subordinate role. The Court's analysis of the certificate in fact depended upon a prior determination that the remission of the excise tax was a "bounty on exportation."[120] Hence, *Downs* supports the proposition that the mere nonexcessive remission of an excise tax mandates, as a matter of law, the imposition of countervailing duties. This was the *only* question presented to the C.C.P.A. in *Zenith*. Based on its limited reading of *Downs*,[121] coupled with the observation that Congress, since 1890, had intentionally elected to refrain

Customs Bulletin, and that it would so modify the order below. 11 Cust. B. & Dec. No. 33, at 41-42 (Miller, J., dissenting).

115. 11 Cust. B. & Dec. No. 33, at 10.

116. *Id.* at 11.

117. *Id.*

118. In United States v. Hills Bros. Co., 107 F. 107 (2nd Cir. 1901), additional duties were exacted on certain sugar imports from Holland under the 1897 countervailing duty statute. *See* notes 31-33 *supra* and accompanying text. The Dutch scheme levied a tax on all sugar imported or raised for consumption in Holland and paid a bounty out of the Treasury for all domestic production of sugar. If sugar was exported, the manufacturer was exempted from the excise tax; yet he nonetheless received the production bounty from the government. Clearly, the effect of this scheme was the bestowal of a bounty or grant upon the exporting manufacturer of sugar in the form of a remission of, or exemption from, the excise tax. The court held that the levying of a countervailing duty was in order. 107 F. at 108-09.

119. Downs v. United States, T.D. 22984, 4 Treas. Dec. 405, 413 (1901), *aff'd*, 113 F. 144 (4th Cir. 1902), *aff'd*, 187 U.S. 496 (1903) (emphasis added). While the C.C.P.A. was able to distinguish *Downs*, it did not deem it necessary to distinguish *Nicholas*. *Nicholas*, however, is clearly distinguishable by recourse to the carefully delineated opinions below. The Board of General Appraisers stated: "In levying the countervailing duty . . . the collector has treated only the allowance of 3d. and 5d. per gallon as a bounty or grant . . . . We are not entirely certain that this takes the excise tax out of the provisions of [the Tariff Act of 1913, ch. 16, § IV, para. E, 38 Stat. 114, 193-94], but as the question is not before us we leave it undecided." G.S. Nicholas & Co. v. United States, T.D. 35595, 29 Treas. Dec. 59, 65 (1915), *aff'd*, 7 Ct. Cust. App. 97 (1916), *aff'd*, 249 U.S. 34 (1919). The Court of Customs Appeals similarly stated: "It must be borne in mind that this appeal concerns only the 'allowance' paid to exporters . . . and not the excise duty . . . which latter is never paid upon spirits exported from the United Kingdom of Great Britain. The status of the latter is not here in question." 7 Ct. Cust. App. at 104.

120. 11 Cust. B. & Dec. No. 33, at 30 (Miller, J., dissenting).

121. *Id.* at 9-14.

from defining the terms "net amount," "bounty" and "grant,"[122] the C.C.P.A. stated that *Zenith* was a case of first impression.[123] Although, it may be true that Congress chose to leave those key words of the statute undefined, the court's characterization of *Zenith* as a case of first impression ignores the interpretative function of the judiciary.[124] While the majority may have wished to avoid the conclusion that Congress had implicitly adopted the judicial pronouncements made in *Downs* and its progeny by reenacting the statute,[125] it should not have ignored the fact that Congress had *explicitly* rejected proposals made in 1950[126] and 1951[127] which would have excluded from the scope of the countervailing duty law a foreign government's exemption from, or remission of, taxes on goods exported to the United States.[128] Indeed, the Customs Court in *Zenith* had stated:

> It is apparent, then, that Congress could have, but declined to nullify the Supreme Court's interpretation of the countervailing duty statute insofar as tax remissions are concerned. A reasonable conclusion from the congressional rejection of the Treasury's proposed amendments in 1950 and 1951 is that Congress was satisfied with the way it had earlier written the statute, and approved of the Supreme Court's construction of the law.[129]

A related issue is whether Congress was aware of the Treasury Department's construction of the law in this area and the weight that should be attached to such an administrative practice. Since the enactment of the first countervailing duty law, the Treasury Department has been responsible for making the initial determination as to whether countervailing duties should be imposed.[130] The majority in *Zenith* attached great importance to the fact that the Treasury Department has "consistently and uniformly"[131] interpreted the statutory countervailing duty language to require more than the mere remission of excise taxes to constitute a bounty or grant.[132]

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122. *Id.* at 16-17.

123. *Id.* at 14.

124. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

125. 11 Cust. B. & Dec. No. 33, at 17-18.

126. 430 F. Supp. at 253 (Newman, J., concurring) (citing the proposed Customs Simplification Act of 1950, H.R. No. 8304, 81st Cong., 2d Sess.). The bill was introduced in the House of Representatives on May 1, 1950, and was referred to the Committee on Ways and Means. 96 Cong. Rec. 6,075 & 6,119 (1950). The bill died in committee. [1949-1950 Transfer Binder] Cong. Index (CCH) 3,664.

127. 430 F. Supp. at 253 (Newman, J., concurring) (citing H.R. No. 5505, 82d Cong., 1st Sess. 1-13 (1951)).

128. The proposed legislation provided *inter alia*: "The exemption of any exported article or merchandise from a duty or tax imposed on like articles or merchandise when destined for consumption in the country of origin or exportation, or the refunding of such a duty or tax, shall not be deemed to constitute a payment or bestowal of a bounty or grant within the meaning of this section." 430 F. Supp. at 254.

129. *Id.*

130. *See* notes 31-33 *supra* and accompanying text.

131. 11 Cust. B. & Dec. No. 33, at 18; *see* notes 97-98 *supra* and accompanying text.

132. *See* notes 97-98 *supra* and accompanying text.

A long-continued, uniform administrative practice, if not contrary to or inconsistent with law, is entitled to great weight, particularly where, as here, those charged with its administration adopted that practice contemporaneously with the inception of the statute, and when Congress has repeatedly reenacted the statute without change, and when Congress has failed to revise the statute in the face of such administrative practice, and when Congress has refused requests to legislate a change.[133]

There are, however, several inconsistencies in the court's analysis. First, the fact that Congress in 1950 and again in 1951 refused to amend the countervailing duty statute to conform to the practice of the Treasury Department can hardly be construed as supportive of that administrative practice.[134] It is difficult to understand how the majority could state, in light of the 1950 and 1951 proposals, that it was certain "nothing in the voluminous citations of record indicate[d] a congressional intent that countervailing duties must be imposed in response to a nonexcessive remission of an excise tax . . . ."[135] This statement becomes even more perplexing when one considers the second lapse in the court's logic, *viz.* the fact that the court can make the above statement in light of a 1970 Senate report[136] which stated, *inter alia:* "The committee is also aware of the Supreme Court cases, and a recent Customs Court case which has interpreted the words 'bounty' or 'grant' to apply to virtually all subsidies, including the rebate of indirect taxes."[137] It can be presumed that the Congress was cognizant of the Senate Committee's report of the judicial construction of the then existing statute. Yet, Congress did not deem it advisable, or necessary, to exclude indirect nonexcessive tax remissions from the scope of section 303. Persistent refusal to act in 1950,[138] 1951,[139] 1968,[140] 1970,[141] 1973[142] and 1974[143] would seem adequate evidence of a congressional rejection of the proposed exclusion of nonexcessive remissions of excise taxes from the scope of section 303.[144]

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133. 11 Cust. B. & Dec. No. 33, at 19 (citations omitted).

134. *See* notes 126-129 *supra* and accompanying text.

135. 11 Cust. B. & Dec. No. 33, at 16.

136. S. Rep. No. 91-1431, 91st Cong., 2d Sess. 278-81 (1970).

137. *Id.* at 281.

138. *See* notes 126-29 *supra* and accompanying text.

139. *Id.*

140. *See 2 Compendium of Papers on Legislative Oversight of United States Trade Policies*, S. Comm. on Finance, 90th Cong., 2d Sess. 475-76, 568-69, 887-89, 918-19 (1968).

141. *See* notes 136-137 *supra* and accompanying text.

142. The House Ways and Means Committee, when considering the Trade Act of 1974, pointed out that it did not "express approval or disapproval of the standard employed by the Treasury Department in administering the countervailing duty law with regard to the treatment under that law of rebates or remissions of direct and indirect taxes." H.R. No. 571, 93d Cong., 1st Sess. 69 (1973).

143. The Senate Finance Committee, when considering the Trade Act of 1974, similarly refrained from approving the Treasury Department's practice in determining whether tax rebates or remissions constitute bounties or grants within the scope of the countervailing duty law. S. Rep. No. 1298, 93d Cong., 2d Sess. 172 (1974), *reprinted in* [1974] U.S. Code Cong. & Ad. News 7,186, 7,309.

144. "[C]ontinued re-enactment of a statute following its judicial interpretation (especially by

The third flaw in the *Zenith* court's logic is its reliance on the principle that a "long-continued" administrative practice is persuasive when not directly contradicted by judicial decision.[145] While this principle is persuasive,[146] it is inapplicable here because *Zenith* was the first case[147] presented for decision pursuant to the court's expanded jurisdiction granted by the Trade Act of 1974.[148] Therefore, it is nonjudicious to place "great weight" upon the Treasury Department's "long-continued" interpretation of section 303 when, for seventy-six of the past seventy-nine years, no judicial review existed to challenge, question or overturn a negative countervailing duty determination.[149]

It is certain that to impose countervailing duties in the *Zenith* case would have serious ramifications in the political[150] and economic[151] realms. To levy

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the Supreme Court) creates a presumption of Congressional approval of that interpretation." 11 Cust. B. & Dec. No. 33, at 34 (Miller, J., dissenting) (citing Shapiro v. United States, 335 U.S. 1, 16 (1948); Burnet v. Harmel, 287 U.S. 103, 108 (1932); Hecht v. Malley, 265 U.S. 144, 153 (1924); Latimer v. United States, 223 U.S. 501, 504 (1912); Sessions v. Romadka, 145 U.S. 29, 42 (1892)).

145. 11 Cust. B. & Dec. No. 33, at 19; *see* notes 97-98 *supra* and accompanying text

146. Saxbe v. Bustos, 419 U.S. 65, 74 (1974).

147. Zenith Radio Corp. v. United States, 430 F. Supp. 242, 250 (Cust. Ct.), *rev'd*, 11 Cust. B. & Dec. No. 33, at 6 (C.C.P.A. 1977); *see* notes 16 & 43 *supra* and accompanying text.

148. *See* note 43 *supra* and accompanying text.

149. This is true because *Hammond* held that negative countervailing duty determinations could not be appealed by Americans to the courts. Hence, one-half of all Treasury Department determinations were incontestable. *See* note 16 *supra* and accompanying text.

Although the C.C.P.A. did not discuss the significance of the General Agreement on Tariffs and Trade (GATT), 61 Stat. A11, A23, T.I.A.S. No. 1700, 55 U.N.T.S. 187 (1947), *as amended by* 8 U.S.T. 1767, T.I.A.S. No. 3930, 278 U.N.T.S. 168 (1957) (the GATT was adopted by the United States through executive agreement in 1947, 12 Fed. Reg. 8,863, Proclamation No. 2671A (1947)), the contention was made in the court below that the imposition of countervailing duties in *Zenith* would be in direct conflict with article VI of the GATT. Article VI, when applied to *Zenith*, expressly prohibits the imposition of countervailing duties unless it is shown that the Japanese consumer electronic goods allegedly benefiting from the Japanese tax scheme threaten to cause material injury to Zenith and the American electronic consumer goods industry. Since no such showing was made, it is argued, the contractual obligations of the GATT are binding on the United States. 430 F. Supp. at 248 n.5. This contention may be dismissed by recourse to the Protocol of Provisional Application of the General Agreement on Tariffs and Trade, which provides that the GATT shall be applied to the fullest extent not inconsistent with existing legislation. 61 Stat. A2051, T.I.A.S. No. 1700, 55 U.N.T.S. 308 (1947). Since the provisions of § 303 of the Tariff Act of 1930 were in full force at the time of contracting, the provisions of the Protocol render article VI of the GATT inapplicable to the United States. The same conclusion can be reached by recourse to the principle that when a treaty and a statute are irreconciliable, the latter one in point of time must prevail. 5 G. Hackworth, Digest of International Law § 489 (1927).

150. The C.C.P.A. in *Hammond* stated: "In the assessment of a countervailing duty, the determination that a bounty or grant is paid necessarily involves judgments in the political, legislative or policy spheres." 440 F.2d 1030. To this the C.C.P.A. added in *Zenith* that the "eminently important economic sphere" must be considered as well. 11 Cust. B. & Dec. No. 33, at 16.

151. *See* note 150 *supra* and accompanying text.

countervailing duties might pose a real threat to international political harmony.[152] One commentator recently stated that the *Zenith* decision "was seen by the Carter Administration as a major legal victory . . . [and that] the *Zenith* case represented a serious threat to trade harmony and to the success of trade-liberalization negotiations in Geneva."[153] However, to refrain from levying countervailing duties on the Japanese products endangers the American electronic consumer goods industry.[154] It has also been stated that cheaper foreign manufacturing has already annihilated the United States domestic black and white television industry.[155] The *Zenith* decision might have a similar effect on the domestic color television industry.[156] While a negative countervailing duty determination poses a threat to the economic well-being of the United States domestic television industry, a positive countervailing duty determination jeopardizes global economic recovery from the recent recession by raising the specter of protectionism.[157] To be sure, the United States cannot remain "an island of prosperity in a sea of economic troubles . . . ."[158]

In response to this dilemma, the United States has negotiated[159] an Orderly Trade Agreement[160] with Japan which established fixed import levels for television sets and parts during the next three years.[161] While such executive remedies to the politico-economic dilemma can only be effective in the absence of judicially imposed countervailing duties, this does not call for abdication by the C.C.P.A. of its responsibility to enforce the countervailing duty laws and, in so doing, to follow the Supreme Court's decision in *Downs*. However, it has been noted that since *Downs* "the world has seen two World Wars, an industrial revolution, a scientific revolution, and a flight from Kitty

152. N.Y. Times, July 29, 1977, § D, at 1, col. 1.

153. *Id.* § A, at 1, col. 4.

154. 178 N.Y.L.J., July 29, 1977, at 1, col. 4, *continued* at 3, col. 2. On September 28, 1977, Zenith announced that because of "heavy imports" from Japan, it had been forced to lay off some 5,600 American workers in order to compete with the Japanese. Other American producers of electronic consumer goods have been forced to take similar measures. N.Y. Times, Sept. 28, 1977, § D, at 1, col. 3.

155. 178 N.Y.L.J., July 29, 1977, at 1, col. 4, *continued* at 3, col. 2. Because of the high level of competition attained by foreign manufacturers, the domestic black and white television industry in the United States is virtually nonexistent. *Id.*

156. *Id.*

157. N.Y. Times, July 29, 1977, § D, at 1, col. 1.

158. *Id.* at col. 3 (quoting Ambassador Mike Mansfield). The assessment of countervailing duties "is also one of the chips in a game played by governments on a world wide stage." 11 Cust. B. & Dec. No. 33, at 16.

159. 42 Fed. Reg. 26, 195 (1977).

160. *See generally* Bernier, *Les ententes de restriction volontaire à l'exportation en droit international économique*, 11 Can. Y.B. Int'l L. 48 (1973). Statutory power for such Orderly Trade Agreements is granted by tit. 1, ch. 1, § 105 of the Trade Act of 1974, 88 Stat. at 1,984, 19 U.S.C. § 2115 (Supp. V 1975).

161. N.Y. Times, July 29, 1977, § A, at 1, col. 4, *continued* § D, at 9, col. 1. The "import level was fixed at 1.56 million complete sets and 190,000 partial sets a year for the next three years." *Id.*

Hawk to the moon."[162] Perhaps it is time for a reconsideration by the Supreme Court of *Downs* and its progeny. The present state of the law requires the imposition of countervailing duties despite the fact that such a decision is at odds with the political and economic exigencies of today.

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162. 11 Cust. B. & Dec. No. 33, at 9.