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Zenith Radio Corp. v. United States: The Nadir of the U.S. Trade Relief Process

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In contrast to the preceding article, Professor Kennedy argues that executive discretion in trade remedies often destroys the protection for domestic industry that the U.S. trade relief process intends to give. As a background for his discussion, Professor Kennedy uses the protracted litigation over Zenith Radio Corporation's challenge to a Commerce Department settlement of massive antidumping duties imposed against Japanese television importers. Professor Kennedy concludes that the Carter Administration's settlement of all claims for antidumping duties, for approximately one-half of the duties originally imposed, denied meaningful relief to American industries. Professor Kennedy asserts Congress intended to limit executive discretion in antidumping law under the Trade Agreements Act of 1979, but that the courts in Zenith Radio *misconstrued congressional intent. Professor Kennedy concludes that Congress should expressly limit executive discretion in trade relief in legislation such as the Omnibus Trade Bill.*

On July 2, 1987, the final chapter to one of the most bitterly fought international trade legal battles was written. On that day the Court of Appeals for the Federal Circuit (CAFC) delivered its last opinion in *Zenith Radio Corp. v. United States*,[1] affirming the Court of International Trade's decision[2] refusing to assess damages in favor of the United States on a 250,000 dollar injunction bond filed by Zenith with the court. The Federal Circuit's opinion brought to a close an international trade dispute spanning some sixteen years, ending Zenith's challenge to a 1980 settlement agreement between the Secretary of Commerce and various importers of Japanese color televisions.

With the *Zenith* case history as backdrop, this article examines how the exercise of discretionary executive branch power, motivated largely by considerations of economic and political expediency, is allowed to subvert the U.S. international trade relief process. Zenith's experience is not an isolated one, but has been repeated for similar

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[1] 823 F.2d 518 (Fed. Cir. 1987).

[2] Zenith Radio Corp. v. United States, 643 F. Supp. 1133, 1138 (Ct. Int'l Trade 1986), *aff'd*, 823 F.2d 518 (Fed. Cir. 1987).

reasons in other trade relief contexts with other domestic industries. What is most regrettable in the *Zenith* case, however, is that the executive branch received an unwarranted helping hand from the judiciary. As a consequence, a case which should have been heard on its merits was nipped in the bud by courts insufficiently sensitive to the will of Congress.

I. The *Zenith Radio Corp.* Background

On March 10, 1971, the Treasury Department issued a dumping finding[3] that monochrome and color television sets from Japan were being sold in the United States at less than fair value.[4] From the date of this 1971 finding until 1979, most of the antidumping duties due on these television receivers went uncollected.[5] Congress deplored this practice of administrative neglect and so it overhauled the antidumping duty law in 1979.[6] Responsibility for administering the antidumping duty law was moved from the Treasury to the Commerce Department in 1980[7] and on March 28, 1980, the Commerce Department conducted its first administrative review of the 1971 Treasury dumping finding.[8] On April 28, 1980, prior to completing

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[3] T.D. 71-76, 5 Cust. B. & Dec. 151, 36 Fed. Reg. 4597 (1971).

[4] The Treasury Department's dumping finding was issued pursuant to § 201(a) of the Antidumping Act of 1921, ch. 14, § 201(a), 42 Stat. 11, 11, *repealed by* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 106(a), 93 Stat. 150, 193. This finding, coupled with a finding of injury to an American industry of competing merchandise, results in the imposition of dumping duties equal to the margin of dumping. A finding of sales at less than fair value is generally made when the price of merchandise in the home market is greater than the price for such merchandise in the U.S. market. For a discussion of the antidumping duty law, see Barshefsky & Cunningham, *The Prosecution of Antidumping Actions Under the Trade Agreements Act of 1979*, 6 N.C.J. INT'L L. & COM. REG. 307 (1981); Horlick, *Summary of Procedures Under the United States Antidumping and Countervailing Duty Laws*, 58 ST. JOHN'S L. REV. 828 (1984); Potts & Lyons, *The Trade Agreements Act of 1979: Administrative Policy and Practice in Antidumping Investigations*, 6 N.C.J. INT'L L. & COM. REG. 483 (1981).

[5] *See* Zenith Radio Corp. v. United States, 509 F. Supp. 1282, 1283 (Ct. Int'l Trade 1981).

[6] In the report of the Senate Committee on Finance to the Trade Agreements Act of 1979, the "dismal performance" of the Treasury Department in collecting antidumping duties was noted. S. REP. No. 249, 96th Cong., 1st Sess. 76-77 (1979) [hereinafter S. REP. No. 249]. The upshot was transfer of responsibility for administering the antidumping and countervailing duty laws from Treasury to the Commerce Department in 1980. *See* Reorg. Plan No. 3 of 1979, § 5(a)(1)(C), 44 Fed. Reg. 69,273 (1979); Exec. Order No. 12,188, 45 Fed. Reg. 989 (1980). This transfer of authority amounted to little more than old wine in a new bottle, however, because most of the Treasury personnel responsible for administering the antidumping duty law transferred to the Commerce Department. Nevertheless, the generally vigorous enforcement record of the Commerce Department under the antidumping duty law over the past seven years shows that Congress' message did not fall on deaf ears.

[7] Reorg. Plan No. 3 of 1979, § 5(a)(1)(C), 44 Fed. Reg. 69,273 (1979); Exec. Order No. 12,188, 45 Fed. Reg. 989 (1980).

[8] 45 Fed. Reg. 20,511 (1980). Regular administrative reviews of outstanding countervailing and antidumping duty orders are required by section 751 of the Tariff Act of 1930, Pub. L. No. 71-361, 46 Stat. 590, *added by* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 144, 175 (codified as amended at 19 U.S.C. § 1675 (1982 & Supp. III 1985)). In these reviews the actual margins of dumping are calculated for the

that section 751 administrative review, the Secretary of Commerce announced that he had settled all claims for antidumping duties arising from entries of the subject television sets from July 1, 1973, to March 31, 1979.[9] The United States estimated that the potential amount of dumping duties which could be collected was approximately 138.7 million dollars,[10] and agreed to a settlement figure of 77 million dollars.[11] Zenith, a domestic manufacturer of television sets, placed the figure of potential antidumping duties due in the hundreds of millions.[12]

In the face of this settlement, Zenith immediately brought an action in the U.S. Customs Court, the predecessor court to the U.S. Court of International Trade (CIT), challenging the lawfulness of the settlement agreement.[13] The company's contention was that the implementation of the settlement agreement would result in the unlawful forgiving of hundreds of millions of dollars in antidumping duties owed by Zenith's competitors.[14] Zenith alleged as a first cause of action that the settlement was ultra vires the Secretary's authority under 19 U.S.C. section 1617,[15] and, thus, illegal and void.[16] As a second cause of action Zenith alleged that even if authority existed under 19 U.S.C. section 1617 for the settlement, this settlement was tainted because the government officials who recommended settlement did so in an arbitrary, capricious, and bad faith manner, having based their decision on political and other irrelevant

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period immediately preceding the review and actual duties are assessed on that basis. That dumping margin is then used for the purpose of assessing estimated duties on imports of affected merchandise during that prospective period until the next administrative review, at which time actual dumping duties are again imposed with any excess estimated dumping duties being refunded to the importer.

9 *Zenith Radio Corp.*, 509 F. Supp. at 1284.

10 Montgomery Ward & Co. v. Zenith Radio Corp., 673 F.2d 1254, 1256 (C.C.P.A.), *cert. denied*, 459 U.S. 943 (1982).

11 Zenith Radio Corp. v. United States, 518 F. Supp. 1347, 1348 (Ct. Int'l Trade 1981).

12 *Id.*, (citing Zenith Radio Corp. v. United States, 505 F. Supp. 216, 217 (Ct. Int'l Trade 1980)).

13 Zenith filed its complaint on May 28, 1980, and followed it with a verified complaint on June 27, 1980. Zenith Radio Corp. v. United States, 505 F. Supp. 216, 217 (Ct. Int'l Trade 1980).

14 *Id.*

15 That section provides:

> Upon a request by a customs officer, United States attorney, or any special attorney, having charge of any claim arising under the customs laws, showing the facts upon which such claim is based, the probabilities of a recovery and the terms upon which the same may be compromised, the Secretary of the Treasury is authorized to compromise such claim, if such action shall be recommended by the General Counsel for the Department of the Treasury.

All functions of the Secretary of the Treasury and the General Counsel of the Department of the Treasury were transferred to the Secretary of Commerce and the General Counsel of the Department of Commerce insofar as those functions relate to the settlement of claims for antidumping duties. Reorg. Plan No. 3, § 5(a)(1)(G), 44 Fed. Reg. 69,273 (1979).

16 505 F. Supp. at 217-18.

considerations.[17]

In parallel litigation, the Committee to Preserve American Color Television (COMPACT), a trade association representing members of the U.S. television manufacturing industry and its workers, brought an identical challenge.[18] Prior to the April 28, 1980, settlement agreement, COMPACT filed an action in the District Court for the District of Columbia challenging the delayed enforcement of the outstanding dumping finding of March 10, 1971.[19] The district court dismissed for lack of jurisdiction and an appeal was taken to the Court of Appeals for the District of Columbia Circuit.[20] While that appeal was pending, the settlement agreement was executed. On May 9, 1980, the D.C. Circuit enjoined implementation of the agreement pending appeal.[21] On October 10, 1980, the Customs Courts Act of 1980 was enacted,[22] vesting exclusive jurisdiction over international trade matters (such as the legal challenge brought by Zenith and COMPACT) in the Court of International Trade.[23] Against this legislative backdrop, on February 5, 1981, COMPACT moved for a stay of proceedings in the court of appeals pending the filing of a new complaint in the CIT and requested a determination of the CIT's jurisdiction.[24] The allegations in COMPACT's com-

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[17] *Id.* at 218.

[18] COMPACT v. United States, 527 F. Supp. 341, 342 (Ct. Int'l Trade 1981), *aff'd*, 706 F.2d 1574 (Fed. Cir.), *cert. denied*, 464 U.S. 825 (1983).

[19] *See id.* at 343 n.4.

[20] *Id.*

[21] *Id.*; *see also* Zenith Radio Corp. v. United States, 505 F. Supp. 217, 218 (Ct. Int'l Trade 1980).

[22] Customs Courts Act of 1980, Pub. L. No. 96-417, 94 Stat. 1727 (codified as amended in scattered sections of 28 U.S.C.).

[23] The Customs Courts Act of 1980 was designed "to improve the federal judicial machinery by clarifying and revising certain provisions of title 28, United States Code, relating to the judiciary and judicial review of international trade matters . . . ." H.R. REP. No. 1235, 96th Cong., 2d Sess. 1, *reprinted in* 1980 U.S. CODE CONG. & ADMIN. NEWS 3729 [hereinafter H.R. REP. No. 1235]. Among the revisions was the enlargement of the jurisdiction of the U.S. Customs Court, renamed the U.S. Court of International Trade. Born out of a legislative concern that litigants were being frustrated in their attempts to obtain judicial review, the Customs Courts Act of 1980 sought to remedy this problem by clarifying the Customs Court's subject matter jurisdiction and expanding its powers by giving it the same powers in law and equity enjoyed by the district courts. *See id.* at 19-20; 28 U.S.C. § 1585 (1982).

Prior to 1980 the Customs Court lacked power to issue injunctive relief. Under the law that existed prior to 1980, it had "become increasingly more difficult to determine, in advance, whether or not a particular case [fell] within the exclusive jurisdiction of the Customs Court . . . . The result [was] considerable jurisdictional confusion . . . ." S. REP. No. 466, 96th Cong., 1st Sess. 1-2 (1979). *See generally* Kennedy, *A Proposal to Abolish the U.S. Court of International Trade*, 4 DICK. J. INT'L L. 13 (1985); Cohen, *The "Residual Jurisdiction" of the Court of International Trade Under the Customs Courts Act of 1980*, 26 N.Y.L. SCH. L. REV. 471 (1981); Cohen, *Recent Decisions of the Court of International Trade Relating to Jurisdiction: A Primer and Critique*, 58 ST. JOHN'S L. REV. 700 (1984); Rodino, *The Customs Courts Act of 1980*, 26 N.Y.L. SCH. L. REV. 459 (1981); Vance, *The Unrealized Jurisdiction of 28 U.S.C. § 1581(i): A View from the Plaintiff's Bar*, 58 ST. JOHN'S L. REV. 793 (1984).

[24] *See* COMPACT v. United States, 527 F. Supp. 341, 343 n.4 (Ct. Int'l Trade 1981).

plaint were virtually identical to those made by Zenith.[25] In an apparent attempt to whipsaw the government, both Zenith and COMPACT resisted efforts by the United States to consolidate the two actions.[26] Consequently, the two suits did not proceed in lockstep.[27]

Faced with the potential dissolution of the injunction issued by the D.C. Circuit in favor of COMPACT,[28] Zenith moved for a preliminary injunction in the CIT in late 1980.[29] Applying the traditional four-part test[30] for determining the propriety of injunctive relief pendente lite,[31] the CIT concluded with virtually no factual discussion or legal analysis that Zenith was likely to prevail on the merits of its complaint.[32] Similarly, with respect to irreparable injury the court concluded that Zenith would not only lose its right to judicial review if the settlement agreement was implemented,[33] but that its competitors would be tremendously rewarded by the allegedly illegal forgiveness of hundreds of millions of dollars in dumping duties, all to Zenith's detriment.[34] As for the balance of hardships factor, the CIT properly rejected the government's bootstrap argument that the Department of Justice had relied to its detriment on the settlement

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The government conceded that the Court of International Trade had jurisdiction over Zenith's and COMPACT's actions. *See Zenith Radio Corp.*, 505 F. Supp. at 219 n.2.

[25] *See COMPACT*, 527 F. Supp. at 342; COMPACT v. United States, 706 F.2d 1574, 1576 (Fed. Cir.), *cert. denied*, 464 U.S. 825 (1983).

[26] *COMPACT*, 706 F.2d at 1576.

[27] *Id.*

[28] As the Court of International Trade observed in Zenith Radio Corp. v. United States, 505 F. Supp. 216 (1980):

> [T]he enactment of the Customs Courts Act of 1980 makes imminent the dissolution by the D.C. Circuit of its injunction in view of the exclusivity of subject matter jurisdiction which Congress has now vested in this court . . . . In this posture the injunction pending appeal could be dissolved by the D.C. Circuit at any time.

505 F. Supp. at 218.

[29] *Id.* at 216.

[30] In order to prevail the petitioner must show:

> (1) that there is a substantial likelihood that the petitioner will prevail on the merits; (2) that without the relief requested the petitioner will be irreparably injured; (3) that the issuance of the relief requested will not substantially harm other interested parties; and (4) that the public interest would be served by the relief requested.

Id. at 218 (footnote omitted).

[31] *Id.* at 218-20.

[32] *Id.* at 219.

[33] *Id.* The loss of the right to judicial review seems to be a matter more properly addressed in an All Writs Act injunction under 28 U.S.C. § 1651(a) than in a Rule 65 injunction.

[34] 505 F. Supp. at 219. The court rejected the government's argument that Zenith's current competitive position viś-a-viś its Japanese counterparts could not be adversely affected because the settlement agreement only covered past entries of television sets. *Id.* The CIT's response was that Congress believed that domestic manufacturers such as Zenith could be harmed by nonenforcement of the antidumping duty laws. *Id.* Nevertheless, to equate Congress' view with the immediate and irreparable harm contemplated under rule 65 seems to be a somewhat sophistic twist on the concept of irreparable injury.

agreement by voluntarily dismissing with prejudice two pending collection actions.[35] Regarding the public interest factor, the court concluded that the public interest "lies in the faithful execution by the Executive Branch of the laws enacted by Congress. . . . [P]laintiff has raised serious issues concerning the Executive Branch's exercise of its responsibilities under the antidumping law . . . ."[36] Accordingly, the CIT preliminarily enjoined implementation of the settlement agreement on December 9, 1980.[37]

Flush with victory, and apparently buoyed by the CIT's conclusion that Zenith had made out a substantial case, at least on its second cause of action,[38] Zenith moved for partial summary judgment on its first cause of action that the settlement agreement was ultra vires the Secretary's authority under 19 U.S.C. section 1617.[39] The government cross-moved for summary judgment.[40] In an opinion issued on February 27, 1981,[41] the CIT concluded that the plain language of section 617, which enables the Secretary to compromise "any claim arising under the customs laws," meant that the United States possessed a claim against the importers of Japanese television sets which could be compromised "even though the exact amount of the claim had not been fixed through the process of liquidation."[42] As for Zenith's contention that enactment of section 751 of the Tariff Act of 1930, as added by the Trade Agreements Act of 1979,[43] amounted to an implied repeal of the Secretary's authority to settle antidumping duty cases,[44] the court found no implied repeal of section 617 in section 751 and, more importantly, was able to give effect to both statutes.[45]

The CIT found sections 751 and 617 to be two distinct statutes with two different purposes, the former dealing with the assessment of antidumping duty claims that are not settled, and the latter deal-

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35 *Id.* at 220.

36 *Id.*

37 *Id.* at 216, 220-21.

38 *Id.* at 219. The court specifically noted that its decision to issue the preliminary injunction was made "without reference to plaintiff's first cause of action . . . ." *Id.*

39 Zenith Radio Corp. v. United States, 509 F. Supp. 1282, 1283 (Ct. Int'l Trade 1981).

40 *Id.*

41 *Id.* at 1282.

42 *Id.* at 1286 (footnote omitted). "Liquidation" is the final duty assessment phase in the entry process. Most of the entries which were the subject of Zenith's suit were unliquidated. *Id.* at 1284 n.7.

43 19 U.S.C. § 1675 (1982 & Supp. III). That section requires the Commerce Department to periodically review all outstanding antidumping and countervailing duty orders and to assess actual dumping and countervailing duties on all unliquidated entries of merchandise subject to such orders.

44 509 F. Supp. at 1286. Zenith argued in effect that Congress' purpose in enacting § 751 was the speedy and efficient collection of antidumping duties, the implication being that the settlement of antidumping duty claims is prohibited. *See id.* at 1286.

45 *Id.* at 1286-87.

ing with such claims that are settled.[46] Moreover, the CIT added that to the extent settlement expedites the duty collection process, section 617 was fully consonant with the congressional intent behind enactment of section 751.[47] The CIT accordingly denied Zenith's motion for partial summary judgment, granted the government's motion as to Zenith's first cause of action, and denied the government's motion with respect to Zenith's second cause of action based on a genuine issue of material fact raised by Zenith at the hearing on its motion for a preliminary injunction.[48]

Realizing that it was faced with potentially protracted and vexing discovery on Zenith's remaining cause of action, the government decided to apply pressure of its own by filing a motion on June 9, 1981, to require Zenith to post security pursuant to rule 65(c) of the CIT.[49] The government's motion was made seven months after the CIT granted Zenith's request for a preliminary injunction. Interestingly, the government never requested the posting of security in the litigation between it and COMPACT, even though an injunction was also issued there.[50]

The government requested security in the amount of 11.5 million dollars, an amount equivalent to fifteen percent interest for one year.[51] Zenith resisted the posting of any security, arguing that the injunction was issued pursuant to the All Writs Act rather than CIT rule 65.[52] The court agreed that its earlier injunction was in effect an All Writs Act injunction, thereby dispensing with the security requirement.[53] Although the CIT concluded that no security was required, the court oddly enough went on to observe that under rule 65(c) it nevertheless had the discretion to require security in a nominal amount, adding that a prohibitively high security requirement might preclude Zenith's right to judicial review.[54] Costing Zenith out of the litigation was, of course, one of the government's reasons for insisting on such a large amount of security from Zenith, although the amount it requested was reasonable under the circumstances. In the end, the CIT required Zenith to post security of 250,000 dollars pursuant to rule 65(c)—from which the government

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[46] *Id.* at 1287.

[47] *Id.* at 1287-88.

[48] *Id.* at 1288; *see* Zenith Radio Corp. v. United States, 505 F. Supp. 216, 219 (Ct. Int'l Trade 1980).

[49] Zenith Radio Corp. v. United States, 518 F. Supp. 1347, 1348 (Ct. Int'l Trade 1981). CIT rule 65(c) is identical to FED. R. CIV. P. 65(c).

[50] *Id.* at 1348 n.2.

[51] *Id.* at 1348.

[52] *Id.* Security is not required for injunctions issued pursuant to the All Writs Act. *See id.* at 1349, and cases cited therein.

[53] *Id.*

[54] *Id.* at 1350.

could be made whole if it was eventually determined that the United States had been wrongfully enjoined.

By requiring what under the circumstances was only nominal security, the CIT was beginning to reveal with whom its sympathies lay. Why the court shifted in midstream from its conclusion that no security was required to a requirement that only nominal security would be imposed on Zenith is difficult to fathom, unless the CIT was attempting to forestall any serious thought on the part of the government to appeal the court's security decision. Recalling the CIT's observation that the government took seven months before it even sought security from Zenith, coupled with the fact that the United States never asked for security in the COMPACT litigation pending in the D.C. Circuit,[55] it may well have been that the CIT doubted the government's good faith in seeking security. In an equity context that factor arguably could be important, but whether or not that would be a legitimate consideration in requiring Zenith to post only nominal security is debatable, given rule 65(c)'s express language that security *shall* be required in all cases where a preliminary injunction is issued. That considerations such as the government's lack of good faith figured in the court's decision to set the amount of security so low seems less debatable.

In a reprise of the *Zenith* motions for summary judgment and for preliminary injunction, COMPACT filed identical motions with the CIT in late 1981 and 1982.[56] COMPACT's motion for partial summary judgment made essentially the same arguments advanced by Zenith in its motion for partial judgment.[57] The CIT, once again resorting to the plain language of section 617, found that section 617 authorizes the government to compromise "any claim arising under customs laws," including the present claim for dumping duties.[58] Rejecting COMPACT's contention that the only claims contemplated as an appropriate subject for settlement were claims for fines,

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[55] *Id.* at 1348 n.2.

[56] COMPACT v. United States, 551 F. Supp. 1142 (Ct. Int'l Trade 1982), *aff'd*, 706 F.2d 1574 (Fed. Cir.), *cert. denied*, 464 U.S. 825 (1983); COMPACT v. United States, 527 F. Supp. 341 (Ct. Int'l Trade 1981), *aff'd*, 706 F.2d 1574 (Fed. Cir.), *cert. denied*, 464 U.S. 825 (1983).

[57] Taking a slightly different tack, COMPACT argued that § 617 only authorized the compromise of claims for duties which were penal in nature, such as fines, penalties, and forfeitures. 527 F. Supp. at 344. Because antidumping duties are not penal in nature, COMPACT contended, they could not be settled under authority of § 617. *Id.* Zenith had argued in its motion for partial summary judgment that only liquidated claims for duties could be settled under § 617, and that because the claim for antidumping duties at issue here was in the main unliquidated, no authority existed for the settlement agreement under § 617. Zenith Radio Corp. v. United States, 509 F. Supp. 1282, 1284 (Ct. Int'l Trade 1981). COMPACT did make the same argument as Zenith, however, that the compromise of a claim for antidumping duties under § 617 was repugnant to its right to administrative review under § 751. *See* 527 F. Supp. at 349-50. This argument was also rejected by the CIT. 527 F. Supp. at 350.

[58] COMPACT v. United States, 527 F. Supp. at 343.

penalties, and forfeitures (that is, claims penal in nature), the court concluded that when Congress intended to so limit the Secretary's authority, it did so expressly, noting that such limiting language was included in section 616 of the Tariff Act of 1930.[59] Accordingly, the court denied COMPACT's motion and granted the government's cross-motion for summary judgment on that cause of action.[60]

The CIT's denial of COMPACT's motion certainly came as no surprise in view of the court's earlier denial of Zenith's motion on similar grounds. Nevertheless, a dark cloud was looming on the horizon for Zenith and COMPACT which neither they nor even the government had forecast. Four months after the CIT's decision in *COMPACT*, the Court of Customs and Patent Appeals (CCPA) was to deal a mortal blow to these plaintiffs' actions.

Undaunted by its lack of success on the merits of its first cause of action, Zenith cranked up the engines of discovery in an attempt to prove its claim of alleged arbitrary, capricious, and bad faith conduct by the government in settling these claims. In the course of an appeal from a CIT discovery order to the CCPA (a predecessor court to the Federal Circuit), the CCPA raised the issue of subject matter jurisdiction sua sponte.[61] After examining Zenith's complaint, the CCPA concluded that Zenith was attempting to press inquiry into the merits of and motives for the settlement, a prohibited area of inquiry in the court's view.[62] At most, the court explained, Zenith could challenge procedural irregularities in reaching the settlement; however other avenues of inquiry were beyond a court's jurisdiction.[63] According to the court:

> In no previous case has a court assumed jurisdiction at the behest of a third party to review the merits of a settlement agreement entered into by the Government with its [the third party's] competitor. The only precedent we find for setting aside a settlement is where the court has found that the complainant was deprived of its statutory right to a hearing on the merits of the underlying case prior to settlement. . . . [D]iscretionary action cannot be reviewed if "there is no law to apply." . . . No situation is more within the category of "no law to apply" than the multifaceted judgmental decision to settle a claim. Thus, the substance of the settlement is clearly outside the scope of judicial review.[64]

Invoking the "no law to apply" rule of judicial review,[65] the CCPA added that in matters entrusted to executive branch discre-

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[59] 527 F. Supp. at 344-45.

[60] *Id.* at 350.

[61] Montgomery Ward & Co. v. Zenith Radio Corp., 673 F.2d 1254, 1258 n.7 (C.C.P.A.), *cert. denied*, 459 U.S. 943 (1982).

[62] *Id.* at 1264.

[63] *Id.* at 1265.

[64] *Id.* at 1262 (citations omitted).

[65] *Id.* at 1262 (citing Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 410 (1971)).

tion, "[t]he only law to apply here is set forth as procedural requirements in 19 U.S.C. § 1617, and any legal wrong to Zenith must be based on the Secretary's violation of the procedures set forth therein."[66] The substance, merits, and motives for entering into the settlement agreement were outside the scope of judicial review.[67] Because Zenith never challenged the procedural regularity of the Secretary's action in reaching the settlement agreement, the CCPA reversed and remanded the case with directions to dismiss for lack of subject matter jurisdiction.[68]

The serious difficulty with the CCPA's decision is that no acknowledgment was made of Zenith's right to an administrative review of the outstanding dumping finding under section 751 and to judicial review of the agency's action thereunder pursuant to 19 U.S.C. section 1516a. Such review would have gone to the merits. By reading section 617 settlements as outside the scope of section 751 administrative determinations,[69] the CCPA unraveled a potentially knotty problem for the government but at the same time ignored congressional intent. In view of Congress' desire to afford American industry a greater role in the administrative process by which antidumping duties are assessed,[70] as well as its goal of introducing more procedural safeguards into this process,[71] one wonders whether the CCPA's delivery of section 617 from the jaws of section 751 was premised more on semantics and sophistry than sound legal reasoning. In this connection, the CCPA would have done well to heed the advice of Judge Learned Hand that

> it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.[72]

Following this stunning defeat, Zenith filed a petition for a writ of certiorari. While Zenith's petition was pending, the CIT denied the government's motion to dissolve the preliminary injunction on the ground that implementation of the settlement agreement would moot the controversy and thereby prevent Supreme Court review.[73]

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66 *Id.*

67 *Id.* at 1262-63.

68 *Id.* at 1265.

69 The CCPA explained that 19 U.S.C. § 1516a provides for judicial review of certain agency "determinations," including those made under § 751, but that § 617 settlements do not result in "determinations" within the contemplation of 19 U.S.C. § 1516a. Consequently, no judicial review of the factual or legal bases of § 617 settlements was permissible. *Id.* at 1260.

70 S. REP. No. 249, *supra* note 6, at 81 ("[section 751] provides a greater role for domestic interested parties and introduces more procedural safeguards").

71 *Id.*

72 Cabell v. Markham, 148 F.2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404, 409 (1945).

73 Zenith Radio Corp. v. United States, 3 Ct. Int'l Trade 243, 244 (1982).

After the Supreme Court denied certiorari on October 18, 1982,[74] the CIT dissolved the preliminary injunction.[75]

The baton was now passed to COMPACT which returned to the CIT immediately before dissolution of the *Zenith* injunction to salvage its and Zenith's seemingly doomed cases with motions for leave to amend its complaint and for a preliminary injunction.[76] Concluding that COMPACT could not succeed on the merits of its amended complaint, the CIT denied COMPACT's motion for a preliminary injunction.[77] In COMPACT's five-count amended complaint, the first and fifth counts tracked the first and second causes of action in COMPACT'S original complaint, that is, ultra vires and bad faith conduct by the Secretary of Commerce.[78] Taking its cue from the CCPA's *Montgomery Ward* decision, COMPACT's second, third, and fourth counts alleged procedural irregularities by the government in reaching the settlement.[79]

Specifically, in Count II of its amended complaint COMPACT contended that the requirement of section 617 that a report and recommendation be submitted to the Secretary of Commerce had not been satisfied.[80] The CIT had little difficulty, however, in finding that the reports, letters, and memoranda submitted by the Commissioner of Customs, the General Counsel of the Department of Commerce, and other government officials satisfied section 617's documentation requirements. To COMPACT's argument that a single report is required under section 617, the court reminded the plaintiff that the reporting requirement was designed to ensure that the Secretary made an informed settlement decision.[81] "Given this consideration," the CIT concluded, "the various letters and memoranda prepared in contemplation of a section 617 settlement, either severally or collectively, satisfy the procedural requirements of section 617."[82]

In Count III of its amended complaint, COMPACT challenged the factual accuracy of the General Counsel's settlement recommendation. Declining COMPACT's invitation to scrutinize the recommendation, the court noted that such an inquiry would go to the

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[74] Zenith Radio Corp. v. United States, 459 U.S. 943 (1982).

[75] Zenith Radio Corp. v. United States, 4 Ct. Int'l Trade 201, 202 (1982). The injunction was dissolved on November 15, 1982.

[76] COMPACT v. United States, 551 F. Supp. 1142 (Ct. Int'l Trade 1982), *aff'd*, 706 F.2d 1574 (Fed. Cir.), *cert. denied*, 464 U.S. 825 (1983).

[77] *Id.* at 1144.

[78] *Id.* The allegation of ultra vires conduct by the Secretary had earlier been dismissed by the CIT, *see* COMPACT v. United States, 527 F. Supp. 341, 350 (Ct. Int'l Trade 1981), *aff'd*, 706 F.2d 1574 (Fed. Cir.), *cert. denied*, 464 U.S. 825 (1983), and was also rejected by the CCPA in *Montgomery Ward*.

[79] 551 F. Supp. at 1145.

[80] *Id.*

[81] *Id.* at 1147.

[82] *Id.*

merits and substance of the General Counsel's recommendation, a prohibited area of inquiry under the *Montgomery Ward* decision.[83] With regard to Count IV's allegations of procedural irregularity insofar as whether the Secretary actually considered the report or recommendation, the CIT once again fell back on *Montgomery Ward*'s admonition not to probe the mental processes of the Secretary.[84] Given that all of the reports and the recommendation antedated the Secretary's decision to settle, the strong presumption of administrative regularity applied.[85] Turning finally to Count V of the amended complaint, the court concluded that allegations of bad faith conduct were in essence an attack on the motives for settlement, an area of inquiry beyond the CIT's jurisdiction.[86] Having thus concluded that there was little, if any, likelihood of success on the merits of COMPACT's amended complaint, the CIT denied its motion for a preliminary injunction.[87] The CIT consolidated the hearing on the motion with trial on the merits and granted judgment in favor of the government on all counts.[88] The lessons of *Montgomery Ward* were clearly not lost on the CIT. Arguably, the CIT applied those lessons with a vengeance.

With so much at stake, COMPACT took an appeal to the Federal Circuit.[89] Even without the benefit of hindsight, this appeal must surely have seemed a futile gesture to COMPACT. Putting to rest any lingering doubts as to whether it had decided otherwise in *Montgomery Ward*, the Federal Circuit reiterated that section 617 includes the power to settle antidumping duty claims.[90] As for Counts II through IV, the Federal Circuit reassured the CIT that the latter's reading of the *Montgomery Ward* decision was on the mark.[91] Parroting the rationale of the CIT for rejecting those three counts, the Federal Circuit affirmed the decision.[92] Finally, regarding Count V's bad faith allegations, the CAFC repeated its earlier statement in *Montgomery Ward* that "[p]roving that the estimate in the report . . . was lower than what Zenith considers reasonable does not destroy the lawfulness of [the Secretary's] decision."[93] With that conclusion, the Federal Circuit affirmed the CIT and dissolved the injunction pending

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[83] *Id.*

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Id.*

[88] *Id.* at 1142.

[89] COMPACT v. United States, 706 F.2d 1574 (Fed. Cir.), *cert. denied*, 464 U.S. 825 (1983).

[90] *Id.* at 1577.

[91] *Id.*

[92] *Id.* at 1577-78.

[93] *Id.* at 1579 (quoting Montgomery Ward & Co. v. Zenith Radio Corp., 673 F.2d 1254, 1264 (C.C.P.A.), *cert. denied*, 459 U.S. 943 (1982)).

appeal.[94] Apparently none the wiser from Zenith's experience with the Supreme Court, COMPACT likewise petitioned for a writ of certiorari and met the same fate as Zenith on October 3, 1983.[95]

The enmity with which these cases were litigated manifested itself in the post-judgment proceedings brought by the United States to recover against the 250,000 dollar bond deposited by Zenith in connection with the grant of its motion for a preliminary injunction. Whether the government's decision to move against the bond was an economically rational one is questionable in view of the protracted nature of the post-judgment proceedings compared to the modest amount of the bond.[96] In any event, after dissolution of the *Zenith* injunction, the government moved for assessment of damages on the injunction bond. The government sought to recover the lost interest on the delayed implementation of the settlement agreement.[97] Not surprisingly, Zenith opposed the motion on grounds that interest had accrued in favor of the government under the settlement agreement, and thus no damages were incurred.[98] Furthermore, Zenith contended that even if there were damages, the government had failed to enforce its rights to collect interest, and that failure amounted to a failure to mitigate damages.[99]

After learning of an intragovernmental dispute between the Commerce Department and the Customs Service over whether the government should have sought interest from the importers, Zenith served the United States with interrogatories and requests for production of documents relating to the substance of all communications concerning whether interest would or should accrue under the settlement agreement.[100] Although the United States responded in part to Zenith's discovery request, it asserted privilege with respect to discovery of information concerning three meetings held in July 1983 among the Commerce Department, Justice Department, and Customs Service, at which a decision was reached not to seek interest from the importers.[101] Zenith then made a motion to compel discovery on the grounds that the United States had waived its privileges by

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94 *Id.* at 1579.

95 COMPACT v. United States, 464 U.S. 825 (1983).

96 It may be the case that the government's decision to proceed against the injunction bond was premised on considerations which transcended the instant litigation, such as the deterrent effect the government's action would have on future litigants contemplating seeking injunctive relief against the United States. Unfortunately, if that was the government's thinking, the relatively insignificant amount of the injunction bond required of Zenith arguably made this case the wrong one for sending a signal to persons entertaining the thought of suing the United States for injunctive relief.

97 *See* Zenith Radio Corp. v. United States, 764 F.2d 1577, 1578 (Fed. Cir. 1985).

98 *Id.*

99 *Id.*

100 *Id.* at 1578-79.

101 *Id.* at 1579.

seeking damages.[102] After an *in camera* inspection of the sought-after documents, the CIT agreed that the government had waived its privileges with the exception of one document and one sentence in another document.[103]

In reversing the CIT, the Federal Circuit concluded that Zenith had not made a sufficient showing of need for the documents in question or that the opinions sought would be particularly probative for purposes of Zenith's defense.[104] More importantly, however, the question of whether the government was entitled to interest under the settlement agreement turned upon an interpretation of that agreement which, as the CAFC noted, was an issue of law.[105] Thus, although the CAFC agreed with the CIT as far as the applicable legal standard was concerned, it disagreed with the CIT's application of that standard to the given facts.[106]

More than a year after the Federal Circuit's reversal of the CIT's discovery order and more than three years after the government filed its motion to assess damages, the CIT issued its decision on that motion. As an initial matter, the court discussed the two general approaches federal courts have taken in assessing damages against an injunction bond.[107] The *Page Communication* approach adopted by the D.C. Circuit states that even where rule 65(c) requires a bond, it does not mean that the court is required to award damages on the bond if the injunction is dissolved. The court must still avoid inequitable results.[108] The *Coyne-Delany* approach adopted by the 7th Circuit states that when a defendant sustains damages because of a wrongfully issued preliminary injunction, the plaintiff should "normally be required to pay the damages, at least up to the limit of the bond."[109] Both of these approaches recognize the equitable discretion which the trial court retains in making any such assessment.[110] Against that legal backdrop, the CIT denied the government's motion on the ground that the CCPA's *Montgomery Ward* decision decided a novel jurisdictional question "contrary to what Zenith legitimately could have expected."[111] In the court's view, that decision effectively constituted a change in the law, a reason previously

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[102] *Id.*

[103] *Id.* at 1579. *See* Zenith Radio Corp. v. United States, 588 F. Supp. 1443, 1444-46 (Ct. Int'l Trade), *rev'd*, 764 F.2d 1577 (Fed. Cir. 1985).

[104] 764 F.2d at 1580-81.

[105] *Id.* at 1579-80.

[106] *Id.*

[107] Zenith Radio Corp. v. United States, 643 F. Supp. 1133, 1135-36 (Ct. Int'l Trade 1986), *aff'd*, 823 F.2d 518 (Fed. Cir. 1987).

[108] *Id.*

[109] *Id.*

[110] *Id.* at 1136-37. For a discussion of damage awards against injunction bonds, see Note, *Recovery for Wrongful Interlocutory Injunctions Under Rule 65(c)*, 99 HARV. L. REV. 828 (1986).

[111] 643 F. Supp. at 1138.

cited by other courts for refusing to assess damages on an injunction bond.[112]

Seven years after it all began, the Federal Circuit penned the last chapter in what had truly become a "lengthy saga."[113] On the government's appeal from the CIT's denial of its motion for assessment of damages, the CAFC applied an abuse-of-discretion standard of review and affirmed.[114] Taking issue with the CIT's characterization of the CAFC's *Montgomery Ward* decision as a "change in the law,"[115] adding that had it made the initial decision whether to assess damages on the bond it might have weighed factors differently than the CIT, the Federal Circuit nevertheless concluded that on balance the CIT had not abused its discretion in reaching the conclusion that it did.[116]

Zenith had won a small, but bittersweet, battle. Zenith, together with COMPACT, should have won the war. As discussed in the next part of this article, the CIT and the CAFC both misinterpreted the antidumping duty law when dismissing Zenith's and COMPACT's first causes of action. At this stage, unfortunately, if they want to press their fight further, Zenith and COMPACT will have to do so in the halls of Congress, for it is only from there that their nemesis in this legal challenge, discretionary executive branch power in the field of international trade, can be effectively curbed. The need for flexibility and discretion in resolving delicate international trade issues is understandable. When the exercise of discretion fails to comport with justice, propriety, and the law, however, and instead shows favor and unrestraint, such discretion becomes license and is unexcusable.

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[112] *See id.* at 1138, and cases cited therein. The CIT explained:

> Because of the jurisdictional ruling in *Montgomery Ward*, Zenith will never have an opportunity to prove its allegation, which the court has found nonfrivolous, that the $77 million settlement was tainted by bad faith. Under all the circumstances, however, it would be manifestly unfair to add a rule 65(c) insult to the jurisdictional injury. The $77 million settlement has never been vindicated on the merits. Rather, this court was held to lack jurisdiction to review the merits of the settlement. If Zenith lost the opportunity to be heard on its good faith claim of governmental impropriety, it should not be required to pay damages to the government as well.

Id. at 1138.

[113] Zenith Radio Corp. v. United States, 823 F.2d 518 (Fed. Cir. 1987).

[114] *Id.* at 522.

[115] The Federal Circuit commented as follows:

> The *Montgomery Ward* decision was not a "change in the law" in the sense that term has been used in other cases that upheld a district court's denial of damages resulting from a preliminary injunction. . . . On the other hand, the decision did announce and apply a limitation upon the jurisdiction of the Court of International Trade that had not theretofor been stated. The result was to preclude Zenith from litigating its contention, which the Court of International Trade "found nonfrivolous, that the $77 million settlement was tainted by bad faith."

Id. at 522 (citations omitted).

[116] *Id.* at 522.

II. The *Zenith* Settlement: Discretionary Power As License

In the field of foreign affairs the President has enjoyed wide latitude in dealing with international emergencies and in formulating U.S. foreign policy.[117] In *United States v. Curtiss-Wright Export Co.*, [118] a unanimous Supreme Court declared that the President possesses "plenary and exclusive power . . . in the field of international relations."[119] While the President may be vested with an inherent foreign affairs power,[120] no such power exists in the field of international trade. The Constitution expressly vests in Congress, not the executive branch, exclusive power to regulate foreign trade pursuant to the Commerce Clause.[121]

When it enacts legislation regulating international trade, Congress does, of course, delegate to the executive branch discretionary powers in order to implement its legislative scheme.[122] Yet even in

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[117] *See* L. HENKIN, FOREIGN AFFAIRS AND THE CONSTITUTION 37 (1972); Dames & Moore v. Regan, 453 U.S. 654, 656 (1981).

[118] 299 U.S. 304 (1936).

[119] *Id.* at 320.

[120] *But see* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635-36 n.2 (1952) (Jackson, J., concurring). For a criticism of Justice Sutherland's theory of Presidential power outlined in the *Curtiss-Wright* decision, see Berger, *The Presidential Monopoly of Foreign Relations*, 71 MICH. L. REV. 1, 26-28 (1972); Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 YALE L.J. 467 (1946).

[121] U.S. CONST., art. I, § 8, cls. 1 & 3. *See* United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955), where the Fourth Circuit noted:

> [W]hile the President has certain inherent powers under the Constitution . . . the power to regulate interstate and foreign commerce is not among the powers incident to the Presidential office, but is expressly vested by the Constitution in the Congress.

204 F.2d at 659. Notwithstanding this textual commitment of the foreign commerce power to Congress, "[i]t is impossible to extricate the question of distribution of powers over foreign economic affairs from the general problem of distribution of powers over foreign affairs in United States governmental and constitutional practice." J. JACKSON & W. DAVEY, CASES ON LEGAL PROBLEMS OF INTERNATIONAL ECONOMIC RELATIONS 77 (1986). Nevertheless, "even though the conduct of general foreign policy . . . may rest largely in the Executive Branch, when it comes to economic foreign policy, Congress does not hesitate to assert itself." *Id.* at 105.

[122] *See, e.g.*, 7 U.S.C. § 1854 (1982 & Supp. IV 1986) (originally enacted as Agricultural Act of 1956, Pub. L. No. 84-540, § 204, 70 Stat. 188, 200); 19 U.S.C. § 1337(g) (1982) (originally enacted as Tariff Act of 1930, Pub. L. No. 71-361, § 337(g), 46 Stat. 590, 704); *id.* § 1861 (1982) (originally enacted as Trade Expansion Act of 1962, Pub. L. No. 87-794, 76 Stat. 872); *id.* §§ 2251-2252 (1982 & Supp. III 1985) (originally enacted as Trade Act of 1974, Pub. L. No. 93-618, § 201, 88 Stat. 1978, 2011-24); *id.* § 2411 (Supp. III 1985) (originally enacted as Trade Act of 1974, Pub. L. No. 93-618, § 301, 88 Stat. 1978, 2041-43); *id.* §§ 2461-2466 (1982 & Supp. III 1985) (originally enacted as Trade and Tariff Act of 1984, Pub. L. No. 98-573, §§ 502-508, 98 Stat. 2948, 3018-23); 50 U.S.C. §§ 1701-1706 (1982 & Supp. III 1985) (originally enacted as International Emergency Economic Powers Act, Pub. L. No. 95-223, 91 Stat. 1626 (1984)). For recent decisions interpreting the President's power under most of these trade statutes, see Florsheim Shoe Co. v. United States, 744 F.2d 787 (Fed. Cir. 1984) (Generalized System of Preferences); Dames & Moore v. Regan, 453 U.S. 654 (1981) (International Emergency Economic Powers Act); Amer. Ass'n of Exporters & Importers v. United States, 751 F.2d 1239 (Fed. Cir. 1985) (section 204 of the Agricultural Act of 1956); Atlantic Richfield Co. v. United States,

those instances where Congress has given the executive branch broad discretionary powers, Congress has sometimes warned against the exercise of that power for reasons other than the merits. For example, in a revealing remark the Senate Finance Committee's report on section 201 of the Trade Act of 1974 noted that "relief ought not to be denied for reasons that have nothing to do with the merits of the case as determined under U.S. law. . . . [N]o U.S. industry which has suffered serious injury should be cut off from relief for foreign policy reasons."[123] These remarks evidence a congressional desire, if not directive, that the administrative decision-making process be depoliticized. But if that is so, then how is it possible to explain the President's decision to grant some form of relief in only eleven of thirty-two affirmative section 201 cases from 1974 to 1986?[124] At least a partial answer must be pressure group politics.[125]

By contrast with section 201 escape clause relief, when Congress amended section 337 of the Tariff Act of 1930 in 1974, it delegated authority to the President to disapprove affirmative section 337 determinations "for policy reasons."[126] The Senate Finance Committee Report on the Trade Act of 1974 explained why Congress felt it necessary to give the President discretionary disapproval authority:

> The President would often be able to best see the impact which the relief ordered by the [International Trade] Commission may have upon the public health and welfare, competitive conditions in the United States economy, the production of like or directly competitive articles in the United States, and United States consumers.[127]

Yet explanations such as these still are cold comfort to domestic industries which find themselves cut off from trade relief, even after they have successfully established their entitlement to relief, by the exercise of discretionary power by the executive branch which short-circuits the administrative process. While the flexibility that comes

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588 F. Supp. 427 (Ct. Int'l Trade 1984) (section 232 of the Trade Expansion Act of 1962); Duracell Inc. v. U.S. Int'l Trade Comm'n, 778 F.2d 1578 (Fed. Cir. 1985) (section 337 of the Tariff Act of 1930); Maple Leaf Fish Co. v. United States, 762 F.2d 86 (Fed. Cir. 1985) (section 201 of the Trade Act of 1974). For a discussion of the discretionary executive branch power under three of these trade statutes, see Kennedy, *Presidential Authority Under Section 337, Section 301, and the Escape Clause: The Case for Less Discretion*, 20 CORNELL INT'L L.J. 127 (1987).

123 S. REP. No. 1298, 93d Cong., 2d Sess. 205 (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7268 [hereinafter S. REP. NO. 1298].

124 *See* Applebaum, *Section 201 (The Escape Clause), and Section 406 of the Trade Act of 1974*, in UNITED STATES IMPORT RELIEF LAWS, CURRENT DEVELOPMENTS IN LAW AND POLICY 137, 158 (Practicing Law Institute 1985).

125 *See* Kennedy, *supra* note 122, at 147, 150, where the author concludes that "[n]o clear pattern emerges from these affirmative presidential relief determinations. . . . [A] possible explanation . . . is the size of the industry in question, both domestically and worldwide. The President is more likely to withhold relief when a larger industry is involved."

126 19 U.S.C. § 1337(g)(2) (1982).

127 S. REP. No. 1298, *supra* note 123, at 199, *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7211, 7331-32.

with discretionary power is undoubtedly welcomed and closely embraced by the executive branch, the unpredictability that necessarily follows from the exercise of that power gives rise to a perception on the part of U.S. domestic industries that U.S. trade laws are arbitrarily and capriciously administered. Witness the *Zenith* debacle. An observer cannot help but be struck by the thought that it was interest group politics, not the merits of a trade relief case, that informed the *Zenith* decision-making process. The disturbing upshot of episodes such as *Zenith* and *COMPACT*, of course, is that American manufacturers and producers may reject outright the statutory mechanisms created by Congress for securing trade relief in preference to extralegal (and arguably unconstitutional) trade relief devices such as voluntary restraint agreements.[128]

Congress has responded in a small way by introducing legislation that eliminates or substantially curtails executive branch discretion to deny trade relief under sections 201 and 301 of the Trade Act of 1974.[129] (An executive branch decision to deny trade relief is, of course, tantamount to settling a trade relief case in favor of the foreign industry.) Amending the various trade relief laws by eliminating or circumscribing the discretionary power of the executive branch to either grant or withhold trade relief or to settle trade cases would be a major step in the direction of restoring regularity and predictability to an administrative process riven with unpredictability and incoherence. The elimination of most executive branch discretion under U.S. trade laws would put an end to the license that has crept into these trade relief proceedings to the detriment of U.S. domestic industry. The elimination of most executive branch discretionary power would also be in the best interests of representative democracy for the simple reason that public confidence in the regularity and rationality of government would be enhanced. Conversely, when meritorious trade relief petitions are thwarted by the exercise of executive branch discretion after an affirmative agency determination that was the product of a regularized administrative proceeding, U.S. industries can only shake their collective head in frustration and disbelief.

The debate over eliminating executive branch discretionary power under U.S. trade relief laws has been discussed elsewhere and will not be repeated here.[130] More importantly, as the next part of the article explores, no such law reform would have been necessary in order for Zenith and COMPACT to have prevailed in their law-

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[128] *See, e.g., More Voluntary Restraint Agreements Said Solution to U.S. Trade Imbalance*, 4 Int'l Trade Rep. (BNA) at 490 (Apr. 8, 1987); *Industry Leaders Urge Administration to Take Tougher Imports Stance, Call for More VRAs*, 3 Int'l Trade Rep. (BNA) at 461 (Apr. 9, 1986).

[129] *See, e.g.*, Senate Omnibus Trade Act of 1987, S. 490, 100th Cong., 1st Sess. (1987); H.R. 4800, 99th Cong., 2d Sess. § 201, 132 CONG. REC. 3173 (1986).

[130] *See, e.g.*, Kennedy, *supra* note 122.

suits. The law as it existed then, even though it gave and still gives the executive branch discretionary power to settle antidumping duty cases, nevertheless curtailed the exercise of that power sufficiently so that those litigants should have had a hearing on the merits of their complaint.

III. Discretionary Power to Settle Antidumping Duty Cases

Under most of the U.S. trade relief laws, Congress has given the President broad discretionary powers to grant or withhold relief.[131] In notable contrast, however, in 1979 Congress trimmed the breadth of that discretionary power considerably under the antidumping (AD) and countervailing duty (CVD) laws,[132] far and away the most widely used and most discretion-free of all the U.S. trade relief statutes.[133] Indeed, the statutory provision affording interested parties judicial review of AD and CVD determinations[134] represents a clear congressional expression that regularity and rationality should be the hallmarks of an AD or CVD administrative proceeding.[135]

Despite the absence generally of broad discretionary executive branch power under the AD and CVD laws, such cases may still be settled at the administrative level by the Commerce Department,[136] bypassing the regularized administrative process. Nevertheless, specific statutory criteria must be satisfied before an AD or CVD investigation may be suspended.[137] In the legislative history of the Trade Agreements Act of 1979, Congress made it abundantly clear that shortcircuiting the AD and CVD administrative process was to be the rare exception:

> The suspension provision is intended to permit rapid and pragmatic resolutions of countervailing duty cases. However, suspension is an unusual action which should not become the normal means of disposing of cases. The Committee intends that investigations be suspended only when that action serves the interests of the public *and the domestic industry affected*. For this reason, the authority to suspend investigations is narrowly circumscribed.[138]

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[131] *See id.*, where the President's discretionary powers under § 337 of the Tariff Act of 1930, and §§ 201 and 301 of the Trade Act of 1974 are analyzed.

[132] 19 U.S.C. §§ 1671-1677g (1982 & Supp. III 1985).

[133] From 1980 through 1986, over 500 antidumping (AD) and countervailing duty (CVD) petitions were filed with the Commerce Department. *See Illegal and Unfair Foreign Trade Practices in Interstate and Foreign Commerce: Hearings Before the Subcomm. on Oversight and Investigations of the House Comm. on Energy and Commerce*, 99th Cong., 2d Sess. 18 (1986) (testimony of Malcolm Baldrige, Secretary of Commerce).

[134] 19 U.S.C. § 1516a(a) (1982 & Supp. III 1985).

[135] The right to judicial review under the AD and CVD laws is to be contrasted with §§ 201 and 301 trade relief where there is no right to judicial review. *See* Maple Leaf Fish Co. v. United States, 762 F.2d 86 (Fed. Cir. 1985).

[136] 19 U.S.C. §§ 1671(c), 1673(c) (1982 & Supp. III 1985).

[137] *Id.* §§ 1671c(b), 1671c(d), 1673c(b), 1673c(d) (1982 & Supp. III 1985).

[138] S. REP. No. 249, *supra* note 6, at 54 (emphasis added). In keeping with the letter and spirit of the suspension agreement provisions, Commerce views them as the exception rather than the rule. *See* Homer & Bello, *U.S. Import Law and Policy Series: Suspension and*

This congressional sentiment was underscored in 1984. Under the Trade and Tariff Act of 1984, Congress tightened the termination provisions of the AD and CVD laws by directing the Commerce Department to consider three public interest factors[139] and to consult with potentially affected consumer, industry, and worker groups[140] before suspending an AD or CVD investigation. But even in 1980 when Zenith filed its action in the CIT, it should have been evident to the reviewing courts that the "no law to apply" rule had no applicability whatsoever to an action challenging the settlement of an outstanding antidumping duty finding. Indeed, the CIT and the CAFC should have understood that when Congress enacted the AD and CVD provisions of the Trade Agreements Act of 1979, it was repealing *pro tanto* section 617.

First of all, compare *Zenith* with those cases in which the CAFC has relied upon the "no law to apply" rule. For example, in *Florsheim Shoe Co. v. United States*,[141] the Federal Circuit considered a challenge to the President's decision to remove certain items from a list entitling them to preferential treatment under the Generalized System of Preferences (GSP).[142] In rejecting the plaintiff's challenge, the CAFC held that courts will narrowly review Presidential action taken in conformance with delegated legislative authority, adding that "[t]he President's findings of fact and the motivation for his action are not subject to review."[143] One distinguishing and critical feature of the *Florsheim Shoe* case from the *Zenith* case is that the GSP does not provide aggrieved persons any right to judicial review.

The identical rationale has been employed by the Federal Circuit under many of the other trade relief statutes in which the President has been given discretionary authority but where Congress has made no express provision for judicial review of Presidential action taken pursuant to that authority. Thus, in *Maple Leaf Fish Co. v. United States*,[144] the Federal Circuit considered a challenge to the scope of relief following an affirmative section 201 escape clause de-

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Settlement Agreements in Unfair Trade Cases, 18 INT'L LAW. 683, 686-87 (1984). Through all of 1986, Commerce concluded only one AD and one CVD suspension agreement. *See* 51 Fed. Reg. 1005 (1986) (suspension of the countervailing duty investigation of certain red raspberries from Canada based on "an agreement to offset or eliminate all benefits . . . found to constitute subsidies on exports of certain red raspberries to the United States"); *Investigation of Canadian Red Raspberries Terminated on Basis of Suspension Agreement*, 3 Int'l Trade Rep. (BNA) at 92 (Jan. 15, 1986); *U.S. Japan Reach Five-Year Deal on Chips, Administration Dropping Dumping, § 301 Cases*, 3 Int'l Trade Rep. (BNA) at 995 (Aug. 6, 1986).

139 Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 604, 98 Stat. 2948, 3025-28 (codified as amended at 19 U.S.C. §§ 1671c(a)(2)(B), 1673c(a)(2)(B) (Supp. III 1985)).

140 19 U.S.C. §§ 1671c(a)(2)(C), 1673c(a)(2)(C) (Supp. III 1985).

141 744 F.2d 787 (Fed. Cir. 1984).

142 *See* Comment, *Trade Preferences and LDCs: Less Executive Discretion and More Congressional Direction: Florsheim Shoe Co. v. United States*, 58 ST. JOHN'S L. REV. 903 (1984).

143 744 F.2d at 795.

144 762 F.2d 86 (Fed. Cir. 1985).

termination. In upholding the scope of the President's relief determination, the CAFC stated that it would be improper for a court to interfere absent executive branch action beyond the President's delegated authority, quoting *Florsheim Shoe*'s admonition that "the President's findings of fact and the motivations for his action are not subject to review."[145] As was true under the GSP, section 201 does not provide adversely affected parties with a right to judicial review. Similarly, in *Duracell Inc. v. U.S. International Trade Commission*,[146] the Federal Circuit considered whether Presidential disapprovals under section 337 were subject to judicial review. The court concluded that it lacked jurisdiction to review a decision of the President disapproving an ITC unfair trade practice determination under section 337(g)(2); that his decision was in effect immune from judicial inquiry.[147] There again, however, Congress had not expressly provided for judicial review of executive branch action taken pursuant to section 337(g)(2).

Finally, in *American Ass'n of Exporters & Importers v. United States*,[148] a challenge was made to Presidential action taken pursuant to section 204 of the Agricultural Act of 1956 regulating textile imports to the United States. The Federal Circuit held that no restrictions could be placed on the President's actions so long as they were relevant to the enforcement of an existing textile agreement.[149] Section 204 does not provide for judicial review of Presidential action taken under that law.

The AD and CVD judicial review provisions of the Trade Agreements Act of 1979, coupled with the sweeping reforms introduced by the Customs Courts Act of 1980,[150] stand in sharp contrast to the foregoing trade relief laws and their absence of judicial review provisions. In enacting the Customs Courts Act of 1980, Congress sought to clarify and enlarge the jurisdiction of the CIT's predecessor, the Customs Court, in order to enable that court "to render extremely expeditious decisions in matters which are important both to our country and to our trading partners."[151] Perhaps the most important of all the reforms introduced by the Customs Courts Act of 1980 was the enactment of 28 U.S.C. section 1581(c).[152] That section

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145 *Id.* at 89.

146 778 F.2d 1578 (Fed. Cir. 1985). The *Duracell* case is only one of two reported decisions to consider the issue of judicial review of Presidential disapprovals under 19 U.S.C. § 1337(g)(2), the other case being Young Eng'rs, Inc. v. International Trade Comm'n, 721 F.2d 1305 (Fed. Cir. 1983).

147 *Duracell*, 778 F.2d at 1580-82.

148 751 F.2d 1239 (Fed. Cir. 1985).

149 *Id.* at 1247.

150 Pub. L. No. 96-417, 94 Stat. 1727 (1980) (codified in scattered sections of Title 28, U.S.C.).

151 S. REP. No. 466, 96th Cong., 1st Sess. 3-4 (1979).

152 That section provides that "[t]he Court of International Trade shall have exclusive

vests exclusive jurisdiction in the CIT to review AD and CVD administrative determinations made by the International Trade Commission (ITC) and the International Trade Administration of the Department of Commerce (ITA). In tandem with section 516A of the Tariff Act of 1930, which was added by the Trade Agreements Act of 1979,[153] it empowers the CIT to review a host of determinations made by the ITC and the ITA in the course of an AD and CVD investigation. The AD and CVD determinations judicially reviewable are:

(1) a determination by the ITA not to initiate an investigation;[154]

(2) an administrative review determination by the ITC or the ITA under section 751, 19 U.S.C. section 1675(b);[155]

(3) a preliminary determination of no injury by the ITC;[156]

(4) a final determination, either affirmative or negative, by the ITC or the ITA under the AD or CVD law;[157]

(5) a determination by the ITA to suspend an AD or CVD investigation;[158]

(6) an injurious effect determination by the ITC under 19 U.S.C. sections 1671c(h) or 1673c(h);[159] and

(7) a determination by the ITA whether a particular type of merchandise is within the class or kind of merchandise described in an AD or CVD order.[160]

In section 1581(c) cases, CIT review is upon the administrative record,[161] with the standard of review generally being whether the agency's decision is supported by substantial evidence on the record considered as a whole, or is otherwise not in accordance with law.[162]

One of Congress' primary purposes in enacting the section 751 administrative review procedures was to give domestic interested parties greater procedural safeguards,[163] and its main motive for en-

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jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930 [19 U.S.C. § 1516a]."

153 19 U.S.C. § 1516a, as amended by the Trade and Tariff Act of 1984, Pub. L. No. 98-573, § 623, 98 Stat. 2948, 3040. The 1984 amendments to § 516A eliminated most interlocutory appeals to the CIT.

154 19 U.S.C. § 1516a(a)(1)(A) (Supp. III 1985).

155 *Id.* § 1516a(a)(1)(B).

156 *Id.* § 1516a(a)(1)(C).

157 *Id.* § 1516a(a)(2)(B)(i), (ii) & (iii).

158 *Id.* § 1516a(a)(2)(B)(v).

159 *Id.*

160 *Id.* § 1516a(a)(2)(B)(vi).

161 19 U.S.C. § 1516a(b)(1)(B) (1982); 28 U.S.C. 2640(b) (1982).

162 *Id.* With certain preliminary determinations, such as a decision by the ITA not to initiate an investigation, the standard of review is whether the agency's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 19 U.S.C. § 1516a(b)(1)(A) (1982).

163 S. REP. No. 249, *supra* note 6, at 81.

acting the judicial review provisions of section 516A was to increase the opportunities for judicial review of such determinations,[164] *including the determination not to proceed with a section 751 review.* The CAFC put on judicial blinders when it concluded that because a "settlement" is not a "determination," sections 751 and 516A have no applicability.[165] Likewise, the CIT's conclusion that section 751 in no way modifies section 617's authority to settle antidumping duty claims[166] ignored the congressional intent behind the enactment of the Trade Agreements Act of 1979. Both conclusions allowed the Commerce Department to circumvent the strictures of the Trade Agreements Act of 1979 on grounds that amounted to little more than administrative convenience.[167]

If Congress had intended such a result then why would it have made it the rare case that AD cases be suspended? Even under an AD suspension agreement, the exporters of the merchandise under investigation must either cease exports of the merchandise to the United States,[168] or revise their prices to eliminate completely the margin of dumping.[169] Moreover, the requirement that the affected domestic industries be consulted entails "[c]omplete disclosure and discussion,"[170] not merely pro forma communications. It is inconceivable that Congress could have intended the administrative end around achieved in *Zenith*. While it is true that suspension agreements only take place in the context of an AD "investigation," which the *Zenith* case was not, the spirit of the Trade Agreements Act of 1979 is that AD findings and orders are generally to be aggressively enforced, not compromised or settled. Indeed, an AD investigation may be settled under the Trade Agreements Act of 1979 only if the petitioning American industry withdraws its petition.[171] Considering the remedial nature of the Trade Agreements Act of 1979, it is unfortunate that Congress' message concerning the lax enforcement of the AD laws under the Treasury Department could be so easily forgotten. There can be little doubt that Congress' expectation was that the administrative enforcement of the AD laws would be tightened. The *Zenith* opinions defeated that expectation through their cramped reading of congressional intent.

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164 *Id.* at 244-45.

165 *See* Montgomery Ward & Co. v. Zenith Radio Corp., 673 F.2d 1254, 1260 (C.C.P.A.), *cert. denied*, 459 U.S. 943 (1982).

166 Zenith Radio Corp. v. United States, 509 F. Supp. 1282, 1286-87 (Ct. Int'l Trade 1981).

167 *See* 673 F.2d at 1264. "A tremendous backlog of cases was inherited by the Secretary which may well have interfered with current work of his Department . . . ." *Id.*

168 19 U.S.C. § 1673c(b)(1) (1982).

169 *Id.* § 1673c(b)(2) (1982).

170 S. REP. No. 249, *supra* note 6, at 71.

171 19 U.S.C. § 1673c(a) (Supp. III 1985). As noted by Homer & Bello, *supra* note 138, at 687, "The legislative history reveals Congress' expectation that investigations be terminated only when in the public interest."

The CIT was unable or unwilling to find any expression of congressional intent repealing *pro tanto* section 617.[172] But all that is required is "some affirmative showing of an intention to repeal,"[173] not proof of such repeal beyond a reasonable doubt. Indeed, there may be a repeal by implication, although such repeals are not favored.[174] A statutory provision can be impliedly repealed by a subsequent enactment if the subsequent enactment covers the entire subject of the prior provision. In *United States v. Allen*,[175] the Supreme Court noted:

> While it is true that repeals by implication are not favored by the courts, it is settled that, without express words of repeal, a previous statute will be held modified by a subsequent one, if the latter was plainly intended to cover the whole subject embraced by both, and to prescribe the only rules in respect to that subject that are to govern.[176]

The Trade Agreements Act of 1979 did not purport to supplant the entire subject of settling claims arising under the customs laws, but that Act did rewrite the rules for terminating and suspending AD proceedings. It seems disingenuous to argue, as the CIT did, that since sections 751 and 617 serve two different purposes, there was no repugnancy between the two provisions.[177] On the contrary, settling a case for a fraction of the dollar with no input from interested third parties is certainly inconsistent with a statutory scheme that not only obligates the administering agency to consult with interested third parties before suspending an investigation, but also accords such parties a right to an administrative review of all outstanding AD findings and a further right to judicial review of that agency determination *on the merits*. That inconsistency is underscored by section 734(a) of the Trade Agreement Act of 1979,[178] the only statutory vehicle for settling AD cases under the Act, which requires withdrawal of the AD petition by the petitioning American industry in order to terminate an AD investigation.[179]

Section 751 may not refer to or derogate from section 617 in express terms, but at least the former implicitly modifies the latter. If it were otherwise, then every AD order and finding subject to section 751 review could be forestalled via a section 617 settlement, thereby repealing *pro tanto* not only section 751 but section 516A's judicial review provisions as well. It is therefore impossible to read sections 751, 516A, and 617, give effect to all three, and still pre-

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172 *See* 509 F. Supp. at 1286-87.
173 Morton v. Mancari, 417 U.S. 535, 550 (1974).
174 *Id.*
175 163 U.S. 499 (1896).
176 *Id.* at 501 (quoting Tracy v. Tuffly, 134 U.S. 206, 223 (1890)).
177 *See* 509 F. Supp. at 1287-88.
178 19 U.S.C. § 1673c(a) (Supp. III 1985).
179 *Id. See* Homer & Bello, *supra* note 138, at 687.

serve the sense and purpose of sections 751 and 516A. Under these circumstances, the latter provisions in time must prevail,[180] particularly where, as here, they treat in far more detail the subject matter covered generally in an earlier statute.[181]

IV. Conclusion

The string of opinions flowing from the *Zenith* litigation highlights the great difficulty American industry has had in obtaining meaningful trade relief because of executive branch discretionary power. That Zenith and COMPACT came away empty handed was not a foregone conclusion. On the contrary, although the courts were faced with a congressional delegation of discretionary power to the executive branch, a more sympathetic treatment of the Trade Agreements Act of 1979 at the hands of the courts would have resulted at least in a hearing on the merits for Zenith and COMPACT.

Congress spoke in clear terms when it passed the Trade Agreements Act of 1979: In the future the administration of antidumping duty law is not to be "business as usual." Congress wanted more regularity and more predictability in the AD administrative process, and less agency discretion. It sought to accomplish these goals by enacting more stringent procedural guarantees for domestic interested parties, including giving them two opportunities to seek judicial review of that administrative process, the first in the CIT, the second in the CAFC.[182] These goals were frustrated by the courts' reluctance to check the executive branch and their willingness to put a crabbed gloss on Congress' purpose in enacting the Trade Agreements Act of 1979.

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[180] *See* Watt v. Alaska, 451 U.S. 259, 268 (1981); 2A C. SANDS, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 51.02 (1984).

[181] *See* United States v. United Continental Tuna Corp., 425 U.S. 164, 168-69 (1976).

[182] *See* 28 U.S.C. § 1295(a)(5).