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## NOTES

### Zenith Radio Corp. v. United States: The Demise of Congressionally Mandated Countervailing Duties

The countervailing duty has long been a favorite tool of the Congress to achieve what it considers to be fair trade between the United States and her trading partners. Countervailing duties are extra duties imposed upon goods that enjoy subsidies, in whatever form, from a foreign government. In *Zenith Radio Corp. v. United States*,<sup>1</sup> the Supreme Court agreed with the Department of Treasury that a remission by the Government of Japan of a domestic indirect<sup>2</sup> commodity tax upon electronic goods was not a subsidy requiring a countervailing duty. This Note will suggest that the Court's dependence upon the legislative history of the countervailing duty statute, the longstanding practice of the Treasury Department, and the reliance interests that have arisen because of this practice, are misplaced. Rather, an analysis of circumstances surrounding the case reveals that it is unarticulated political considerations, such as pressure from the Government of Japan and the Department of State, which make logic of an otherwise illogical decision.

In April, 1970, Zenith filed a petition with the Commissioner of Customs,<sup>3</sup> seeking the imposition of a countervailing duty upon elec-

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<sup>1</sup> 437 U.S. 443 (1978). Zenith alleged in its complaint that the tax remission by the Government of Japan should be countervailed under § 303(a) of the Tariff Act of 1930, 19 U.S.C. § 1303(a) (1976), which provides in relevant part that:

- (1) Whenever any country, dependency, colony, province or other political subdivision of government, person, partnership, association, cartel, or corporation shall pay or bestow, directly, any bounty or grant upon the manufacture or production or export of any article . . . then upon the importation of such article or merchandise into the United States . . . there shall be levied and paid, in all such cases, in addition to any other duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

<sup>2</sup> The term "indirect" tax usually refers to four major types of taxes: excise taxes, sales taxes, stamp taxes, and customs duties. See generally J. DUE, *INDIRECT TAXATION IN DEVELOPING ECONOMIES* 1-99 (1970). While an indirect tax system causes higher prices to consumers, it allows a greater rate of savings that can then be used for capital formation. *Id.* at 8-12. Direct taxes, particularly on corporate income, primarily absorb funds that otherwise would be used for capital formation. *Id.* Further, indirect taxes reduce the consumption of imported luxury goods because of the higher prices; the net effect is to lessen the drain on foreign exchange reserves and to facilitate the importation of goods necessary for optimal capital formation. *Id.*

<sup>3</sup> The Secretary of the Treasury has delegated the authority to make countervailing duty

tronics products<sup>4</sup> exported from Japan to the United States. The petitioner alleged that Japan's remissions of a tax levied under the Commodity Tax Law of Japan<sup>5</sup> constituted a bounty or grant because the return of the commodity tax when the goods were exported had conferred a direct or indirect benefit upon the Japanese producers. After an investigation<sup>6</sup> and without providing any reasons, the Commissioner rejected Zenith's petition.

Zenith subsequently filed suit in Customs Court<sup>7</sup> disputing this finding.<sup>8</sup> The Treasury Department, on behalf of the Commissioner, argued in defense that the statute did not require assessment of a countervailing duty because the remission of the commodity tax in issue was non-excessive.<sup>9</sup> The three-judge panel,<sup>10</sup> however, unanimously granted Zenith's motion for summary judgement as a matter of law,<sup>11</sup> holding that the remission was clearly encompassed by the statutory language of section 303(a). The Court of Customs and Patent Appeals reversed in a three-to-two decision, holding that the remission did not constitute a bounty or grant within the meaning of the statute.<sup>12</sup> The

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determinations to the Commissioner of Customs, subject to the Secretary's approval. 19 C.F.R. § 159.47 (1977).

<sup>4</sup> The products were television receivers, picture tubes, radios, radio-phonographs, radio-phonograph-television combinations, record and tape players, and tape recorders. 437 U.S. at 446 n.5.

<sup>5</sup> Law No. 48 of 1962. Under this law, television receivers, sound equipment and other consumer durable goods, such as cars, boats and appliances are called Class 2 Commodities. *Id.* Televisions are taxed at a rate of 15-20% of the wholesale price while the other mentioned goods are taxed at a rate of 15-30%. *Id.*

<sup>6</sup> 41 Fed. Reg. 1298 (1976).

<sup>7</sup> *Zenith Radio Corp. v. United States*, 430 F. Supp. 242 (Cust. Ct. 1977).

<sup>8</sup> In 1975 Congress authorized American manufacturers, producers and wholesalers to seek review in the Customs Court of decisions against the imposition of a countervailing duty. 19 U.S.C. § 1516(d) (1976). This provision was enacted in response to a holding that the courts lacked jurisdiction to review such determinations. *United States v. Hammond Lead Products, Inc.*, 440 F.2d 1024 (C.C.P.A.), *cert. denied*, 404 U.S. 1005 (1971).

<sup>9</sup> 437 U.S. at 447.

<sup>10</sup> Upon the government's motion, the chief judge of the Customs Court appointed a three-judge panel pursuant to § 108 of the Customs Court Act of 1970, 28 U.S.C. § 225(a) (1970). Section 108 provides that:

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.

*Id.*

<sup>11</sup> 430 F. Supp. at 265.

<sup>12</sup> *United States v. Zenith Radio Corp.*, 562 F.2d 1209, 1223 (C.C.P.A. 1977). Whether this court decided the issue as a question of law or fact is unclear. *See generally* 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.*

Supreme Court granted certiorari on February 12, 1978.<sup>13</sup>

In affirming the decision of the Court of Customs and Patent Appeals, the Supreme Court based its opinion upon four considerations.<sup>14</sup> First, the legislative history of the various Tariff Acts revealed that Congress did not intend the countervailing duty statute to apply to nonexcessive remissions of indirect taxes.<sup>15</sup> Second, the construction that the Secretary of Treasury had placed upon the statute was deemed to be reasonable in light of the statutory purpose of preventing unfair competition, regardless of what the legislative history might indicate.<sup>16</sup> Third, since the Treasury Department's interpretation was longstanding and had been incorporated into the General Agreement on Tariffs and Trade (GATT),<sup>17</sup> it had created substantial reliance interests, and thus, it would "not be disturbed except for cogent reasons."<sup>18</sup> Finally, *Zenith's* reliance upon *Downs v. United States*<sup>19</sup> was misplaced because that case involved not only the remission of an indirect tax, as was the case in *Zenith*, but also the granting of a commercially valuable certificate.<sup>20</sup>

This note will first examine the correctness of the *Zenith* Court's interpretation of the purpose and effect of the congressional amendments to the 1890<sup>21</sup> and 1894<sup>22</sup> countervailing duty statutes. Secondly, it will compare the *Zenith* decision with prior case law that had interpreted the countervailing duty statutes, consistent with the congressional intent and command, to encompass nonexcessive remissions of indirect taxes.<sup>23</sup> Thirdly, it will criticize in the light of current methods of economic analysis the eighty year-old position of the Treasury Department which maintains that all indirect taxes are completely shifted forward to the consumer.<sup>24</sup> Finally, the Note will analyze the trade

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§ 1303 (*Supp. V 1975*), 46 FORDHAM L. REV. 573 (1973) [hereinafter cited as *Customs Law*]; Development, *Export Subsidies—Countervailing Duties*, 10 CASE W. RES. J. INT'L L. 577 (1978).

<sup>13</sup> 434 U.S. 1060 (1978).

<sup>14</sup> 437 U.S. at 450-62.

<sup>15</sup> *Id.* at 450-54.

<sup>16</sup> *Id.* at 454-57.

<sup>17</sup> *Id.* at 457. Article VI (3) of GATT, adopted in 1947, 61 Stat. A24, T.I.A.S. No. 1700 (1947), provides that: "[n]o product . . . imported into the territory of any other contracting party shall be subject to . . . countervailing duty by reason of the exemption of such product from . . . taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such . . . taxes."

<sup>18</sup> 437 U.S. at 457-58.

<sup>19</sup> 187 U.S. 496 (1903).

<sup>20</sup> 437 U.S. at 459-62.

<sup>21</sup> 26 Stat. 567, 584 (1890) (current version at 19 U.S.C. § 1303(a) (1976)).

<sup>22</sup> 28 Stat. 151 (1897) (current version at 19 U.S.C. § 1303(a) (1976)).

<sup>23</sup> See text accompanying notes 53-68 *infra*.

<sup>24</sup> See text accompanying notes 96-103 *infra*.

disequilibrium that has developed between Japan and the United States partly because of Japan's tax remission systems<sup>25</sup>—a development with which the Treasury Department and the Court should come to terms.

#### CONGRESSIONAL EXTENSION OF THE SCOPE OF COUNTERVAILING DUTIES

Congress first authorized the imposition of countervailing duties in the Tariff Acts of 1890<sup>26</sup> and 1894<sup>27</sup> in order to combat German subsidies of sugar exported to the United States.<sup>28</sup> These statutes exempted foreign sugar exporters from the payment of countervailing duties if it could be shown that the triggering bounty paid by the foreign government did not exceed the tax collected by that government upon the sugar or the beets from which the sugar was produced.<sup>29</sup> In the Tariff Act of 1897,<sup>30</sup> Congress expanded the statute, imposing countervailing duties on all imported products subject to duties that had benefited from either "bounties" or "grants."<sup>31</sup> In other words, the countervailing duty was intended to offset any unfair advantage derived from the bounty or grant that dutiable products exported to the United States enjoyed.

Relying heavily upon the 1897 floor debates, the *Zenith* Court emphasized the continuity and similarity that existed between these three Tariff Acts.<sup>32</sup> The Court noted, for example, that the senator who sponsored the 1897 amendment had commented that it was an imitation of the 1894 countervailing duty on sugar.<sup>33</sup> In addition, the Court referred to the extended floor discussion about the effect of the 1897 statute upon German sugar imports.<sup>34</sup> Moreover, an analysis of the legislative history of the Tariff Act of 1897 led the Court to conclude that Congress used the term "net amount"<sup>35</sup> in the 1897 statute to mean

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<sup>25</sup> See note 103 *infra*.

<sup>26</sup> Note 21 *supra*.

<sup>27</sup> Note 22 *supra*.

<sup>28</sup> 437 U.S. at 451-52.

<sup>29</sup> *Id.* at 453.

<sup>30</sup> 30 Stat. 151 (1897) (current version at 19 U.S.C. § 1303(a) (1976)).

<sup>31</sup> See text accompanying notes 58-60 *infra* for further discussion of the word "grant".

<sup>32</sup> 437 U.S. at 451-55.

<sup>33</sup> *Id.* at 453.

<sup>34</sup> *Id.* at 454.

<sup>35</sup> In the 1894 statute, Congress stated that only a "net bounty", *i.e.*, a remission in excess of taxes paid or otherwise due, triggered the countervailing duty. 28 Stat. 521 (current version at 19 U.S.C. § 1303(a)(1976)). The *Zenith* Court argued that the "net bounty" term of the 1894 statute and the "net amount" term of the 1897 statute were essentially functional equivalents. 437 U.S. at 453.

the amount remitted in excess of domestic excise taxes already paid.<sup>36</sup> The Court noted in support of its arguments that Senator Jones, the author of the provision in the 1894 Tariff Act that exempted nonexcessive tax remissions from a countervailing duty,<sup>37</sup> had characterized the difference between the amounts received upon exportation and the amounts already paid in taxes as the "net bounty" upon exportation.<sup>38</sup> The Court further observed that Senator Allison, the sponsor of the 1897 amendment, had considered the bounty contemplated by his proposed countervailing duty statute to be the net bounty less any taxes and reductions.<sup>39</sup>

This exegesis of the legislative history, however, is much less convincing than the *Zenith* Court's interpretation would lead one to believe. Notwithstanding the remarks of Senators Jones and Allison, Congress did delete the 1894 Jones proviso, which had exempted nonexcessive remissions of indirect taxes, when it enacted the 1897 statute.<sup>40</sup> Thus, it is only reasonable to assume that, if the legislature had meant to exempt the nonexcessive remission of taxes, it would have left the 1894 exemption in its place rather than going to the trouble of repealing it. Several remarks made during the legislative debate of the 1897 statute lend credence to this assumption.

During the congressional debates on the 1897 statute, Senator Caffery pointed out that American retaliatory action is sometimes necessary for self-preservation.<sup>41</sup> Conceding that it is generally good policy to accept less expensive goods,<sup>42</sup> he argued that such a policy becomes inappropriate when there is sufficient inducement, in the form of a bounty or grant given by a foreign government to its producers, to export and thereby to destroy American industry.<sup>43</sup> Furthermore, Representative Meyer of Louisiana, a delegate from the heart of the American sugar cane growing industry, emphatically declared:

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<sup>36</sup> 437 U.S. at 453-54.

<sup>37</sup> The exemption specified:

That the importer of sugar produced in a foreign country, the Government of which grants such direct or indirect bounties, may be relieved from this additional duty under such regulations as the Secretary of the Treasury may prescribe, in case said importer produces a certificate of said government that no indirect bounty has been received upon said sugar in excess of the tax collected upon the beet or cane from which it was produced, and that no direct bounty has been or shall be paid . . . .

28 Stat. 521 (current version at 19 U.S.C. § 1303(a) (1976)).

<sup>38</sup> 437 U.S. at 452, citing 26 Cong. Rec. 5705 (1894).

<sup>39</sup> *Id.* at 454, citing 30 Cong. Rec. 1721 (1897).

<sup>40</sup> Compare 28 Stat. 509, 521 (1894) with 30 Stat. 151 (1897).

<sup>41</sup> 30 Cong. Rec. 2205 (1897).

<sup>42</sup> See note 118 *infra* for further discussion of this point within the context of the economic doctrine of comparative advantage.

<sup>43</sup> 30 Cong. Rec. 2205 (1897).

We do not say to [foreign supporters] you shall or shall not impose this tax or this bounty, but we do say that when we find your export bounty *or other device* enables you to come here and undersell our own people, we will meet you at the shore with a countervailing duty about which there will be no quibbling or mistake.<sup>44</sup> (Emphasis added.)

He urged Congress to place a countervailing duty on *all remissions*, whether excessive or not.<sup>45</sup>

Thus, the legislative commentary which the *Zenith* Court cited does indeed support its decision that nonexcessive remissions were not to be countervailed. However, the repeal in 1897 of the exemption contained in the 1894 Act and other statements in the legislative history of the 1897 Act strongly suggest just the opposite.

The selective use in *Zenith* of the commentary from legislative debates is particularly inappropriate because the Court has recognized in the past that such speeches given on the floor in Congress are unreliable sources of information for determining the meaning of statutory language. In *United States v. Trans-Missouri Freight Ass'n*,<sup>46</sup> the Court reasoned that it is impossible to ascertain with any certainty what construction attaches to legislation by referring to the speeches of individual members of the enacting legislatures. Instead, as the Court pointed out in *United States v. Wrightwood Dairy Co.*,<sup>47</sup> legislative intent is more reliably determined by reference to reports of committees or their members.

In *Zenith*, the Court made no reference to any such committee or committee member reports. The Court's selective reliance on the Jones and Allison statements was therefore misguided, especially in light of the contradictory statements made by Caffery and Meyer during the same debates.

The history of the present countervailing duty statute, however, does not stop with the Tariff Act of 1897, even though the *Zenith* Court never mentioned any subsequent tariff legislation. Congress significantly enlarged the scope of countervailing duty protection under the Tariff Acts of 1909,<sup>48</sup> 1913,<sup>49</sup> and 1922.<sup>50</sup> The new statutes extended the reach of countervailing duties to include bounties or grants on manufacture or production, not just exportation, by inserting the phrase

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<sup>44</sup> *Id.* at 318.

<sup>45</sup> *Id.*

<sup>46</sup> 166 U.S. 290 (1897).

<sup>47</sup> 315 U.S. 110 (1941). See text accompanying notes 77-92 *infra* for further discussion of Senate committee reports on the scope of the countervailing duty statute.

<sup>48</sup> 36 Stat. 11, 85 (1909) (current version at 19 U.S.C. § 1303(a) (1976)).

<sup>49</sup> 38 Stat. 114, 193-94 (1913) (current version at 19 U.S.C. § 1303(a) (1976)).

<sup>50</sup> 42 Stat. 858, 935-36 (1922) (current version at 19 U.S.C. § 1303(a) (1976)).

“upon the manufacture or production or export of any article.”<sup>51</sup> The practical effect of these amendments was to make the countervailing duty law applicable to any foreign bounty or grant, regardless of whether the foreign bounty or grant was specifically designed to encourage exportation or to resolve domestic, fiscal, or production problems.<sup>52</sup> Hence, this broad expansion of the reach of the countervailing duty statute attained by the amendments of 1909, 1913, and 1922 is a direct reflection of congressional intent to counteract any action taken by foreign governments which confers any benefits upon their producers exporting to the United States.

#### JUDICIAL CONSTRUCTION OF THE COUNTERVAILING DUTY STATUTE

Until *Zenith*, the Court had consistently given effect to the broad congressional purpose of offsetting all benefits conferred by a foreign government upon its exporters. The Court first interpreted the countervailing duty statute in 1903 in *Downs v. United States*.<sup>53</sup> In *Downs*, the Court considered a complicated program to stimulate sugar production in which the Russian government (1) remitted a domestic tax upon sugar and (2) gave exporting producers a negotiable certificate.<sup>54</sup> Without holding that the remission was a bounty in and of itself, the Court concluded that the Russian scheme as a whole bestowed a bounty upon exporters.<sup>55</sup> Thus, the Court held that the imposition of a countervailing duty upon the Russian sugar was mandatory under the Tariff Act of 1897.<sup>56</sup>

In *Zenith*, the Court found that the bestowal of the certificate in *Downs* was the dispositive factor in that Court's decision.<sup>57</sup> Specific language in the *Downs* decision, however, indicates that the statute was interpreted more broadly than that. Justice Brown, writing for the majority in *Downs*, stated that “[w]hen 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.*”<sup>58</sup> (Emphasis added). Moreover, the

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<sup>51</sup> *Id.*

<sup>52</sup> See Comment, *United States Countervailing Duty Law: Renewed, Revamped and Revisited—Trade Act of 1974*, 17 B.C. IND. & COM. L. REV. 832 (1976).

<sup>53</sup> 187 U.S. at 502-512.

<sup>54</sup> *Id.* at 516.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> 437 U.S. at 461.

<sup>58</sup> 187 U.S. at 516.



*Zenith* Court ignored the point raised by *Zenith* in its brief<sup>59</sup> that the *Downs* Court had explicitly stated that a remission of domestic sales or commodity tax upon exportation is an example of an indirect bounty.<sup>60</sup> The Court's attempt to distinguish *Downs* from *Zenith* was therefore misguided.

Nor is there any explanation for the *Zenith* Court's summary dismissal<sup>61</sup> of *G.S. Nicholas & Co. v. United States*,<sup>62</sup> the only other Supreme Court case construing the countervailing duty statute. In that case, the British government had remitted a domestic tax levied upon certain alcoholic beverages and paid a small allowance when these products were exported. The Treasury Department then imposed a countervailing duty that was upheld by all three reviewing tribunals.<sup>63</sup> The *Zenith* Court dismissed *Nicholas* in a footnote because the British program at issue had included a direct bounty.<sup>64</sup>

This dismissal, though, is unsatisfying given the sweeping pronouncements and the similar *rationes decidendae* of all three reviewing courts. The Board of General Appraisers, the precursor of the Customs Court, relied heavily upon the language in *Downs* when it stated that any remission of taxes is a bounty under the Tariff Act.<sup>65</sup> The Court of Customs Appeals then held that the sole inquiry in such cases is whether the foreign remission of an indirect tax upon export to the United States enables the exported goods to be sold at a lower price in competition with American goods.<sup>66</sup> In affirming the Customs Court, the Supreme Court went on to declare that "[i]f the word 'bounty' has a limited sense, the word 'grant' has not. A word of broader significance could not have been used."<sup>67</sup> The Court further noted that a grant is a "concession, the conferring of something by one person upon another."<sup>68</sup>

It is submitted that the expansive language in *Downs* and *G.S. Nicholas* is fully consistent with the intent of Congress to exercise fully

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<sup>59</sup> Brief for Petitioner at 14.

<sup>60</sup> 187 U.S. at 515.

<sup>61</sup> 437 U.S. at 459 n.15.

<sup>62</sup> 187 U.S. 34 (1919).

<sup>63</sup> 29 Treas. Dec. 59 (Bd. Gen. App. 1915), *aff'd*, 7 Ct. Cust. App. 97 (1917), *aff'd*, 249 U.S. 34 (1919).

<sup>64</sup> Note 61 *supra*.

<sup>65</sup> 29 Treas. Dec. 59, 64 (Bd. Gen. App. 1915).

<sup>66</sup> 7 Ct. Cust. App. 97, 107 (1916).

<sup>67</sup> 249 U.S. 34, 39 (1919).

<sup>68</sup> *Id.*

its power under the commerce clause<sup>69</sup> to impose countervailing duties upon goods that have received any benefits, direct or indirect.<sup>70</sup> Moreover, it is also consistent with the Court's practice, as shown in income tax cases decided by it, of giving full rein to Congress to lay and collect taxes on income, from whatever source derived.<sup>71</sup> In a nutshell, then, the *Zenith* Court's sudden decision to check Congress' exercise of its power over foreign commerce is inconsistent with prior decisions and policies.

#### EXECUTIVE AGENCY INTERPRETATION OF ENABLING LEGISLATION

The *Zenith* Court adopted the interpretation of the countervailing duty statute espoused by the Secretary of the Treasury.<sup>72</sup> In the Court's view, that interpretation furthered the statutory purpose of section 303(a) to prevent unfair competition.<sup>73</sup> The legislative history surrounding the Secretary's interpretation reveals that this is simply not so.

The Secretary had consistently ruled that a nonexcessive remission of an indirect tax was not a subsidy but a means of avoiding double taxation by both the exporting and importing countries.<sup>74</sup> This long-standing administrative policy, the Court reasoned, had encouraged substantial reliance interests among America's major trading partners and had even been incorporated into the GATT.<sup>75</sup> Thus, only "cogent reasons" could justify a change in policy.<sup>76</sup>

However reasonable the Secretary's interpretation of the countervailing duties statute seemed to the Court,<sup>77</sup> Congress has refused to

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<sup>69</sup> U.S. CONST. art. I, § 8, which reads in pertinent part: "The Congress shall have Power To . . . regulate Commerce with foreign Nations and among the several States . . . ."

<sup>70</sup> See notes 41-52 and accompanying text *supra*.

<sup>71</sup> See generally *Commissioner v. Kowalski*, 434 U.S. 77 (1977); *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955); *United States v. Kirby Lumber Co.* 284 U.S. 1 (1931); *Old Colony Trust Co. v. Commissioner*, 279 U.S. 716 (1929); *Eisner v. Macomber*, 252 U.S. 189 (1920).

<sup>72</sup> 437 U.S. at 457.

<sup>73</sup> *Id.* at 456.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 457.

<sup>76</sup> *Id.* at 457-58.

<sup>77</sup> The Court of Customs and Patent Appeals also found the Secretary's position to be entitled to considerable weight because the Congress reenacted the statute without change and failed to revise the statute in the face of the Treasury Department's practice. 562 F.2d at 1219. *But see* the decision of the Board of General Appraisers in *Nicholas* where it is stated that the *Downs* decision, which held that nonexcessive tax remissions triggered countervailing duties, is the one "which Congress is presumed to have adopted rather than that given in the brief letter of the Assistant Secretary of the Treasury." 29 *Treas. Dec.* at 64. *Cf.* note 95 *infra* where the Court stated that Congress' silence cannot baptize a statutory gloss.

endorse it at least six times. In 1950<sup>78</sup> and 1951<sup>79</sup> Congress explicitly rejected proposals that would have excluded from the scope of the countervailing duty law a foreign government's remissions of, or exemption from, taxes on goods exported to the United States.<sup>80</sup> A similar refusal occurred in 1968.<sup>81</sup> In 1970, in addition to declining to enact the Treasury Department's proposed amendment, a Senate report explained the Senate's awareness of the Supreme Court cases (*Downs* and *Nicholas*) and of a 1970 Customs Court case that had interpreted the words "bounty" and "grant" to apply to virtually all subsidies, "including the rebate of indirect taxes."<sup>82</sup> In 1973, the Treasury Department's position was again rejected.<sup>83</sup>

The most recent refusal to enact the Treasury Department's interpretation came with the Trade Act of 1974.<sup>84</sup> The Senate Finance Committee declared that the purpose of the Trade Act was to provide, among other things, close, continuing congressional oversight of international trade and effective import relief to domestic industries that are seriously injured or threatened with injury by increased imports.<sup>85</sup> The Senate then strongly criticized the Executive's implementation of the trade statutes.

Too often the Executive has granted trade concessions to accomplish political objectives. Rather than conducting U.S. international economic relations on sound economic and commercial principles, the Executive has used trade and monetary policy in a foreign aid context. An example has been the Executive's unwillingness to enforce U.S. trade statutes in response to foreign trade practices.<sup>86</sup>

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<sup>78</sup> H.R. 8304, 81st Cong., 2d Sess. (1950).

<sup>79</sup> H.R. 1535, 82nd Cong., 1st Sess. (1951).

<sup>80</sup> 430 F. Supp. at 253 (Newman, J., concurring) (citing the proposed Customs Simplification Act of 1950, H.R. 8304, 81st Cong., 2d Sess.). The bill was referred to the Committee on Ways and Means, 96 Cong. Rec. 6075, 6119 (1950), where it died. [1949-1950 Transfer Binder] Cong. Index (CCH) 3664. As Judge Newman pointed out: "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." *Id.* at 254.

<sup>81</sup> 2 S. COMM. ON FIN., COMPENDIUM OF PAPERS ON LEGISLATIVE OVERSIGHT OF UNITED STATES TRADE POLICIES, 90th Cong., 2d Sess. 475-76, 568-69, 887-89, 918-19 (1968).

<sup>82</sup> S. REP. NO. 91-1431, 91st Cong., 2d Sess. 278-81 (1970).

<sup>83</sup> In its consideration of the Trade Act of 1974 in 1973, the House Ways and Means Committee specifically noted 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. REP. NO. 93-571, 93d Cong., 1st Sess. 69 (1973).

<sup>84</sup> 88 Stat. 1978 (1975) (codified in scattered sections of 5, 19, 26, 31 U.S.C.).

<sup>85</sup> S. REP. NO. 1298, 93d Cong., 2d Sess., reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7186, 7187 [hereinafter cited as *Report*].

<sup>86</sup> *Id.* at 7193. Several sources have commented upon the Executive's obvious unwillingness

This criticism applies in full force to the position taken by the Treasury Department, as it is the executive agency responsible for enforcing the trade statutes.

The Senate report further noted that even though the United States is a party to the GATT, such membership need not completely determine U.S. trade policies because the GATT is often either inappropriate in today's complex world economy or is observed only in the breach.<sup>87</sup> In support of these observations, the Committee declared that there are too many nontariff barriers to, and distortions of, trade.<sup>88</sup> They include quotas, variable levies, border taxes, discriminatory procurement and internal taxation practices, rules of origin requirements, and subsidies.<sup>89</sup> The Committee specifically stated that implicit payments through a reduction of a particular tax liability constitute subsidies.<sup>90</sup>

The view that Congress intended indirect tax remissions to be countervailed receives further support from statements of the Senate Finance Committee. In a committee print, it declared that the countervailing duty law is meant to counter the subsidy effect of indirect tax remissions upon exports.<sup>91</sup> It then noted that the law has not been applied even though couched in mandatory terms.<sup>92</sup>

The consistent refusal of Congress to adopt the Treasury Department's interpretation of section 303(a) and the legislative reports surrounding these refusals reveal congressional disapproval of the executive's lax enforcement of the countervailing duty statutes. Indeed, these legislative developments indicate that, contrary to the interpreta-

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to impose countervailing duties when politically expedient. *See, e.g., Hearings on H.R. 10710 Before the Senate Comm. on Finance, 93d Cong., 2d Sess., pt. 2, at 504 (1974).* One author has stated that:

the mandatory requirement to countervail is desirable because it offsets the natural tendency of the Executive Branch to avoid a confrontation which might make the conduct of foreign affairs more difficult.

Butler, *Countervailing Duties and Export Subsidization: A Reemerging Issue in International Trade*, 9 VA. J. INT'L L. 82, 145 (1968). *See also* Customs Law, *supra* note 12, at 844-45, arguing that Treasury's position flies in the face of the statute's mandatory language.

<sup>87</sup> *Report, supra* note 85, at 7304. Of further interest, it may be noted that the Protocol of Provisional Application of the General Agreement on Tariffs and Trade provides that GATT shall be applied to the fullest extent *not* inconsistent with existing legislation. 61 Stat. A2051, T.I.A.S. No. 1700 (1947).

<sup>88</sup> *Report, supra* note 85, at 7224.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

<sup>91</sup> SENATE FINANCE COMM., 92D CONG., 1ST SESS., FOREIGN TRADE: A SURVEY OF CURRENT ISSUES TO BE STUDIED BY THE SUBCOMM. ON INTERNATIONAL TRADE OF THE SENATE COMM. ON FINANCE 14 (Comm. Print 1971).

<sup>92</sup> *Id.*

tion espoused by the Treasury Department in *Zenith*, Congress intended to continue to command the imposition of countervailing duties upon all indirect tax remissions by foreign governments.

In the past, the Supreme Court has not hesitated to overrule an erroneous interpretation of an enabling statute by an administrative agency. For example, in 1969, in *Zuber v. Allen*,<sup>93</sup> the Court unhesitatingly overruled the administrative construction of a statute because "it [was] only one input in the interpretational equation."<sup>94</sup> The Court recognized that its duty was to construe the language used by Congress when the agency has clearly missed the mark.<sup>95</sup> Therefore, as it is clear that the Treasury Department's interpretation of section 303(a) is not in accord with Congressional intent, the reasonableness of that interpretation vanishes. The *Zenith* Court failed to recognize this fact.

### ECONOMIC RATIONALE

The Treasury Department justifies its practice of not countervailing indirect taxes such as the Japanese Commodity Tax by arguing that they are "completely neutral;" that is, they are not absorbed by the producer but instead are shifted completely forward to the consumer.<sup>96</sup> It maintains that an exporting country's remission of an indirect tax therefore merely avoids double taxation and puts manufacturers of different countries on an equal footing.<sup>97</sup> Although this rationale may have been thought to be sound in the 1890's, subsequent developments in economic theory shed new light on the impact of indirect taxation and prove the economic unreasonableness of the Secretary's position.

Firstly, the Treasury's assertion that an indirect tax is "completely neutral" is a definitional misstatement. If the tax were indeed "neutral," it would be paid by producers and consumers *equally*.<sup>98</sup> Secondly, and more importantly, basic economic theory teaches that the party who bears the tax incidence is a function of the relative elasticities

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<sup>93</sup> 396 U.S. 168 (1969).

<sup>94</sup> *Id.* at 192.

<sup>95</sup> *Id.* at 193. The *Zuber* Court noted that:

The verdict of quiescent years cannot be invoked to baptize a statutory gloss that is otherwise impermissible . . . Congressional inaction frequently betokens unawareness, preoccupation, or paralysis . . . Where, as in the case before us, there is no indication that a subsequent Congress has addressed itself to the particular problem, we are unpersuaded that silence is tantamount to acquiescence, let alone the approval discerned by the dissent.

396 U.S. at 198.

<sup>96</sup> Brief for the United States at 17, n.10.

<sup>97</sup> *Id.*

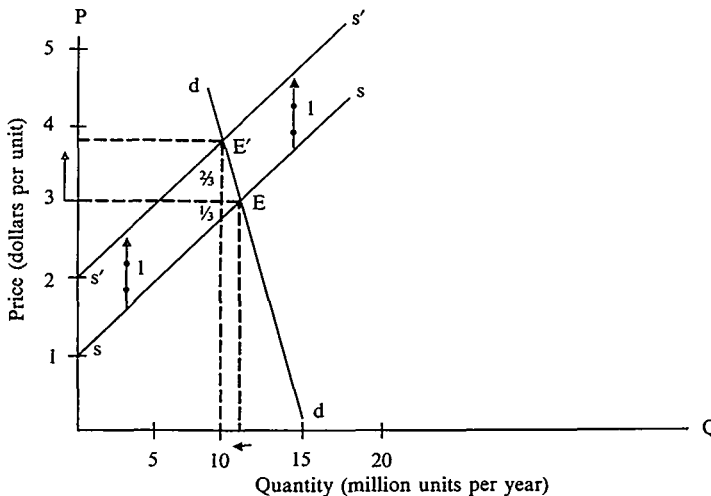
<sup>98</sup> The word "neutral" implies that neither side is favored. If the tax is shifted forward to the consumers, then the producers are favored by the tax, and the situation is not "neutral."

ties of supply and demand.<sup>99</sup> When the demand curve for a product is completely elastic,<sup>100</sup> the producer will absorb the cost of the tax, and when the demand curve is totally inelastic, the consumers will bear the cost of the tax.<sup>101</sup> The burden of the tax will only be shifted completely to the consumer when the demand curve for the product is *completely inelastic*—a very unlikely situation.<sup>102</sup> Thus, the Treasury Department has failed to recognize that, in the real world, indirect taxes fall upon both the consumer *and* the producer in varying degrees depending upon the elasticity of demand for the particular product.

This failure of the Treasury Department officially to give effect to basic principles of micro-economics has resulted in a policy that penal-

<sup>99</sup> P. SAMUELSON, *ECONOMICS* 389-90 (10th ed. 1976) [hereinafter cited as P. SAMUELSON].

<sup>100</sup> The following diagram from P. SAMUELSON, *supra* note 99, at 389, Fig. 20-6, and discussion derived therefrom will help clarify this point.



The solid line dd is the demand curve. The line ss is the initial supply curve, the line s's' is the supply curve after a one dollar tax has been imposed. The points E and E' are the respective equilibrium points. A one dollar tax shifts ss up one dollar everywhere to give a parallel supply curve s's'. This line intersects dd at the new equilibrium point of E', where the price to the consumer has risen \$2/3 above the old equilibrium point E, and where the price to the producer has fallen by \$1/3. The dotted lines and accompanying arrows show the change in P and Q. If the demand curve (dd) were *completely elastic* and flat relative to the supply curve (ss), all of the one dollar tax would fall on the producer. If the supply curve (ss) were totally horizontal and thus *completely inelastic*, the whole tax would be shifted forward onto the consumer.

<sup>101</sup> P. SAMUELSON, *supra* note 99, at 389-400.

<sup>102</sup> *Id.*

izes American producers, for they must compete with foreign goods that in effect receive a government subsidy due to the remission of indirect taxes. It is true, however, that a tax remission may only be marginally effective in giving foreign producers a competitive edge, depending upon the relative efficiencies of the American and foreign producers. Therefore, in the instant case, if *Zenith* is at least as efficient as its Japanese counterparts, any price differential must be attributed to the remission of indirect taxes by the Japanese government when the goods are exported.<sup>103</sup> Nevertheless, the remission of taxes upon the exportation of goods to the United States is no less a government subsidy because of its marginal effectiveness. This "subsidy" therefore does not put manufacturers from different countries on an equal footing as the Treasury Department maintains; it gives foreign producers a cost benefit which American producers cannot match.

#### FOREIGN POLICY RATIONALE

Developments surrounding the judicial handling of the case indicate that, in reality, it may have been foreign policy considerations that swayed the court. On April 13, 1978, while the *Zenith* case was pending, the Government of Japan sent a letter to the Department of State

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<sup>103</sup> The following example will show how Japan's tax system favors the Japanese producers and enables them to underprice their American competitors. The example is borrowed from Nevin, *Can U.S. Business Survive Our Japanese Trade Policy*, HARV. BUS. REV., Sept.-Oct. 1978, at 170 (Mr. Nevin is currently the president of Zenith Radio Corporation.)

Let us assume that products produced in both Country *A* and Country *B* are priced at \$100, including all taxes, when sold in the home market. Assume also that Country *A* assesses only indirect taxes, Country *B* assesses only direct taxes, and the total of all taxes assessed in each country equals 10 per cent of the value of those products. Next assume that *A*'s indirect taxes are remitted upon exportation. Finally, assume that freight and tariff costs are insignificant.

If a producer in Country *A* exports to Country *B*, then \$10 of Country *A*'s indirect tax will be remitted upon the exported product. Thus, when selling in Country *B*, the producer from Country *A* could price his product at \$90 against locally manufactured products that are priced at \$100 and carrying the full burden of Country *B*'s taxes. When a producer in Country *B* exports to Country *A*, he already would have paid \$10 of direct taxes in his own country. These direct taxes would not be remitted. When his goods enter Country *A*, they would be assessed the indirect tax that applies to all products sold there. The products of Country *B* thus would be priced at \$110, that is \$10 more than the local product. In either case, Country *A*'s producers have the advantage. In sum, when this analysis is applied to the instant situation the disadvantage at which American producers operate is apparent.

The possible inequities of this trade situation become clearer when one realizes that the great majority of the United States' revenue comes from direct taxes while a significant amount of Japanese revenue comes from indirect taxes. In 1974, for example, 88.4% of U.S. revenue came from direct taxes. DEP'T OF COMM., STATISTICAL ABSTRACT OF THE UNITED STATES 249 (Table No. 407) (1977). In comparison, Japan received 30.1% of its revenue from indirect taxes. H. PATRICK & H. ROSOVSKY, *ASIA'S NEW GIANT: HOW THE JAPANESE ECONOMY WORKS* 328 (Table 5-4) (1976).

expressing its views regarding the possible ramifications of the *Zenith* case.<sup>104</sup> The letter stated that Japan considered the United States to be bound under Article VI(4) of the GATT, which prohibits imposition of countervailing duties upon nonexcessive remissions of indirect taxes.<sup>105</sup> It further stated that a Supreme Court decision directing the imposition of countervailing duties would constitute a "clear violation" by the United States of its GATT commitments and would infringe the rights of Japan under GATT.<sup>106</sup> Moreover, an adverse decision might compel Japan "to question the good faith of the United States."<sup>107</sup>

On April 14, 1978, at the request of the State Department, Wade H. McCree, the Solicitor General of the United States, sent the letter to the Supreme Court.<sup>108</sup> During the course of oral arguments, when Justice Blackmun read parts of the letter to the Court and inquired of the Solicitor General as to its meaning, he was told: "We circulated it for what it was worth. We don't suggest that this court should be responsive to any threat or any apprehension of apocalyptic [sic] consequences in the field of international trade."<sup>109</sup> Nevertheless, the considerations embodied in the letter seem to have had an impact on the decision.

As the Government of Japan noted in its letter, other United States trading partners remit internal indirect taxes upon exported goods.<sup>110</sup> Thus, a decision supporting *Zenith's* position would have had an impact on far more than just the trade between Japan and America. It would have affected all foreign trade with the United States, possibly triggering a major trade war during the important Tokyo Round of the GATT negotiations. In addition, the outcome of the case would have had serious repercussions upon internal Japanese tax policies if it had been decided in favor of *Zenith*.

Hence, the amicable relations of nations were at stake. In such situations, American courts have traditionally taken into consideration

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<sup>104</sup> The letter, dated 13 April 1978 from the Embassy of Japan, as well as the cover letter from the Solicitor General, is reproduced in the Appendix.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> See the cover letter in the Appendix *infra*.

<sup>109</sup> Transcript of Oral Argument, *Zenith Radio Corp. v. United States*, Sup. Ct. No. 77-539 (argued 4/25/78 and 4/26/78), as prepared by Hoover Reporting Co., Inc. (Washington, D.C.), 32-33. A moment later the Solicitor General stated that "the client of the government here is the Secretary of State and not a foreign prince or potentate." *Id.* at 34. As the Court then pointed out, the Solicitor General was supposedly representing the Secretary of the Treasury. *Id.* That is, he was supposed to be arguing the Treasury Department's economic position, not the political considerations of the Department of State. *Id.*

<sup>110</sup> See the Appendix *infra*.



the views of foreign governments and the Department of State when the case at bar has serious foreign policy implications or raises questions of comity between nations.<sup>111</sup> The Court in *Zenith*, however, made no reference to these considerations in arriving at its decision. Yet these considerations were before the Court. The principle of comity thus helps to make logic out of an illogically reasoned opinion.

### CONCLUSION

Some of the ramifications of *Zenith* are already known. On September 28, 1977, only two months after the Court of Customs and Patent Appeals rendered its decision, *Zenith* announced that it had been forced to lay off about 5,600 American workers in order to compete with the Japanese.<sup>112</sup> The long-term implications of the *Zenith* decision, however, are less clear.

The U.S. domestic electronics industry will undoubtedly be impaired as a result of what is, in reality, unfair competition from foreign producers. Moreover, now that the Supreme Court has indicated that it will not become embroiled in the struggle between the legislative and executive branches, the Executive may continue, for political reasons, to refrain from imposing countervailing duties as it did in the *Zenith* case.

The Court's analysis of such factors as the legislative history of the countervailing duty statute, the economic theory upon which the Treasury Department has based its position, the reliance interests that the position of the Treasury has engendered, and the *Downs* and *Nicholas* decisions is unpersuasive. While Congress has explicitly and repeatedly stated that the imposition of countervailing duties should not be

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<sup>111</sup> See *Oetjen v. Central Leather Co.*, 246 U.S. 297, 303-04 (1917); *In re Grand Jury Investigations of the Shipping Industry*, 186 F. Supp. 298 (D.D.C. 1960); *New York & Cuba Mail S.S. Co. v. Republic of Korea*, 132 F. Supp. 684 (S.D.N.Y. 1955); *Weilamann v. Chase Manhattan Bank*, 21 Misc. 2d 1086, 192 N.Y.S.2d 469 (Sup. Ct. 1959); *Stephen v. Zivnostenska Banka*, 155 N.Y.S.2d 340 (Sup. Ct.), *aff'd*, 2 App. Div. 2d 958, 157 N.Y.S.2d 903 (1956), *aff'd*, 3 N.Y.2d 862, 166 N.Y.S.2d 309 (1957), *appeal dismissed*, 356 U.S. 22 (1958). As one author has noted, however, the actions of the State Department in these four cases suggest that the Department accords great weight to foreign policy considerations when it is passing on requests for foreign sovereign immunity. See Comment, *The First Decade of the Tate Letter Policy*, 60 MICH. L. REV. 1142, 1144 (1962). In *Weileman and Zivnostenska*, where the State Department granted the request for sovereign immunity, the governments involved (Soviet Union and Czechoslovakia) had generally strained relations with the United States. In *Shipping Industry* and *Cuba Mail*, which involved the governments of Korea and the Philippines, with whom the United States has generally had amicable relations, the requests for sovereign immunity treatment were denied.

<sup>112</sup> N.Y. Times, Sept. 28, 1977, § D, at 1, col. 3.

sacrificed for political considerations,<sup>113</sup> there is reason to believe that such considerations contributed significantly to the *Zenith* Court's decision. This suggestion is even more persuasive when one notes that the Court rendered a unanimous opinion, based primarily upon the 1897 Congressional floor debates, when none of the eight lower court judges who had previously heard the case found those debates persuasive.

In response to *Zenith*, it is likely that American television manufacturers will lobby Congress to pass a new trade act which mandates countervailing duties when indirect taxes are remitted upon exported goods.<sup>114</sup> The Executive, however, which has praised the *Zenith* decision,<sup>115</sup> has indicated that it will attempt to resolve the problem of indirect tax remissions through trade negotiations.<sup>116</sup> It is clear that the optimal use of resources—and the resultant lower prices—that the Executive presumably desires to achieve through free trade<sup>117</sup> cannot be attained unless the comparative advantages<sup>118</sup> that nations possess are not obscured by remissions of unequal indirect taxes.

*Robert Dziubla*

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<sup>113</sup> See text accompanying note 86 *supra*.

<sup>114</sup> Interview with John Nevin, President of Zenith Radio Corporation, in Winnetka, Illinois (October 18, 1978).

<sup>115</sup> See Strauss *United States Foreign Trade Policy: A Delicate Balancing Act*, 1 NW. J. INT'L L. & BUS. 40 (1979).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> In discussing the doctrine of "comparative advantage," Paul Samuelson maintains that regardless of whether one country is absolutely more efficient than another, if each specializes in the products in which it has a comparative advantage, *i.e.*, the greatest *relative* efficiency, trade will be mutually profitable to both countries. P. SAMUELSON, *supra* note 99, at 673.

Another author has argued that an importing country should accept any cheaper product, regardless of whether it is cheaper because of efficiency or subsidization. Barcelo, *Subsidies and Countervailing Duties—Analysis and a Proposal*, 9 LAW & POL'Y INT'L BUS. 779, 795 (1977). The author then argues that, although the exporting country's government might remove the subsidy later, thus raising the price, government subsidies are neither theoretically nor experientially less predictable than market forces. *Id.* at 797. This argument, however, fails to consider the economic dislocations and dysfunctions that will occur in the importing country when the subsidy goes into effect and when it is removed. The cost to the importing country of switching those resources freed by the imported subsidized products to other lines of production, and then switching them back when the subsidy is removed, may well outweigh any benefits accruing from the subsidized product. He maintains that, in either case, the lower prices allow the importing country to channel its now unused productive resources to other areas of production. *Id.* In short, "[t]he freed resources represent a net gain." *Id.*

APPENDIX

OFFICE OF THE SOLICITOR GENERAL

Washington, D.C. 20530

April 14, 1978

Honorable Michael Rodak, Jr.  
Clerk  
Supreme Court of the United States  
Washington, D. C. 20543

Re: Zenith Radio Corporation v.  
United States, No. 77-539

Dear Mr. Rodak:

I have been asked by the Department of State to submit to the Court the attached note expressing the view of the Government of Japan on the above case. I enclose the note and accompanying affidavit of Ms. Sharon E. Ahmad, Department of State, and 10 copies for distribution to the Court.

Sincerely,

WADE H. McCREE, JR.,  
Solicitor General

Enclosures

cc: Attached Service List

EMBASSY OF JAPAN  
WASHINGTON

April 13, 1978

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The Embassy of Japan presents its compliments to the Department of State and, in connection with the suit that the Japanese Government exempting internal commodity taxes on exportation of consumer electronics products imported into the United States be subject to countervailing duty, has the honor to state the views of the Government of Japan.

The United States Supreme Court has started to review a case, in which the applicant, Zenith Radio Corporation is alleging that the action of the Japanese Government exempting applicable internal commodity taxes on exportation of consumer electronic products imported into the United States constitutes a bounty or grant and is subject to countervailing duty under United States law.

The issue presented to the Court, in the view of the Government of Japan, has broad and far-reaching implications which could have serious effects, not only upon trade between Japan and the United States, but also on world trade. Accordingly, the Government of Japan, deeply concerned about the overriding importance of the matter presented in the context of international economic relations, respectfully submits its following views on this subject:

1. In the view of the Government of Japan, the United States Government should give due consideration to established international rules codified in the General Agreement on Tariffs and Trade, to which both the United States and Japan are signatory Contracting Parties, that the remission of or exemption of exported merchandise from internal taxes such as commodity taxes does not constitute export subsidies. Annex 1 Ad Article XVI of the GATT provides: "The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy." Accordingly, the exemption of Japanese commodity tax payments on exported merchandise (not to exceed the amount of the commodity tax collected on the sale for home consumption of like merchandise) is entirely consistent with and properly authorized by applicable GATT provisions.

Article VI (4) of the GATT also provides: "No product of the territory of any contracting party imported into the territory of any other contracting party shall be subject to anti-dumping or countervailing duty by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes." Thus, the application of countervailing duties for the exemption of exported merchandise from internal commodity tax imposed on like merchandise sold for home consumption is not permitted in the GATT. Following the decision of the United States Customs Court, the Government of Japan took this matter up to the GATT, and its working group drafted and issued a report on June 2, 1977, which was referred to and adopted by the Council of the GATT on June 16, 1977. This report, embody-

ing the latest official position of GATT, contains the following statements of position addressed to the issues raised by the U.S. Customs Court decision.

- (a) Commodity tax exemption on exported merchandise granted by Japan is legally proper under the GATT.
- (b) Should the decision of the United States Customs Court be sustained and the assessment and collection of countervailing duties commence, such action will constitute a clear violation by the United States of its commitments under the GATT and a direct infringement of the rights of the Government of Japan thereunder.
- (c) The withholding of appraisement on entries of consumer electronic products from Japan taken in response to the U.S. Customs Court decision also violates United States commitments under GATT, and the resulting uncertainty distorts and seriously jeopardizes international trade.
- (d) The problems created by the action taken will adversely affect not only trade in consumer electronic products, but its ripple effect will also adversely affect world trade generally.

2. The exemption of internal duties and taxes on exports similar to the commodity tax exemption is widely practiced in the United States, European countries, and other countries. Virtually all of the trading partners of the United States have a similar system exempting internal indirect taxes on exported merchandise. If the final decision in the pending case holds that the Japanese commodity tax exemptions on exports constitute subsidies subject to the imposition of countervailing duties, it appears that exports to the United States from other countries exempting duties and taxes on exports will also be subject to the same action. Such a result cannot help but have a serious long term impact on international trade, since each country exempting indirect duties or taxes on exports is doing so in accordance with the clearly established rules subscribed to by the Contracting Parties to the GATT. Thus, the Court action, depending upon the final decision, could bring about a breakdown of the GATT system itself and seriously impair the chances for success in the current multilateral international trade negotiations.

3. The Government of Japan fully understands that the Government of the United States is acting in good faith to honor its commitments to abide by international rules. In the unlikely event that the United States should proceed in a manner violative of the very international rules in the establishment of which it has taken leadership to further the objective of freer international trade, those countries who joined with the United States in establishing such rules to promote economic development through normalization of international trade might be compelled to question the good faith of the United States.

4. In view of the foregoing concerns, the Government of Japan expresses its fervent hope that the United States will continue to take all appropriate action in a timely manner to resolve this matter consistent with established international rules.