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Nonexcessive Remissions of Foreign Excise Taxes Under Section 1303(a) of the Trade Act of 1974: Zenith Radio Corp. v. United States

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Nonexcessive remissions of foreign excise taxes under section 1303(a) of the Trade Act of 1974: *Zenith Radio Corp. v. United States* [1]—The United States countervailing duty provision is intended to avoid unfair competitive advantages that may arise when some nations bestow bounties or grants upon certain items exported from these nations. In administering this statute, the Treasury Department has exempted from the countervailing duty requirement remissions by nations of their domestic excise taxes in an amount not exceeding the amount of the taxes that would be imposed if sold in the country of manufacture. The courts, on the other hand, have held that *any* remission of taxes is a bounty, and therefore subject to the countervailing duty provision. In *Zenith Radio Corp. v. United States* [2] the Supreme Court resolved the conflict between the administrative and judicial interpretations in favor of the Treasury Department practice. While this decision is laudable in that it represents a proper interpretation of the present countervailing duty provision, the decision highlights the need for reform in this area of the law to better fulfill the purpose of avoiding unfair competitive advantages in the sale of imported and domestic goods.

The Commodity Tax Law of Japan [3] imposes a single stage consumption tax on Japanese consumer goods, including electronic products.[4] The Japanese government levies the tax—calculated as a percentage of the sales price—on the goods when they are shipped from the factory. If the goods are exported from Japan, however, the tax either is not imposed or is refunded to the manufacturer.[5]

The Zenith Radio Corporation, a United States manufacturer of electronic equipment whose goods are in competition with the imported Japanese products, petitioned the Commissioner of Customs to declare the remission of the Japanese tax on exported goods a "bounty or grant" within the meaning of section 303, the countervailing duty provision of the Tariff Act of 1930.[6] The countervailing duty provision requires that whenever a bounty or grant is bestowed by a foreign government on goods imported into the United States, the Secretary of the Treasury must determine the amount of the bounty or grant and levy a countervailing duty equal to that amount.[7] Arguing that the

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[1] 437 U.S. 443 (1978).

[2] *Id.*

[3] Law No. 48 of 1962. Relevant provisions of the Japanese statute are contained in the Unified Appendix to *Zenith* at 44-48.

[4] Zenith Radio Corp. v. United States, 430 F. Supp. 242, 242 (Cust. Ct. 1977), *rev'd*, 562 F.2d 1209 (C.C.P.A. 1977), *aff'd*, 437 U.S. 443 (1978). The electronic products covered under the tax law include television receivers, radio receivers, tape players, tape recorders and phonographs. These products are taxed at rates which range from 5% to 40% of the sales price. *Id.* at 242-43.

[5] *Id.* at 243.

[6] 46 Stat. 687 (1930), *as amended*, 19 U.S.C. § 1303(a) (1976). Zenith filed its petition in 1970 pursuant to the provisions of § 303 of the Act. *Zenith*, 430 F. Supp. at 243.

[7] Section 303(a) of the Trade Act of 1974, 19 U.S.C. § 1303(a) (1976) provides in relevant part that:

> (1) Whenever any country, dependency, colony, province or other political subdivision of government, . . . shall pay or bestow, directly or in-

Japanese tax remittance procedure met this statutory requirement, the Zenith Corporation requested the Treasury Department to assess a countervailing duty on the Japanese products imported into the United States.[8] The Acting Commissioner of Customs rejected Zenith's petition and issued a Final Negative Countervailing Duty Determination.[9]

Following the Customs Commissioner's denial Zenith instituted an action in the Customs Court to require the Secretary of the Treasury to impose a countervailing duty.[10] A three judge panel, relying on the 1903 Supreme Court decision in *Downs v. United States*,[11] ruled that the remission of any indirect tax—a tax on the sale of the goods themselves—constitutes an impermissible bounty.[12] Characterizing the Japanese tax as an indirect tax, the district court concluded that the amount remitted constituted a bounty and had to be subject to a countervailing duty.[13] The court therefore directed the Secretary of the Treasury to determine the net bounty, and to impose a countervailing duty equal to that amount on the imported goods.[14]

On appeal, the United States Court of Customs and Patent Appeals reversed[15] the Customs Court ruling on the ground that the lower court had

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> directly, any bounty or grant upon the manufacture or production or export of any article or merchandise . . . 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 duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.
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> . . . .
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> (5) The Secretary shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated.

Id.

[8] Zenith's petition alleged that not only the remission of the Commodity tax, but also other "Export Promotion Techniques" such as special depreciation allowances, an overseas Market Cultivation Reserve, Financial Incentives, and an Export Insurance System combined to create an impermissible bounty or grant. Unified Appendix at 139-50.

[9] 41 Fed. Reg. 1298 (1976). In his decision the Acting Commissioner stated that the incentives alleged by Zenith "involve an aggregate amount considered to be *de minimus* per dollar of value of the exported products." *Id.* The Acting Commissioner ruled that this *de minimus* bounty was not subject to the countervailing duty provisions. *Id.*

[10] Zenith Radio Corp. v. United States, 430 F. Supp. 242 (Cust. Ct. 1977). This action was brought pursuant to section 331(b) of the Trade Act of 1974, 19 U.S.C. § 1516(d) (1976). Section 331(b) of the Trade Act of 1974 provides a means of recourse for domestic manufacturers dissatisfied with the Treasury's determinations. Accordingly, if a domestic manufacturer's petition before the Treasury Department is denied, the manufacturer may file for judicial review of the Treasury decision in the Customs Court. The manufacturer must, however, first notify the Treasury Department of its intention to so contest the decision. 19 U.S.C. § 1516(d) (1976).

[11] 187 U.S. 496 (1903).

[12] 430 F. Supp. at 248-49. .

[13] *Id.* at 249.

[14] *Id.* at 265.

[15] Zenith Radio Corp. v. United States, 562 F.2d 1209, 1223 (C.C.P.A. 1977).

construed the decision in *Downs* improperly.[16] The appeals court found that the language relied upon by the lower court, in determining that all remissions of indirect taxes are impermissible, was broad dicta, and inconsistent with the actual holding in *Downs*. The court therefore determined that the language was not binding.[17] Finding no legislative or judicial actions that conflicted with the Treasury's interpretation of the countervailing duty provision, the appeals court upheld the Treasury determination[18] that only excessive remissions of indirect taxes need be countervailed.

The Supreme Court granted certiorari[19] and in a unanimous decision HELD: The nonexcessive remission of an indirect domestic tax does not constitute a "bounty or grant" within the meaning of the countervailing duty statute.[20] The Court stated that the legislative history of the original 1897 countervailing duty provision makes clear that the Secretary's interpretation, exempting a nonexcessive remission of indirect taxes from the countervailing duty sanction, is at least a permissible interpretation, and one deserving great deference.[21] In addition, the Court noted that nothing in subsequent legislative or judicial considerations of the subject contradicts the Treasury interpretation.[22] Accordingly, the Court affirmed the Court of Customs and Patent Appeals' decision.[23]

The *Zenith* decision is significant primarily for its clarification of which foreign taxes will trigger the countervailing duty provisions. By adopting the Treasury Department's interpretation of the statute, the *Zenith* Court firmly rejected lower court decisions that interpreted the statute as forbidding any remission of indirect taxes.[24] Furthermore, possible interpretations of prior Supreme Court decisions as forbidding any such remission were rejected.[25] In rejecting these interpretations the Court clearly indicated that only excessive remissions of indirect taxes will invoke the protection of the countervailing duty provision.

While *Zenith* is proper in its coordinating the judicial and administrative constructions of the countervailing duty provision, the decision nevertheless points up the failure of the United States trade law to meet present trade conditions. The United States trade law fails to deal with unfair trade advan-

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[16] *Id.* at 1212-13.
[17] *Id.* at 1212-15.
[18] *Id.* at 1222-23.
[19] 434 U.S. 1060 (1978).
[20] 437 U.S. 443, 449, 461-62 (1978).
[21] *Id.* at 450-55.
[22] *Id.* at 457-62.
[23] *Id.* at 462.
[24] *E.g.*, United States v. Hills Bros. Co., 107 F. 107, 109 (2d Cir. 1901); American Express Co. v. United States, 332 F. Supp. 191, 197-200 (Cust. Ct. 1971), *aff'd on other grounds*, 472 F.2d 1050 (C.C.P.A. 1973); Hammond Lead Products, Inc. v. United States, 306 F. Supp. 460, 465-66 (Cust. Ct. 1969), *rev'd on procedural grounds*, 440 F.2d 1024 (C.C.P.A. 1971), *cert. denied*, 404 U.S. 1005 (1971); F. W. Meyers & Co. v. United States, T.D. 24306, 6 TREAS. DEC. 260, 264-65 (Bd. Gen. App. 1903).
[25] *E.g.*, Nicholas & Co. v. United States, 249 U.S. 34, 39 (1919); Downs v. United States, 187 U.S. 496, 515 (1903).

tages that arise from the differences between direct and indirect tax systems. By permitting the remission of indirect taxes, the present interpretation favors those nations that, unlike the United States, place greater emphasis on indirect taxes. A remission of indirect taxes, for manufacturers in these nations, results in a greater overall reduction in taxes than in those nations which have relatively minor indirect taxes. Accordingly, the *Zenith* decision most certainly will lead to American manufacturer and producer pressure on Congress and the Executive Branch for changes in domestic legislation and for renegotiating the General Agreement on Tariffs and Trade subsidy provisions.[26] The implementation of these changes should work to improve the present imbalances in United States trade relations.

This casenote will examine the Court's decision in *Zenith* in view of prior legislative, administrative and judicial interpretations of the countervailing duty statute. The requirements of the present countervailing duty provision will first be examined. The casenote will next analyze and discuss the various interpretations given to the countervailing duty provision by the Congress, the Treasury Department and the Supreme Court. The note will then examine the opinion in *Zenith* by considering the Court's treatment of prior legislative, administrative and judicial interpretations. Finally, this note will consider the implications of *Zenith* on United States foreign trade. It will be submitted that although the *Zenith* court properly interpreted the present countervailing duty statute, this interpretation does not achieve the statute's intended purpose of eliminating unfair competitive advantages arising by means of government aid of industries. Through this examination the need for reform of the present scheme will be shown.

I. The Legislative, Administrative and Judicial Antecedents of *Zenith*

A. *Scope of the Statutory Provisions*

The countervailing duty provision is intended to ensure fair competition between domestic goods and similar items imported from other nations.[27] The trade provisions contained in the United States trade laws and the Gen-

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[26] 61 Stat. A5 (1947). Since 1947, the General Agreement on Tariffs and Trade (GATT), an agreement consented to by over 120 nations, including the United States has sought to promote international trade by reducing protective barriers to trade. Article VI(3) of the GATT, 61 Stat. A24 (1947), provides in relevant part that:

> No product . . . imported into the territory of any other contracting party shall be subject to . . . a 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.

Id.

[27] 30 Cong. Rec. 318 (1897) (remarks of Representative Adolph Meyer of Louisiana). In *Zenith*, the Court interpreted the countervailing duty provision in light of its clear purpose to "offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments." 437 U.S. at 456.

eral Agreement on Tariffs and Trade are premised on a model of international trade that encourages competition between manufacturers of similar products from different countries. The model presumes that manufacturers will price their products competitively, and that manufacturing costs will determine the amount of the prices. Ideally, the company and country which enjoys a comparative advantage in a particular field and can produce the product for the lowest cost will benefit from the competition and eventually will dominate a substantial portion of the market for that product. If, however, the government of one nation subsidizes manufacturing costs of exporting companies, the free market forces of comparative advantage will be disrupted, and the subsidized exporter will have an unfair competitive advantage over his unsubsidized counterparts in other countries. To offset this potential unfair advantage, the countervailing duty provision provides that the Secretary of the Treasury should determine the amount of any bounty or grant bestowed directly or indirectly by a foreign government on goods imported into the United States.[28] In the event of such a determination, the Secretary is required to impose a countervailing duty on these goods equal to the net amount of the foreign bounty or grant,[29] returning the producers to the ideal competitive model.

The implementation of the statute has not been as effective in dealing with disparities in international trade as the model would suggest. In particular, the failure of the statute to define the terms bounty and grant has led to confusion concerning whether rebates of foreign taxes will trigger the remedy of the countervailing duty provision. In determining whether a bounty or grant exists, a distinction has arisen between the remission of direct and indirect taxes. Direct taxes are those imposed on the manufacturer of the goods themselves.[30] Although the countervailing duty statute does not define the meaning of the terms bounty or grant, it is generally accepted that the remission of a direct tax constitutes an impermissible bounty or grant, thereby invoking the countervailing duty sanction.[31]

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[28] 19 U.S.C. § 1303(a) (1976).

[29] *Id.*

[30] In a press briefing on October 20, 1975, David MacDonald, Assistant Secretary of the Treasury for Enforcement Operations and Tariff Affairs defined these terms as follows:

> Direct taxes are those taxes which, theoretically, are imposed directly upon the tax-paying entity, such as an income tax, or Labor/related type taxes like the FICA.
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> . . . .
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> Indirect taxes are assessed on the transaction, such as a sales tax or a commodity excise tax, so that the transaction itself gives rise to the tax.

Unified Appendix at 80.

[31] Marks and Malmgren, *Negotiating Nontariff Distortions to Trade*, 7 LAW & POL'Y INT'L BUS. 327, 350-51 (1975). [hereinafter cited as Marks & Malmgren]. The remission of a direct tax is improper not only according to United States domestic law, but also under Article VI(2) of the GATT, 61 Stat. A5, A23-24 (1947). *Id.*

While direct taxes clearly come within the meaning of bounty or grant, the inclusion of indirect taxes within the terms has been less clear. The statute's failure clearly to define bounty led to a conflict as to whether any indirect tax remission or solely the excessive indirect tax remissions necessitate the levying of a countervailing duty. An excessive remission, on the one hand, would be a payment in excess of the tax that would be imposed if the goods were sold in the country of manufacture. A non-excessive remission, on the other hand, would be a payment that does not exceed the domestic indirect taxes that otherwise would be imposed. Since 1898, the Treasury Department has interpreted the statute as requiring countervailing duties solely for excessive remissions of indirect taxes.[32] Opponents of the Treasury interpretation, however, have contended that a proper interpretation of the statute would forbid any remission of an indirect tax.[33]

These conflicting interpretations presented the major issue for resolution in the *Zenith* opinion. A brief examination of the legislative history of the terms bounty and grant, along with an overview of the administrative action and the pre-*Zenith* judicial review of that action will provide a backdrop for the *Zenith* Court's analysis of this issue.

B. *The Legislative Background*

The Tariff Act of 1897,[34] which contained the first generally applicable countervailing duty provision, is the basis for the present trade law regarding countervailing duties. Although the countervailing duty provision has been reenacted five times since 1897, Congress has made no change in the relevant language.[35] Therefore, the history and intent of Congress in enacting the 1897 statute remain relevant to ascertaining the Congressional intent behind the terms bounty and grant.

The history of the 1897 statute includes two earlier limited countervailing duty provisions. A countervailing duty provision was first enacted by Congress in the Tariff Act of 1890.[36] This 1890 provision applied a fixed duty to bounties bestowed on imported refined sugar.[37] The statute did not define

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[32] *E.g.*, T.D. 49355, 73 TREAS. DEC. 107 (1938); T.D. 43634, 56 TREAS. DEC. 342, 343 (1929); T.D. 20039, 2 SYNOPSIS OF DECISIONS 534, 535-36 (1898); T.D. 19729, 2 SYNOPSIS OF DECISIONS 157, 157-58 (1898).

[33] This position has been advocated strongly by American manufacturers, who rely for support on early Supreme Court decisions. *E.g., Review of United States Trade Policy: Hearings Before the Senate Committee on Finance*, 90th Cong., 2d Sess. 564, 568-69 (1968) (statement of the National Livestock Feeders Association); *id.* at 887-89 (statement of the United States Olive Producers and Importers).

[34] Ch. 11, 30 Stat. 151 (1897).

[35] Tariff Act of 1897, ch. 11, § 5, 30 Stat. 205 (1897), *as amended by* Tariff Act of 1909, ch. 6, § 6, 36 Stat. 85 (1909), *as amended by* Tariff Act of 1913, ch. 16, § IV(E), 38 Stat. 193 (1913), *as amended by* Tariff Act of 1922, ch. 356, § 303, 42 Stat. 935 (1922), *as amended by* Tariff Act of 1930, ch. 497, § 303, 46 Stat. 687 (1930), *as amended by* Trade Act of 1974, Pub. L. No. 93-618, 19 U.S.C. § 1303 (1976).

[36] Ch. 1244, 26 Stat. 567 (1890).

[37] Ch. 1244, Schedule E, § 237, 26 Stat. 584 (1890). Section 237 of the Tariff Act provides in part that:

the term bounty, leaving it doubtful whether the provision applied to all remissions or solely to excessive remissions of taxes. Although the 1890 section was modified in the Tariff Act of 1894[38] to include language exempting nonexcessive remissions of domestic indirect taxes from the countervailing duty provision of the statute,[39] the provision remained limited to bounties bestowed on sugar.

In the precursor to the present statute—the Tariff Act of 1897[40]—the countervailing duty provision was extended to all dutiable goods.[41] At the same time, however, the express exemption for nonexcessive remissions was deleted from the new Act, leaving only language indicating that duties would be equal to the "net" bounty.[42] This deletion of the definitional limit on the term bounty thus raised the question whether Congress intended to carry forward the 1894 definition, through the use of the word "net", or whether, by dropping the express provision in the 1897 statute, Congress intended to change the meaning of bounty to include any remission of indirect taxes.

The legislative history of each of these acts supports the view that Congress intended to continue the excessive remissions meaning of the term bounty. Although the original 1890 statute did not contain any express language defining bounty, the congressional debates on the bill show that Congress understood the term to refer to excessive remissions.[43] In the 1894

> All sugars above number sixteen Dutch standard in color shall pay a duty of five-tenths of one cent per pound: *Provided,* That all such sugars above number sixteen Dutch standard in color shall pay one tenth of one cent per pound in addition to the rate herein provided for, when exported from, or the product of any country when and so long as such country pays or shall hereafter pay, directly or indirectly, a bounty on the exportation of any sugar . . . , and the Secretary of the Treasury shall prescribe suitable rules and regulations to carry this provision into effect.

Id.

[38] Ch. 349, 28 Stat. 509 (1894).

[39] Ch. 349, Schedule E, § 182 1/2, 28 Stat. 521 (1894). Section 182 1/2 imposes a countervailing duty of one-tenth of a cent for imported sugar receiving a bounty from the country of export, provided that:

> the importer . . . 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.

Id.

[40] Ch. 11, 30 Stat. 151 (1897).

[41] *Id.* § 5, 30 Stat. at 205.

[42] *Id.*

[43] See 21 CONG. REC. 9529-32 (1890). Senator Gibson, a strong proponent of the countervailing duty for sugar, attached to his comments an appendix containing "The Bounty Systems in Europe" from *Sugar and the Tariff* by J. Alexander Lindquist. These comments contained a discussion of the bounty systems in France, Germany and Austria. In the discussion of each country's system the bounty is described in terms of the excess over the remission of a domestic indirect tax. In speaking of the Austrian system the discussion states that "On exports the domestic tax is remitted and a direct bounty is paid of $6.30 per ton, and on refined of $9.04 per ton. But the amount of money which can be paid in bounties is limited to $1,930,000, so that only 300,000

Act, this policy was expressly incorporated into the language of the statute itself.[44]

Although the express language of the 1894 Act was eliminated in 1897,[45] the congressional debates reveal that no change in the meaning of the language was intended. Senator Allison, the sponsor of the Senate amendment favoring a generally applicable countervailing duty provision stated that while the House provision containing the nonexcessive remission exemption was being "stricken from the bill, the same paragraph in substance [was] being inserted [in] section [5] making this countervailing duty apply to all articles instead of to [sugar] alone."[46] Indeed, Senator Allison considered the new provision to be "only an imitation and an emulation" of the 1894 provision.[47] He stated that the contemplated meaning of the term bounty was "the net bounty, less the taxes and reductions."[48] In addition to Senator Allison's statements, the figures used in debate indicate that the term bounty was intended to refer to excessive remissions of taxes. Specifically, both opponents and proponents of the Senate amendment spoke of the then existing German sugar subsidization plan using figures only a fraction of the full amount rebated.[49] The use of these figures would indicate that the Senators did not consider all remissions to be bounties.

The early statutes and their legislative history thus reveal that Congress intended to exempt non-excessive remissions of indirect taxes from the coverage of the countervailing duty provision. It is reasonable to assume that by enacting a similar provision so shortly after the 1894 Act, and with no mention of any dissatisfaction with the earlier provision, Congress intended no change in the 1897 provision. Further, statements by the Amendment's sponsor indicate that the Amendment was to continue the then present policy. The congressional intent of the original 1897 statute, therefore, should be interpreted as continuing the exemption from the countervailing duty provision for nonexcessive remissions of indirect taxes.

C. *Administrative Interpretations*

The congressional intent bears on the question whether the provisions of the statute are being properly enforced by the agency charged with its administration. Congress has delegated responsibility for administering the

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tons of raw or 213,000 tons of refined could receive the bounty; . . ." 21 CONG. REC. at 9538 (1890).

[44] Ch. 349, § 182 1/2, 28 Stat. 521 (1894).

[45] When Congress was considering the 1897 act, the House passed and sent to the Senate a slightly modified version of the 1894 sugar provision. 30 CONG. REC. 1634 (1897). The Senate, however, voted to adopt a new, generally applicable countervailing duty provision. *Id.* at 2226. The proposed Senate amendment, agreed to by the House, *Id.* at 2750, called for duties on "net" bounties, but did not include the House provision on nonexcessive remissions. It was through this change to broaden the coverage of the provision that the express language exempting nonexcessive remissions was lost.

[46] *Id.* at 1635.

[47] *Id.* at 1719.

[48] *Id.* at 1721.

[49] *Id.* at 2823-24.

countervailing duty provision and determining the existence of bounties to the Secretary of the Treasury. Consistent with the legislative intent, the Treasury Department, since 1898, has interpreted the statute as exempting nonexcessive remissions of indirect taxes.[50] The Department has reasoned that a failure to recognize this exception would result in double taxation on imported goods. Double taxation occurs when imported goods are subject to the indirect consumption taxes of the producing state as well as the United States federal, state and local excise or sales taxes. The Department has concluded that this double taxation would place the imported products at an unfair competitive disadvantage with respect to American products.[51] Since the purpose of the countervailing duty statute is to eliminate unfair trade advantages, the Department has concluded that interpreting the statute to result in double taxation is impermissible, and only remissions in excess of the foreign excise tax imposed ought to be subject to a contervailing duty.

The Treasury Department's interpretation, like the intent of the enacting Congress, is highly relevant to a consideration of the meanings of bounty and grant. Two factors emphasize the deference due to this administrative interpretation. First, the Department provided Congress with the data used in drafting the 1897 statute.[52] By its participation in the enacting of the statute the Department presumably would be in a strong position to interpret the provisions in accordance with Congressional intent. In addition, the Treasury Department interpretation is deserving of deference since the Department is

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[50] The *Zenith* Court noted that "[i]t is undisputed that the Treasury Department adopted the statutory interpretation at issue here less than a year after passage of the basic countervailing-duty statute in 1897, . . . , and that the Department has uniformly maintained this position for over 80 years." 437 U.S. at 450. In a decision dated July 26, 1898, the Treasury Department clearly stated its view that,

> [t]here is a difference in the matter of appraisment and assessment of duty, between a bounty and a remission of an internal revenue tax. Where a bounty has been granted, a countervailing duty equal to the net amount of bounty is levied and paid. The internal revenue tax remitted on exportation (unless excessive) is not held to be a bounty. When such a tax is levied and remitted on the exportation of the merchandise, no allowance is made in the appraisement of the merchandise for such remission.

T.D. 19729, 2 SYNOPSIS OF DECISIONS 157, 157-58 (1898).

[51] Executive Branch GATT Studies, Senate Committee on Finance, 93rd Cong., 2d Sess. 17-18 (1974).

[52] *Zenith*, 437 U.S. at 456. In 1969 the Supreme Court, in Zuber v. Allen, 396 U.S. 168, a case involving a challenge by Vermont dairy farmers to the Secretary of Agriculture's determination that dairies near Boston should be paid more for their milk, stated,

> [w]hile this Court has announced that it will accord great weight to a departmental construction of its own enabling legislation, especially a contemporaneous construction, . . . it is only one input in the interpretational equation. Its impact carries most weight when the administrators participated in drafting and directly made known their views to Congress in Committee hearings. . . . In such circumstances, absent any indication that Congress differed with the responsible department, a court should resolve any ambiguity in favor of the administrative construction, if such construction enhances the general purpose and policies underlying the legislation.

Id. at 192.

responsible for administering the statute and determining the existence of bounties.[53] This responsibility should carry with it authority to interpret the statute within a permissible scope. Even if the interpretation advanced by the Department is not the only permissible one, it is at least a reasonable interpretation calculated to further the legislative purpose of eliminating unfair advantage, and therefore, deserving great deference. These factors combine to give great weight to the Treasury's interpretation.

D. *Judicial Interpretations*

1. *Downs v. United States*[54]

Despite the longstanding consistency between the legislative history and the administrative construction of the countervailing duty provisions, pre-*Zenith* judicial interpretations of bounty and grant are confusing and contradictory. In a landmark decision, *Downs v. United States*,[55] the Supreme Court held that the Russian government had improperly encouraged the exportation of sugar by remitting the excise tax due on sugar if sold within Russia, and by issuing certificates entitling producers to reductions in their domestic excise tax equal to the value of the sugar exported.[56] The Court in *Downs* rejected the importer's contention that the Russian scheme did not constitute an impermissible bounty, and accordingly, found that this program clearly invoked the sanctions contained in the Tariff Act of 1897.[57]

Although the *Downs* Court held that the Russian scheme necessitated the levying of a countervailing duty, confusion has arisen regarding the precise holding of the *Downs* decision. On the one hand, the decision can be interpreted as holding that both aspects of the Russian scheme, the remission and the certificates, constituted improper bounties.[58] This interpretation focuses on language in *Downs* that states:

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[53] In Udall v. Tallman, 380 U.S. 1 (1964), the Supreme Court stated that "[w]hen faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration." *Id.* at16.

[54] 187 U.S. 496 (1903).

[55] *Id.*

[56] *Id.* at 515-16.

[57] *Id.* at 500, 516.

[58] This interpretation of *Downs* has been most often advanced by the lower courts. *E.g.*, Zenith Radio Corp. v. United States, 430 F. Supp. 242, 244-45 (Cust. Ct. 1977), *rev'd*, 562 F.2d 1209 (C.C.P.A. 1977), *aff'd*, 437 U.S. 443 (1978); American Express Co. v. United States, 332 F. Supp. 191, 197-200 (Cust. Ct. 1971), *aff'd on other grounds*, 472 F.2d 1050 (C.C.P.A. 1973); Hammond Lead Products, Inc. v. United States, 306 F. Supp. 460, 465-66 (Cust. Ct. 1969), *rev'd on procedural grounds*, 440 F.2d 1024 (C.C.P.A.), *cert. denied*, 404 U.S. 1005 (1971); F. W. Meyers & Co. v. United States, T.D. 24306, 6 TREAS. DEC. 260, 264-65 (Bd. Gen. App. 1903). The Supreme Court itself, in Nicholas & Co. v. United States, 249 U.S. 34, 41 (1919), read *Downs* as holding the nonexcessive remission of indirect taxes to be a bounty under the Tariff Act.

> When a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then by whatever process, or in whatever manner, or under whatever name it is disguised, it is a bounty upon exportation.[59]

If this language in the decision controls, then *Downs* held that *any* remission of taxes, not merely an excessive remission, is an impermissible bounty. Despite the deference due to an administrative agency's interpretation of a statute, such as the one reached by the Treasury Department concerning indirect tax remissions, this clear and contrary interpretation announced by the Supreme Court in 1903 would contradict the Treasury interpretation and would require the courts to find *all* tax remissions to be covered under the statute.

On the other hand, the *Downs* decision may be read as finding only the certificates for reduced domestic taxes, the second half of the Russian scheme, to be impermissible bounties.[60] Despite the above quoted broad language from *Downs*, suggesting that all remissions are impermissible, the *Downs* Court calculated the value of the bounty using figures equal only to the value of the certificates.[61] The use of these figures indicates that the Court followed the excessive remission approach, the Treasury Department's interpretation. According to this interpretation the broad language in *Downs* that calls for a duty on any remission of taxes is dicta, inconsistent with the actual holding and not binding. *Downs*, therefore, may be read as exempting non-excessive remissions of indirect taxes from the coverage of the countervailing duty statute and endorsing the longstanding Treasury practice.

Although the Court's assessment of the value of the bounty as equal to the value of the certificates supports the excessive remission reading of *Downs*, several other factors indicate that the Court did not intend this reading. First, the *Downs* Court affirmed the lower court decisions that expressly found both aspects of the scheme to be bounties.[62] Second, the amount of the bounty

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[59] 187 U.S. at 515.

[60] Although commentators have interpreted *Downs* in this manner, Marks and Malmgren, *supra* note 31 at 350; Butler, *Countervailing Duties and Export Sudsidization: A Re-emerging Issue in International Trade*, 9 VA. J. INT'L LAW 82, 120 (1969), it was not until the Court of Customs and Patent Appeals decision in *Zenith* that a court expressly adopted this interpretation. 562 F.2d 1209, 1215 (C.C.P.A. 1977), *aff'd*, 437 U.S. 443 (1978).

[61] 187 U.S. at 514-16.

[62] 113 F. 144 (4th Cir. 1902). The Circuit Court of Appeals for the Fourth Circuit's opinion expressly incorporated that rendered by the Board of General Appraisers and affirmed by the district court. In so doing the court stated:

> In affirming the decree of the court below, we also affirm the judgment rendered by the board of general appraisers, whose opinion so fully expresses our views and so ably presents the facts involved herein and the law applicatable thereto, that we deem it entirely appropriate to adopt the same as part of the opinion of this court.

Id. at 146. In the opinion, the Board of General Appraisers stated,

> section 5 of the tariff act of 1897, under which this case arises, does not use the word "bounty" in any narrow or technical meaning. It embraces "any bounty or *grant*" bestowed or conferred by the Government, whether directly or indirectly. The word "grant" is more comprehensive in meaning

granted by the Russian government, determined by the Secretary of the Treasury to equal the value of the certificate was not in issue in *Downs*, nor was the Secretary's assessment contested by the importer.[63] It is therefore reasonable to assume that the Court in *Downs*, once it had decided whether any bounty existed, merely used the figures agreed upon without passing judgment on significance of the amount. The notion that the figures used in *Downs* do not reflect an affirmative decision by the Supreme Court gains additional support from subsequent Customs Court decisions which uniformly cite *Downs* as holding that the remission of any indirect tax is a bounty.[64] Thus, although the language in *Downs* does not completely preclude the possibility of doubting that both aspects of the Russian scheme—the certificates and the remission of taxes—were impermissible bounties, the more likely reading is that *Downs* prohibits any remission of indirect taxes.

2. *Nicholas & Company v. United States*[65]

The Supreme Court also considered the applicability of the countervailing duty statute to remissions of indirect taxes in 1919 in *Nicholas & Co. v. United States*.[66] In *Nicholas*, the Supreme Court held that certain allowances bestowed by the British government on exporters of "spirits" were a prohibited grant within the meaning of section 4 of the Tariff Act of 1913.[67]

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than the term "bounty." It implies the conferring by the sovereign power of some valuable privilege, franchise, or other right of like character, . . .

T.D. 2984, 4 TREAS. DEC. 405, 407 (Bd. Gen. App. 1901). The Board went on to state,

> Our conclusion, therefore, is that a bounty or grant, . . . has been paid or bestowed by the Russian Government upon the exportation of this sugar, so as to work a benefit or advantage to the Russian sugar exporter, as follows:
>
> First. Upon the exportation of the sugar, the Government remitted or refunded the excise tax due thereon, or otherwise cancelled the indebtedness of the sugar manufacturer, so that he was enabled to place his product upon the market free from the burden of either the regular or additional excise tax.
>
> Second. The certificate which the Government issued to him upon the exportation of his sugar had a substantial market value, and was transferable, and operated as a premium, grant, bonus, or reward.

Id. at 413.

[63] 4 TREAS. DEC. at 406; 113 F. at 146. The absence of a contest on the question of the amount of the bounty is not surprising. The Treasury Department desired only to countervail the excessive portion of the export scheme. Similarly, the importer, Downs, had no interest in claiming that the figures used to assess a countervailing duty against him did not encompass the entire bounty. Accordingly, the figures used reflect the Secretary's decision, based as they were on the Department's interpretation of the Act rather than the Court's determination that solely an excessive remission constitutes a grant.

[64] See cases cited in note 24 *supra*.

[65] 249 U.S. 34 (1919).

[66] *Id.*

[67] *Id.* at 35, 39-41.

Britain paid its exporters three or five pence per gallon on exported alcohol as compensation for special domestic warehousing fees.[68] The *Nicholas* Court found that although these allowances may not have constituted a bounty, they did constitute a grant. The Court stated,

> If the word "bounty" has a limited sense the word "grant" has not. A word of broader significance than "grant" could not have been used. Like its synonyms "give" and "bestow," it expresses a concession, the conferring of something by one person upon another. And if the "something" be conferred by a country "upon the exportation of an article or merchandise" a countervailing duty is required . . . .[69]

This language in *Nicholas* indicates a decision by the Supreme Court that any concession whatsoever granted by a country on goods exported must be countervailed. Additionally, the *Nicholas* Court read *Downs* as holding the remission of the Russian taxes to be an impermissible indirect bounty.[70] If any confusion existed over the Court's interpretation of the countervailing duty statute in *Downs*, this confusion should have been resolved by the *Nicholas* Court's reading of *Downs*. After *Nicholas* it became clear that the Court intended any remission of indirect taxes by a foreign government to require a countervailing duty.[71]

E. *The Resulting Conflict*

It thus appears that the different branches of government were in conflict over the interpretations of the countervailing duty statute. The enacting Congress and the Treasury Department viewed the statute as exempting nonexcessive remissions of taxes from countervailing duties, while the pre-*Zenith* courts maintained that any remission must be countervailed. In addition, the continued reenactment of the original statute—the countervailing duty statute has been re-enacted five times since 1897[72]—failed to resolve this conflict. Throughout this time period, there has been virtually no change in the relevant language and no effort to further define the term bounty. None of these actions provide any definite congressional endorsement of either the judicial interpretation or the administrative practice. Further, congressional action taken subsequent to the judicial decisions in *Downs* and *Nicholas*, is equally inconclusive. Congress in 1950 failed to adopt a Treasury sponsored

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[68] *Id.* at 36-37.

[69] *Id.* at 39.

[70] *Id.* at 41.

[71] In a press conference in 1975, Assistant Secretary MacDonald of the Treasury Department conceded the validity of this interpretation of *Downs* and *Nicholas*. He stated,

> There are two ancient Supreme Court Cases—*Nicholas* and *Downs*—in which the Supreme Court stated—this is going back to, I believe, the first and second decades of the 20th Century, in which the Supreme Court stated that the remission of indirect taxes on Russian sugar and of some other product that I cannot think of right now, did, indeed, constitute a bounty or grant.

Unified Appendix 78, 81.

[72] See note 35 *supra*.

amendment that would have defined bounty according to the Treasury interpretation.[73] The Senate Finance Committee, however, also was informed in 1968 of the Treasury's failure to enforce the *Downs* interpretation;[74] yet Congress took no action to expressly include nonexcessive remissions within the scope of the Tariff Act. Similarly, while Congress responded to the concerns of domestic manufacturers in 1974 by granting a right to appeal adverse Treasury determinations as to countervailing duty petitions to the District Court,[75] Congress did not act in 1973 regarding the Treasury Department's failure to act on Zenith's petition, after being prompted to do so by manufacturing spokesmen.[76]

No clear policy choice, no definite endorsement of either the adminstrative or the judicial position can be determined from these congressional acts and failures to act in the years subsequent to the original legislative history. The original interpretations reached by the Treasury and the Court, therefore, continued in their original conflicting positions, unaffected by the subsequent legislative actions. The conflict contained in these interpretations had to be resolved.

II. Judicial Acceptance of Administrative Interpretations

A. *The Zenith Decision*

In *Zenith*, the Supreme Court resolved any ambiguity regarding the remission of indirect taxes by upholding the Treasury interpretation that solely

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[73] H.R. 8304, 81st Cong., 2d Sess., § 2 (1950). Section 2 of the proposed amendment would have added the following language to section 303 of the Tariff Act of 1930:

> The exemption of any exported article or merchandise from a duty or tax imposed on like articles or merchandise when destined for consumption in the country of origin or exportation, or the refunding of such a duty or tax, shall not be deemed to constitute a payment or bestowal of a bounty or grant within the meaning of this section.

Id.

[74] In 1968, the Senate Committee on Finance conducted extensive hearings to review United States trade policy. In the course of these hearings, representatives of various domestic industries stressed that the Supreme Court's decision in *Downs* was not followed by the Treasury Department. *E.g.*, *Review of United States Trade Policy: Hearings Before the Senate Committee on Finance*, 90th Cong., 2d Sess. 564, 568-69 (1968) (statement of the National Livestock Feeders Association); *id.* at 887-89 (statement of the United States Olive Producers and Importers).

[75] Section 331(b) of the Trade Act of 1974, 19 U.S.C. § 1516(d) (1976).

[76] *Proposed Amendments to the Tariff Act of 1930: Hearings on H.R. 6767 Before the House Committee on Ways and Means*, 93rd Cong., 1st Sess. 3292-93 (1973). The Committee was informed of Zenith's petition by Frank D. Langstroth, Vice President for Legislative Affairs of the Magnavox Company. Mr. Langstroth sent recommendations to Rep. Wilbur Mills on June 14, 1973 in which he stated,

> The Zenith case represents an outrageous disregard of the Congressional mandate. Zenith first filed its countervailing duty complaint in April 1970. . . . For approximately two years Treasury failed to conduct even a cursory investigation—while thousands of American workers in the electronics industry lost their jobs as domestic production rapidly declined, . . . Treasury finally initiated an investigation, but that investigation has since

excessive remissions of indirect taxes are to be countervailed.[77] In reaching this decision, the Court first noted that the Treasury Department has interpreted the countervailing duty statute to exclude nonexcessive remissions since the statute was first enacted.[78] The Court stated that great deference is due to Treasury interpretations since the Department is responsible for the administration of the statute. The Court concluded in this connection, that the Treasury interpretation should be upheld unless found to be unreasonable.[79]

The Court then examined the reasonableness of the Treasury interpretation by considering the language and legislative history of the original statute. In so doing, the Court considered the earlier countervailing duty provisions—especially the 1894 language exempting nonexcessive remissions—important in determining the meaning of the 1897 "net" bounty language.[80] The *Zenith* Court considered Senator Allison's statements regarding the 1897 change,[81] and the use of identical figures in describing the operation of the law by both proponents and opponents of the amendment significant in construing the statute.[82] The Court determined that these factors were persuasive, and therefore rejected the possibility that the deletion of the 1894 language was intended to eliminate the exemption for nonexcessive remissions.[83] Accordingly, on the basis of the legislative history, the Court determined that the express definitional limit contained in the 1894 statute was intended by Congress to apply to the 1897 "net" bounty language.[84]

Having concluded that the language and legislative history of the Tariff Act of 1897 supported the Treasury Department interpretation, the Court next determined that the interpretation was equally consistent with the statutory purpose to eliminate unfair competitive advantage for foreign exporters.[85] The Court agreed with the reasoning of the Treasury Department regarding the dangers of double taxation stating, "[t]his intuitively appealing principle regarding double taxation had been widely accepted both in this country and abroad for many years prior to the enactment of the 1897 statute."[86] In addition, the Court noted that since the Treasury Department participated in drafting the 1897 statute, the Department was well suited to interpret the statute according to its purpose. Indeed this factor gave additional weight to the reasonableness of the Department's position.[87]

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languished and no action has been taken to offset the subsidy element contained in imports of Japanese television sets.

Id.

[77] 437 U.S. at 447, 449.
[78] *Id.* at 450.
[79] *Id.* at 450-51.
[80] *Id.* at 451-53.
[81] See text and notes at notes 46-48 *supra*.
[82] 437 U.S. at 453-55.
[83] *Id.* at 452-53.
[84] *Id.* at 453.
[85] *Id.* at 455-56.
[86] *Id.* at 457.
[87] *Id.* at 456.

The Court concluded its examination of the reasonableness of the Treasury interpretation by considering the relationship between that interpretation and continual congressional re-enactment of the statute with virtualy no change in the language.[88] In this regard, the Court stated, "whether or not Congress can be said to have 'acquiesed' in the adminstrative practice, it certainly has not acted to change it."[89] The Court, therefore, saw no cause to find the Treasury practice unreasonable.[90]

The Court concluded is consideration of Zenith's petition by recognizing that even if the Treasury interpretation was reasonable, supported by the legislative history and uncontradicted by subsequent congressional action, this interpretation must fall before any contrary judicial interpretations.[91] In this regard, the Court considered its decision in *Downs v. United States*.[92] The Court found that the language in *Downs*, expressly prohibiting any remission of indirect taxes,[93] was inconsistent with other language in the opinion that suggested only excessive remissions were bounties.[94] The *Zenith* Court determined that the repeated use in *Downs* of the figures representing only a fraction of the full benefit bestowed on the exporter outweighed the single reference to the effect that all benefits are subject to the countervailing duty provision. The *Zenith* Court concluded that only the certificates, representing the excessive portion of the remission in *Downs*, were impermissible bounties.[95] The Court unanimously ruled, therefore, that *Downs* was consistent with the Treasury Department interpretation, and, accordingly, that deference would be shown to the reasonable Treasury interpretation.

B. *Validity of the Court's Reasoning*

The Court's decision in *Zenith*, exempting nonexcessive remissions from the statute's coverage, represents a proper interpretation of the countervailing duty statute. The Court's reasoning, however, is not totally convincing. Although the Court's examination of the legislative intent and the deference due to reasonable Treasury Department practices demonstrates sound judicial interpretation, the treatment of judicial precedent is less persuasive. The weakness in the treatment of judicial interpretations becomes apparent in the

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[88] *Id.* at 457. See note 35 *supra*.

[89] *Id.* at 457.

[90] The Court also noted that "the Secretary's position has been incorporated into the General Agreement on Tariffs and Trade (GATT), which is followed by every major trading nation in the world." *Id.* at 457. The Court considered the provisions of the GATT relevant to its inquiry because it believed that foreign tax systems may have been structured around the belief that nonexcessive remissions of indirect taxes would not be countervailed under United States tariff laws. *Id.*

[91] *Id.* at 459.

[92] 187 U.S. 496 (1903).

[93] See text at note 59 *supra*.

[94] See text at note 61 *supra*.

[95] *Id.* Speaking of the language in *Downs*, which broadly prohibits any remission of indirect taxes, the Court stated: "This passage is inconsistent with both preceding and subsequent language which suggests that the [*Downs*] Court understood the 'bounty' to reside in the value of the certificates." *Id.* at 461.

Court's failure to recognize the judicial precedent contrary to the Treasury interpretation established in *Downs* and carried forward in the lower court decisions. While confusion in the *Downs* opinion is quite understandable, given the seemingly inconsistent sections of that opinion,[96] several considerations previously noted reveal that both of the aspects of the tax scheme in question were deemed impermissible bounties by the Court in *Downs*. These considerations include the fact that the figures used in *Downs* were never at issue in the case, that the Supreme Court in *Downs* affirmed lower court decisions that expressly found both aspects of the Russian scheme to be impermissible bounties,[97] and that the Supreme Court had subsequently interpreted *Downs* as forbidding the remission of indirect taxes.[98] These considerations show that, properly read, *Downs* prohibits any remission of indirect taxes. The Court in *Zenith*, therefore, improperly relied on the *Downs* decision to support its proposition that solely excessive remissions are to be countervailed.

The weakness in the treatment of judicial precedent also is apparent in the *Zenith* Court's treatment of *Nicholas*.[99] The only mention of *Nicholas* in *Zenith* is contained in a footnote that distinguishes the facts of that case from those in *Zenith*.[100] The *Zenith* Court determined that language in *Nicholas* that calls for a broad interpretation of the statute in response to direct bounties could not be applied to the question whether the remission of a consumption tax—an indirect bounty—must be countervailed.[101]

The *Zenith* Court's characterization of *Nicholas* as referring only to direct bounties ignores the scope of the language used therein. The *Nicholas* Court, in introducing its discussion of the meaning to be attributed to the term grant, quoted the language from the countervailing duty statute which provides that "[w]henever any country 'shall pay or bestow directly, or *indirectly*, any bounty or grant . . . ,' "[102] a countervailing duty will be assessed. Further, the court in *Nicholas* referred only to *United States v. Passavant*,[103] and *Downs* and claimed that both of these cases, which dealt with indirect bounties, supported its conclusion as to the meaning of the term grant.[104] The *Zenith* Court, therefore, erroneously limited the *Nicholas* decision to situations involv-

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[96] *Id.* at 459.

[97] See text and notes at notes 62-63 *supra*.

[98] Nicholas & Co. v. United States, 249 U.S. 34, 41 (1919).

[99] 249 U.S. 34 (1919), See text and notes at notes 65-71 *supra*.

[100] 437 U.S. at 459 n.15.

[101] *Id.*

[102] *Nicholas*, 249 U.S. at 39 (emphasis added).

[103] 169 U.S. 16 (1898).

[104] 249 U.S. at 40-41. *Passavant*, which dealt with a domestic tax remission, was quoted by the *Nicholas* Court for the proposition that "the laws of this country in the assessment of duties proceed upon the market value in the exporting country and not upon that market value less such remission or amelioration as that country chooses to allow in accordance with its own views of public policy." *Id.* The *Nicholas* Court cited *Downs* as involving both direct and indirect bounties. *Id.* at 41. The *Nicholas* Court's reliance on decisions involving the remissions of indirect taxes indicates its view that such remissions are, along with direct bounties subject to identical analysis under the countervailing duty provisions.

ing direct bounties. Both the *Nicholas* and *Downs* decisions, provide judicial precedent contrary to the Treasury Department's interpretation of the statute.[105] The Court in *Zenith* is not persuasive in its consideration of the *Downs* holding and in its failure to consider the *Nicholas* decision.

This weakness in the interpretation of judicial precedent, however, does not alter the validity of the Court's decision. In order to reconcile the opposing interpretations, the Court should have looked to the authority attributed to each branch's interpretation and to the clarity with which the interpretation is demonstrated. The Treasury interpretation has been very clear and consistent. The Department has explicitly stated that nonexcessive remissions are not covered under the statute.[106] Although the congresssional intent is not as clear, it has been shown that the enacting Congress also supported the Treasury interpretation.[107] The reviewing courts, therefore, should have deferred to the interpretation followed by the Treasury. This interpretation was consistent with that of Congress and was a reasonable means of achieving the statute's intended purpose. Prior to *Zenith*, however, the courts did not defer to the Treasury, and the *Zenith* Court was faced with judicial precedent contrary to the administrative practice.[108] In this position, the Court should have recognized the error contained in its earlier decisions and upheld the original intent as announced by the Treasury Department.[109]

III. The Need for Reform

A. *The Problem*

Although the *Zenith* Court properly interpreted the countervailing duty statute, the more important issue in this analysis is whether the statute is achieving its intended purpose of eliminating unfair competitive advantages between domestic and foreign goods. Consideration of this question shows that the statute does not fulfill its intended purpose. As will be shown in this section, nonexcessive remissions of indirect taxes do, in fact, give rise to unfair competitive advantages. The statute's failure to correct this imbalance thus indicates a need for legislative reform.

The Treasury Department's present refusal to assess duties for the nonexcessive remissions of indirect taxes is based on the theory that to do so would result in double taxation.[110] This double taxation analysis is premised on the assumption that direct taxes are borne entirely by the manufacturer,

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[105] The practical result of the Court's interpretation is the same as it would have been had the Court expressly recognized the conflict. *Downs* and *Nicholas* can no longer be cited as binding precedent supporting the proposition that a nonexcessive remission must be countervailed.

[106] See note 50 *supra*.

[107] See text at notes 45-48 *supra*.

[108] See text at note 96 *supra*.

[109] Although the Court did not follow this procedure, and erroneously interpreted the prior precedent, the error does not materially affect the validity of the Court's holding. Under the present statute the Treasury Department and the Court correctly denied Zenith's petition.

[110] See text at note 51 *supra*.

whereas indirect taxes are borne entirely by the consumer. Theoretically, "an indirect tax is always passed on to the consumer in the form of higher price (shifted), whereas all direct taxes are absorbed entirely by the factors of production in the form of lower wages or reduced dividends."[111] Under this theory, remission of a direct tax would clearly constitute a bounty in that its sole benefit would run to the manufacturer and would thereby encourage export. Because of the remission the manufacturer would face a lower cost of production, and would be able to offer higher wages or gain greater profits. On the other hand, remission of an indirect tax levied on the sale of the item theoretically would not benefit the manufacturer. Rather, it would only remove from consumers the unfair burden of double taxation—paying a sales tax for both the country of manufacture and the country of consumption. The Treasury Department has concluded that it would not violate the statute's intended purpose of prohibiting benefits to manufacturers to exempt consumers from this double taxation burden.

The validity of this analysis depends on a clear separation between direct and indirect taxes. It is essential that only manufacturers benefit from remissions of direct taxes and only consumers be affected by remissions of indirect taxes because, if this separation is not maintained, the distinction between direct and indirect taxes would be meaningless. In the present market system, however, assuming this clear separation is unjustified. Manufacturers do not necessarily absorb the burden of direct taxes by reducing profits or by paying lower wages. Rather, they often pass much of this burden on to the consumer.[112] Similarly, indirect taxes are not borne entirely by the consumer, since a manufacturer will often absorb some of this cost by offering the product at a reduced price in order to encourage sales.[113] In interpreting the applicability of the countervailing duty provision, therefore, the Treasury Department's justification for distinguishing between direct and indirect taxes—to avoid double taxation of the consumer—is not persuasive.

The double taxation theory erroneously assumes that the manufacturer alone is affected by the levying of direct taxes. This theory fails to take into account that when the manufacturer passes on the cost of direct taxes to the consumer, the consumer also is affected. In these instances, despite the Treasury Department intent of avoiding double taxation for consumers, the consumer will pay two taxes—the direct taxes of the manufacturing country and the indirect taxes of the country of sale. It thus appears that the facts do

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[111] Butler, *Countervailing Duties and Export Subsidization: A Re-emerging Issue in International Trade*, 9 VA. J. INT'L LAW 82, 113 (1969) [hereinafter cited as Butler]. This theoretical construction of the tax system is also the basis for the policy toward remissions of taxes contained in Article VI of the General Agreement on Tariffs and Trade. *Id.* at 113-14.

[112] The manufacturer will often raise the price of the item in order to compensate for the direct taxes and ensure profits. This practice is especially widespread where the manufacturer holds a strong market position. *Id.* at 114-15.

[113] The manufacturer in a sharply competitive market may reduce the price of the item, thereby reducing the profit from each item sold, in order to maintain or increase the manufacturer's share of the market. *Id.*

not support the Treasury claim that permitting remissions of indirect taxes will avoid the imposition of two sets of taxes on the consumer.

In addition, the assumption that the remission of indirect taxes will benefit only consumers is without merit. Manufacturers also benefit. The error of this position becomes particularly apparent when a comparison is drawn between profits derived from domestic as opposed to export sales. In the case of the manufacturer who is engaged in stiff competition and who has absorbed some of the indirect taxes by reducing prices, the removal of the indirect tax cost will restore the original profit margin. This will only be true, however, for exported goods where the tax is remitted. The tax will remain on the goods sold domestically. The manufacturer therefore may gain greater profits by increased exports. In the case of the manufacturer in a strong market position where there is less competitive pressure to lower prices, the remission of the tax will only benefit the consumers to the extent that the manufacturer is willing to roll back the price. The manufacturer not faced with competitive pressures may decide to deduct only a portion of the full amount remitted from the sales price, thereby increasing the profits from export sales.[114] The manufacturer, therefore, often may benefit from the remission of indirect taxes.

The Treasury Department's theory regarding which remissions are prohibited by the countervailing duty statute ignores not only the actual effects of indirect and direct taxes on the market, but also disregards the varying schemes of taxation utilized by exporting countries. The Treasury analysis ignores the fact that different nations place different emphasis on direct and indirect taxes in their taxation systems.[115] The small number of nations, such

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[114] In hearings before the House Ways and Means Committee, remarks dealing with this issue were submitted by Stanley S. Surrey, Assistant Secretary of the Treasury. Mr. Surrey stated:

> If sales taxes or other indirect taxes—whether they be value-added, turnover, retail or other tax forms—cannot be fully passed on in price, then a manufacturer selling in his domestic market must lower his prices and reduce his profits. But if the full rebate of the tax cost and the exemption of exports from the tax make it unnecessary to change his export prices, then he is not concerned about passing anything along on an export sale, he need not lower his export price, and his export profits would not suffer as would his domestic profits. The business of exporting becomes that much more attractive, and the sales tax system has become an incentive to export activity.

Foreign Trade and Tariff Proposals: Hearings Before the House Committee on Ways and Means, 90th Cong., 2d Sess. 64 (1968).

[115] Marks and Malmgren, *supra* note 31 at 352. The Common Market countries have emphasized the indirect tax through the use of the value added tax (VAT). These nations have been increasing their reliance on the value added tax and reducing direct taxation as they have moved to a more uniform tax system. Butler, *supra* note 111 at 112. Richard W. Lindholm, Professor of Finance and Dean of the Graduate School of Management and Business at the University of Oregon noted in remarks submitted to the House Ways and Means Committee that "[The Common Market] is well on its way to establishing a common VAT. Under the rules of GATT the VAT possess the capability of providing a powerful export stimulus through rebate to the

as the United States, that place greater emphasis on direct rather than indirect taxes and derive a greater percentage of their revenue from direct taxes are placed at a competitive disadvantage when indirect taxes alone are permitted to be remitted. The manufacturers in strong direct tax nations are forced to offer their goods at a higher price than manufacturers in those nations that have a lower direct tax rate and have their indirect taxes remitted without fear of being countervailed.[116] These two factual weaknesses in the Treasury analysis—the error of the double taxation theory and the differences between tax systems—demonstrate that reform of the present countervailing duty provision is needed.

The need for reform has not gone unnoticed. Articles[117] and statements before congressional Committees[118] have highlighted the present need. Indeed, David R. MacDonald, Assistant Secretary for Enforcement Operations and Tariff Affairs for the Treasury Department has stated that the economic argument offered in opposition to the practice of allowing nonexcessive indirect tax remissions is sound.[119] It is clear, then, that more congressional consideration of this issue is necessary.

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exporter of all tax attributable to the production of the product exported." *Foreign Trade and Tariff Proposals: Hearings Before the House Committee on Ways and Means,* 90th Cong., 2d Sess. 1708 (1968).

[116] The inequity contained in this system is compounded when United States products imported into nations that rely on indirect taxes are levied with a border tax equal to the amount of the indirect tax imposed on similar products manufactured in the importing nation. In this instance the American products reach the foreign market with a higher direct tax rate imposed by the United States and a high indirect tax rate imposed by the country of import. Marks and Malmgren, *supra* note 31 at 352.

[117] Marks and Malmgren, *Negotiating Nontariff Distortions to Trade,* 7 LAW & POL'Y INT'L BUS. 327 (1975); Butler, *Countervailing Duties and Export Subsidization: A Re-emerging Issue in International Trade,* 9 VA. J. INT'L LAW 82 (1969).

[118] *Foreign Trade and Tariff Proposals: Hearings Before the House Committee on Ways and Means,* 90th Cong., 2d Sess. 1639-43 (1968) (statement of William A. Dymsza, Research Director, International Business Institute, Graduate School of Business Administration, Rutgers University); *id.* at 1723-27 (statement of the National Association of Manufacturers); *id.* at 2863-64 (statement of Philip O. Geier, Jr., of the Machine Tool Builders Association); *id.* at 3697 (brief of the General Electric Company); *id.* at 4335 (statement of Herman K. Intemann of the Union Carbide Corp.).

[119] In a press briefing on October 20, 1975 regarding the denial of a United States Steel countervailing duty request, Assistant Secretary of the Treasury MacDonald said,

> I just want to make this additional point: The fact that we have not found the remission of value-added taxes to be a bounty or grant within the meaning of our law, does not mean that the United States Government is wild about other taxes of this sort. In fact, if there was one thing that was quite persuasive in the petition by U.S. Steel, it was their economic argument that, *in fact,* there should be no distinction between direct and indirect taxes. . . . [T]he distinction between so-called "direct" taxes and so-called "indirect" taxes, economically speaking, may well be chimerical.

Unified Appendix at 80.

B. *The Alternatives*

It would appear that Congress is faced with two alternatives to resolve the present imbalance in tax treatment. Congress can reform our tax laws to conform more closely to the tax systems used in Japan and many of the European nations with which the United States carries on a substantial level of trade. Although the long term merit of this alternative is beyond the scope of this article, it seems clear that such reform would require substantial study and in any event could not be implemented in the foreseeable future. The present problem requires more immediate attention than could be afforded in a major revision of our tax system. Even if a longterm shift to emphasizing indirect taxes would provide a better tax structure for the future, it would not provide an effective remedy for the current trade advantages problem. The remaining alternative left to Congress is to tax remissions of indirect taxes. This is the proposal that has been favored by many manufacturing spokesmen.[120]

A change in the domestic legislation alone, however, will not be sufficient to remedy the problem. The dichotomy between direct and indirect taxes has been incorporated into the General Agreement on Tariffs and Trade, to which the United States is a party.[121] Article VI(4) of the GATT provides that nations, parties to the agreement will not assess countervailing duties in response to the remission of indirect taxes.[122] Accordingly, in order to fulfill its obligations under this international agreement, the United States will have to re-negotiate the GATT provisions dealing with subsidies.

The need for reform is great enough to warrant this legislative and diplomatic action. Although it cannot be determined as an exact percentage, American manufacturers cite the unfair tax advantages as a contributing factor in the deterioration of the United States' share of the world market.[123] Congress and the Executive most certainly will not ignore this problem that threatens the health of the American economy. In addition, the matter is of sufficient importance to the United States to require the cooperation of other nations in reaching a fair resolution of the problem.[124]

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[120] See note 118 *supra*.

[121] See note 26 *supra*.

[122] 61 Stat. A24 (1947).

[123] A statement by Joseph S. Wright, Chairman of the Board of the Zenith Radio Corporation was submitted to the *Zenith* Court. In his statement Mr. Wright noted that the United States manufacturer's share of the American electronics market has declined dramatically. Unified Appendix at 55-56.

[124] The United States has ben involved in negotiations in a Working Party of the Organization for Economic Co-operation and Development nations, formed to consider the problem. However, no resolution of the problem in these negotiations has been reached as of yet. In addition, the Multinational Trade Negotiations agreed in Geneva, Switzerland on proposed International Codes for interpreting the provisions of the General Agreement on Tariffs and Trade on April 12, 1979. The Sub-Group on Subsidies and Countervailing Duties proposed that countervailing duties be imposed only in the event of injury to the domestic industry and subsidy to the foreign exporter. The Subgroup also proposed that in no event will the countervailing duty imposed exceed the amount of the subsidy deemed to exist. In a footnote to this

IV. CONCLUSION

Prior to the Court's decision in *Zenith* a conflict existed regarding the interpretation of the countervailing duty statute. The Treasury Department, responsible for administering the statute, interpreted the countervailing duty provision as exempting nonexcessive remissions of indirect taxes. Early Supreme Court decisions, on the other hand, concluded that any remission of a tax requires the levying of a countervailing duty. The Court in *Zenith* resolved this ambiguity concerning the meaning of the statute by upholding the Treasury Department interpretation. The Court noted that the Department's interpretation was reasonable given the purpose and legislative history of the statute. Although the Court did not recognize the conflict presented by the two earlier Supreme Court decisions, this weakness does not materially affect the validity of the decision. Had the Court recognized the conflict, it properly could have noted the deference due to the clear and reasonable interpretation of the Treasury Department and overruled the improper earlier decisions. The countervailing duty statute, correctly interpreted, does not require a duty for the nonexcessive remission of an indirect tax.

Despite the correct statutory interpretation reached by the Court, the *Zenith* decision demonstrates factual weaknesses in the statute. The countervailing duty statute is intended to elimate unfair competitive advantages arising by means of foreign subsidies of their exports. As it is now written and interpreted, the present statute fails to achieve this purpose. Nonexcessive remissions of indirect taxes do give rise to competitive advantages. In order to alleviate this weakness in the statute, the countervailing duty provision should be re-written to respond to the present market conditions. In addition, the GATT provisions which permit nonexcessive remissions of indirect taxes should be re-negotiated. In this way, a fairer and more balanced market system can be achieved.

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section, the proposed agreement states, "An understanding among signatories should be developed setting out the criteria for the calculation of the amount of the subsidy." Multilateral Trade Negotiations: International Codes Agreed to in Geneva, Switzerland, Joint Committee Print of the Committee on Ways and Means and the Committee on Finance, 96th Cong. 1st Sess., p. 11 fn. 2. In the "Subsidies/Countervailing Measures" section of the proposed agreement a subsidy or bounty is defined as "[t]he exemption or remission in respect of the production and distribution of exported products, of indirect taxes in excess of those levied in respect of the production and distribution of like products when sold for domestic consumption." *Id.* at Annex (g) p. 39. It thus appears that resolution of the problem is yet to be achieved.