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JUDICIAL REVIEW OF NEGATIVE
COUNTERVAILING DUTY DETERMINATIONS:
UNITED STATES V. ZENITH RADIO CORP.

The Trade Act of 1974¹ amends the Tariff Act of 1930² to provide for judicial review of negative countervailing duty³ determinations. This new right to judicial review, embodied in section 516(d) of the Tariff Act,⁴ applies to determinations made by the Secretary of the Treasury under section 303 of the Tariff Act.⁵ The first case to arise under section 516(d) involving

1. Pub. L. No. 98-618, § 321(f)(1), 88 Stat. 1978 (1975) (amending Tariff Act of 1930, ch. 497, tit. IV, § 516, 46 Stat. 590).

The Trade Act of 1974 made other significant changes in the countervailing duty law. See generally Comment, *United States Countervailing Duty Law: Renewed, Revamped and Revisited—Trade Act of 1974*, 17 B.C. INDUS. & COM. L. REV. 832, 852-63 (1976).

2. Ch. 497, 46 Stat. 590 [hereinafter cited as Tariff Act].

3. A countervailing duty is a special or additional duty imposed on imported merchandise to offset a subsidy paid by the exporting country upon exportation. The general purpose of a countervailing duty is to preserve free trade and competition between domestic and imported merchandise by neutralizing the competitive advantage accorded foreign goods by such subsidies. See Butler, *Countervailing Duties and Export Subsidization: A Re-emerging Issue in International Trade*, 9 VA. J. INT'L L. 82, 83 (1969).

4. Tariff Act of 1930, § 516(d), 19 U.S.C. § 1516(d) (1976). Section 516(d) of the Tariff Act as amended, 19 U.S.C. § 1516(d) (1976), states in pertinent part:

(d) Within 30 days after a determination by the Secretary—

.....

(2) under section 303 of this Act, that a bounty or grant is not being paid or bestowed, an American manufacturer, producer, or wholesaler of merchandise of the same class or kind as that described in such determination may file with the Secretary a written notice of a desire to contest such determination. Upon receipt of such notice the Secretary shall cause publication to be made thereof and of such manufacturer's, producer's, or wholesaler's desire to contest the determination. Within 30 days after such publication, such manufacturer, producer, or wholesaler may commence an action in the United States Customs Court contesting such determination.

5. Tariff Act of 1930, § 303, 19 U.S.C. § 1303 (1976). Section 303 of the Tariff Act as amended, 19 U.S.C. § 1303 (1976), states in pertinent part:

(a)(1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

Although private subsidies have been included within the purview of § 303 since 1922, no

a negative countervailing duty determination is *United States v. Zenith Radio Corp.*⁶ In *Zenith*, an American manufacturer challenged a Treasury determination not to assess countervailing duties against certain imported Japanese electronic products, upon which the Japanese Government had remitted a domestic excise tax. The Court of Customs and Patent Appeals (CCPA) decision in *Zenith* resolves the controversy in favor of the Treasury Department, reflecting extraordinary judicial deference to the Treasury's interpretation of section 303.⁷ The court's approach creates substantial doubt as to the viability of the new section 516(d) right to judicial review of negative countervailing duty determinations.

After tracing the conflict between administrative practice and judicial decisions that culminated in the *Zenith* controversy, this Note will consider whether the CCPA failed to fulfill its responsibility under section 516(d) to scrutinize the Treasury determination. Alternatives will then be explored which remain available to American manufacturers who, after *Zenith*, appear to be without effective judicial recourse from unfavorable Treasury determinations.

I

TREATMENT OF EXCISE TAX REMISSION UNDER U.S. COUNTERVAILING DUTY LAW

A. TREASURY PRACTICE

Treasury policy concerning the remission of excise taxes originated with an 1898 Treasury decision involving allegations that exporters of French chestnuts had received "a drawback of 50 centimes (one-half franc) per kilo" from the French Government.⁸ The decision established a blanket rule that "the noncollection of an internal revenue tax by the exporting country does not constitute an export bounty."⁹ However, "excessive" remissions—payments in excess of the tax originally imposed—are subject to

claim against an alleged private subsidy has ever arisen under the statute. This fact provides a useful rule for distinguishing between countervailing duty cases and those arising under the closely related Antidumping Act, 19 U.S.C. §§ 160-173 (1976): cases treated under the Antidumping Act involve unfair international trade practices of private interests, while those under countervailing duty law always involve governmental subsidies. See Feller, *Mutiny Against the Bounty: An Examination of Subsidies, Border Tax Adjustments, and the Resurgence of the Countervailing Duty Law*, 1 LAW & POL'Y INT'L BUS. 17, 33 (1969). Congress has entrusted enforcement of the countervailing duty statute to the Secretary of the Treasury, who determines whether or not various export schemes of foreign governments constitute bounties or grants under § 303.

6. 562 F.2d 1209 (C.C.P.A. 1977), cert. granted, 46 U.S.L.W. 3526 (U.S. Feb. 21, 1978) (No. 77-539).

7. *Id.* at 1218-23.

8. T.D. 19321, 1 TREAS. DEC. 696 (1898).

9. *Id.* at 696.

countervailing duties.¹⁰

Attempts to determine the Department's rationale for this rule founder on the most recurrent problem in the area of countervailing duty law: Treasury secrecy.¹¹ Neither section 303 nor the Customs Service regulations on countervailing duty investigations¹² contain a provision requiring the Treasury to explain its determinations. Furthermore, the Treasury has not officially enumerated the types of practices that are subject to countervailing duties, although commentators have attempted to construct lists based on the skeletal decisions published by the Treasury.¹³ Even these lists, however, do not specify which practices the Treasury considers clearly *outside* the scope of section 303, since prior to the enactment of the Trade Act of 1974 the Department was not required to publish its negative determinations.¹⁴

At least in the early stages of a countervailing duty investigation, Treasury secrecy is not entirely without justification. Any determination under the statute, whether positive or negative, could have a substantial impact on international trade,¹⁵ and premature disclosure could hinder negotiations aimed at resolving the dispute by international agreement.¹⁶ Another justification for the Treasury's secrecy might be the tremendous complexity of the issues involved.¹⁷ Neither of these reasons, however, adequately justifies continued secrecy after the termination of a particular countervailing duty investigation. Not surprisingly, commentators have frequently criticized the Treasury's secrecy,¹⁸ and a congressional subcommittee has expressed concern that this practice inhibits analysis of Treasury interpretations of the law.¹⁹ Critics have suggested forcing disclosure of

10. *Id.* at 696-97. For later applications of this standard, see, for example, T.D. 31659, 20 TREAS. DEC. 67 (1911); T.D. 49355, 73 TREAS. DEC. 107 (1938).

11. Lamenting the failure of Congress to require Treasury explication of its countervailing duty decisions, one commentator stated: "The continuation of this practice will hinder, as previously, both those seeking a clear understanding of administrative construction of the phrase, as well as those who seek to support or protest particular Treasury determinations in an intelligent manner." Comment, *supra* note 1, at 864 (footnotes omitted).

12. 19 C.F.R. § 159.47 (1977).

13. One writer, a Treasury official, lists eight such categories. See Feller, *supra* note 5, at 40-50.

14. The Treasury had published only one negative countervailing duty determination prior to 1974. See T.D. 67-142, 1 Cust. B. & Dec. 292 (1967).

15. See, e.g., note 84 *infra*.

16. See, e.g., Agreement Concerning Automotive Parts, Jan. 16-Mar. 9, 1965, United States-Canada, 17 U.S.T. 1372, T.I.A.S. No. 6093. This Agreement was the product of informal negotiations while a countervailing duty investigation was pending on the issue. See Butler, *supra* note 3, at 131-32.

17. Butler, *supra* note 3, at 125.

18. See, e.g., *id.*, at 131-33; Comment, *supra* note 1, at 864.

19. In "[t]he absence of any reports from the Treasury Department as to the basis on which its determinations of the existence of subsidization are made, it is difficult, if not impossible, to analyze the administration of section 303." SUBCOMM. ON CUSTOMS, TARIFFS AND RECIPRO-

Treasury reasoning under the Freedom of Information Act,²⁰ but apparently this has not been tried.²¹

The Treasury's refusal to explain its decisions under section 303 would be relatively unimportant if the principles involved were simple and invariable. Unfortunately, the opposite is true. For example, although the general rule is that remission of internal revenue taxes is not countervailable, in 1967 the Treasury countervailed against remission of certain Italian internal revenue taxes on the export of electrical transmission towers.²² Predictably, the Treasury published its determination with no explanation. The importer in *American Express Co. v. United States*²³ challenged the order in the Customs Court, which affirmed the Treasury's finding. The importer then appealed to the CCPA, where the Department's rationale for the imposition of countervailing duties finally surfaced. In a stipulation, the parties agreed that section 303 would apply to "the remission, rebate, refund, or abatement, however accomplished, of taxes or other charges *which are not directly related to the exported product* or to the raw materials or components used therein."²⁴

The adoption of this refinement of the Treasury rule—distinguishing between taxes imposed directly upon the product itself and all other taxes—brings Treasury practice into line with the international standard embodied in the GATT,²⁵ which exempts from countervailing duty liability

CAL TRADE AGREEMENTS, HOUSE COMM. ON WAYS & MEANS, 85TH CONG., 1ST SESS., REPORT ON UNITED STATES CUSTOMS, TARIFF AND TRADE AGREEMENT LAWS AND THEIR ADMINISTRATION 95 (1957).

20. 5 U.S.C. § 552 (1976).

21. See Comment, *supra* note 1, at 839 n.66.

Critics of Treasury secrecy did win a major victory upon the enactment of an amendment to the Antidumping Act, 19 U.S.C. §§ 160-173 (1976), in the Trade Act of 1974. As amended, the Antidumping Act requires the Treasury to publish along with its determinations in antidumping investigations "a complete statement of findings and conclusions, and the reasons or bases therefor, on all the material issues of fact or law presented." *Id.* at § 160(d)(2). Although this disclosure requirement was not specifically added to the countervailing duty statute, some commentators were optimistic that disclosure would be extended to countervailing duty determinations as well as antidumping investigations. See, e.g., Remarks by Eugene Stewart, before the Third Annual Judicial Conference of the United States Court of Customs and Patent Appeals, *American Manufacturer's Contest of Treasury Decision Not to Assess Countervailing or Antidumping Duties* (May 10, 1976), reprinted in 72 F.R.D. 397, 410. However, the Treasury has refused to extend its disclosure obligation to its reasoning in countervailing duty cases.

22. T.D. 67-102, 1 Cust. B. & Dec. 212 (1967). The remitted taxes had been imposed on such general overhead items as factory machinery, registration taxes, etc.

23. 472 F.2d 1050 (C.C.P.A. 1973), *aff'g* 332 F. Supp. 191 (Cust. Ct. 1971).

24. *Id.* at 1057 (emphasis added).

25. The General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. pt. 5 at A11, T.I.A.S. No. 1700, 55 U.N.T.S. 194 [hereinafter cited as GATT]. GATT is a multilateral agreement concerning international trade policy. See generally K. DAM, THE GATT—LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1970).

remission of "duties or taxes borne by the . . . product."²⁶ The United States is not legally bound to follow the GATT rule because of its grandfather clause, exempting contracting parties from compliance if prior inconsistent domestic legislation exists.²⁷ Nonetheless, reference to the international practice does help to clarify the Treasury's interpretation of section 303.

B. CONFLICTING JUDICIAL INTERPRETATION: *Downs* AND *NICHOLAS*

The longstanding Treasury interpretation of section 303 not to counter-vail against the remission of excise taxes does not accord with the language in several Supreme Court cases, the most important of which is *Downs v. United States*.²⁸ *Downs* involved a scheme of the Russian Government to regulate the internal price of sugar, by which exporters received a remission of the Russian excise tax on sugar as well as a transferable export certificate. The value of the certificate was determined by the difference between the domestic and foreign market prices of sugar at the time of export. The Supreme Court held that this arrangement bestowed a bounty upon exportation, stating in broad language that the mere remission of the excise tax was per se a bounty or grant:

The details of this elaborate procedure for the production, sale, taxation, and exportation of Russian sugar are of much less importance than the two facts which appear clearly through this maze of regulations, *viz.*: that no sugar is permitted to be sold in Russia that does not pay an excise tax of R. 1.75 per pood, and that sugar exported pays no tax at all 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.²⁹

Although this language would conclusively resolve the question of excise tax remission if clearly a part of the *Downs* holding, the precedential value

26. GATT, *supra* note 25, art. VI(3), 61 Stat. pt. 5 at A24. This article states:

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.

Because GATT follows the "country of destination" principle to avoid double taxation of internationally traded goods, the GATT rule allows remission of indirect taxes such as excise taxes. Rosendahl, *Border Tax Adjustments: Problems and Proposals*, 2 LAW & POL'Y INT'L Bus. 85, 90 (1970). On the other hand, remission of direct taxes, such as income taxes, is countervailable. The rationale for the difference in treatment rests on the assumption that direct taxes are ultimately shifted backward to the producer, whereas indirect taxes are shifted entirely forward to the consumer. *Id.*

27. GATT, *supra* note 25, Protocol of Provisional Application, 61 Stat. pt. 6 at A2051.

28. 187 U.S. 496 (1903).

29. *Id.* at 515.

of the case is disputed.³⁰ The Treasury has consistently ignored *Downs*, contending that the Supreme Court's language concerning excise tax remission is mere dictum.³¹ The opinions of the lower courts in *Downs* do little to resolve the ambiguity of the Supreme Court opinion,³² making the Treasury's argument difficult to confirm or refute.³³

The other major Supreme Court case on tax remission is *Nicholas & Co. v. United States*.³⁴ This case involved a countervailing duty assessment against spirits imported from the United Kingdom, whose manufacturers had received both remission of an internal excise tax and an additional "allowance" upon export.³⁵ The *Nicholas* Court gave as an example of an indirect bounty "the remission of taxes upon the exportation of articles which are subject to a tax when sold or consumed in the country of their production," and cited *Downs*.³⁶ Further, the Court broadly interpreted the word "grant" in section 303.³⁷ Nonetheless, the specific issue of tax remission apparently was not before the Court, again raising the question of whether the Court's discussion was dictum.³⁸

30. The Supreme Court in *Downs* showed some confusion even as to the precise issue before it, giving the tax remission issue only scant treatment while focusing most of its attention on the export certificate. *Id.* at 512-15.

31. See Butler, *supra* note 3, at 120.

32. For example, the Board of General Appraisers held that the Russian Government bestowed a bounty by remitting taxes and by issuing the export certificate. T.D. 22984, 4 TREAS. DEC. 405 (1901). The court of appeals incorporated the Board of Appraisers' opinion as part of its own, *Downs v. United States*, 133 F. 144, 151-52 (4th Cir. 1902), but at the same time concluded that the bounty consisted only of the export certificate. *Id.* at 145.

33. Many commentators have argued that the language in *Downs* is dictum. One such argument relies on the value of the export certificate and the excise tax remission. See Recent Decision, *The Michelin Decision: A Possible New Direction for U.S. Countervailing Duty Law*, 6 LAW & POL'Y INT'L BUS. 237, 245 (1974). The excise tax of R. 1.75 per pood was fully remitted under the Russian scheme. The market value of the export certificate was between R. 1.25-1.64 per pood. Thus, if the remission of the excise tax was at issue, the countervailing duty levied "would necessarily have had to exceed 1.75 rubles, the normal excise tax." *Id.* Since, however, the amount levied was only .38-.50 rubles per pood, the tax remission issue must not have been before the Court, and the tax remission language must be dictum. *Id.*

The problem with this argument is that the amount finally countervailed as the "net" bounty corresponds neither to the value of the tax remission nor to the value of the export certificate. The Treasury's basis for determining the net bounty was not disclosed, so that what was considered to be the "gross" bounty—whether consisting of one or both elements—is not ascertainable. See Butler, *supra* note 3, at 119; notes 62-66 *infra* and accompanying text.

34. 249 U.S. 34 (1919).

35. *Id.* at 36.

36. *Id.* at 41.

37. "Like its synonyms 'give' and 'bestow,' ['grant'] 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 any article or merchandise' a countervailing duty is required. . . ." *Id.* at 39.

38. The lower court in *Nicholas* stated: "It must be borne in mind that this appeal concerns only the 'allowance' paid exporters of 3d. and 5d. and not the excise duty of 14s.9d, which latter is never paid upon spirits exported from the United Kingdom of Great Britain. The

C. JUDICIAL REVIEW OF NEGATIVE COUNTERVAILING DUTY DETERMINATIONS

The conflict between the administrative interpretation of section 303 and the judicial interpretation espoused in *Downs* and *Nicholas* remained unresolved through successive reenactments of the statute by Congress.³⁹ American manufacturers competing with subsidized imports might have tried to bring the controversy to a head, but were hindered by Treasury secrecy⁴⁰ and by Treasury delays in pursuing countervailing duty investigations.⁴¹

An additional problem arose in 1971 with the CCPA's decision in *United States v. Hammond Lead Products, Inc.*⁴² that American manufacturers were not entitled to judicial review of negative countervailing duty determinations. The CCPA based the *Hammond Lead* decision on its reading of section 516(b) of the Tariff Act,⁴³ which provides for judicial review of Treasury determinations on the "classification of and the rate of duty" imposed on imported merchandise. A countervailing duty, according to the court, was a "penal exaction" and not a "duty" within the meaning of the statute.⁴⁴ As an alternative holding, the court indicated at length that countervailing duty assessments are "not essentially judicial in nature"⁴⁵ and

status of the latter is not here in question." *Nicholas & Co. v. United States*, 7 Ct. Cust. App. 97, 104 (1916).

39. For a more comprehensive treatment of the legislative evolution of the countervailing duty law, see Comment, *supra* note 1, at 833-63.

40. See notes 11-21 *supra* and accompanying text.

41. Perhaps the most egregious example of Treasury delay is *Zenith* itself, which required almost six years to progress from the filing of the initial complaint (April 1970) to the final negative countervailing duty determination (January 1976). While testifying before the House Committee on Ways and Means on the proposed amendments to the countervailing duty law, one of the American manufacturers that filed a complaint in *Zenith* stated:

The *Zenith* case represents an outrageous disregard of the Congressional mandate. *Zenith* first filed its countervailing duty complaint in April 1970. Incorporated into that complaint was a comprehensive report from the American Embassy in Tokyo detailing an extensive list of Japanese export subsidy practices. 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. At the same time, our balance of trade with Japan went from bad to worse.

In the Spring of 1972, the Magnavox Company and several U.S. electronic parts producers also filed a countervailing duty complaint Japanese subsidy practices [*sic*]. Treasury finally initiated an investigation, but that investigation has since languished and no action has been taken to offset the subsidy element contained in imports of Japanese television sets.

Trade Reform: Hearings on H.R. 6767 Before the House Comm. on Ways and Means, 93d Cong., 1st Sess. 3292-93 (1973) (statement of Magnavox Company). See also *id.* at 806.

42. 440 F.2d 1024 (C.C.P.A. 1971), *cert. denied*, 404 U.S. 1005 (1971).

43. Tariff Act of 1930, § 516(b), 19 U.S.C. § 1516(b) (1976).

44. 440 F.2d at 1030.

45. *Id.*

that Congress had chosen to rely on the executive branch, rather than on the judiciary, to determine when to impose countervailing duties.

The *Hammond Lead* decision had the effect of "legitimiz[ing] prevailing administrative practice"⁴⁶ by insulating it from judicial scrutiny. The combination of administrative discretion and judicial restraint drastically reduced the utility of section 303 to American manufacturers seeking protection from subsidized foreign goods.⁴⁷ Congress recognized that *Hammond Lead* "might adversely affect the ability of American producers to obtain meaningful relief under the countervailing duty law."⁴⁸ In order to "balance" Treasury discretion with the need to protect domestic interests from subsidized imports,⁴⁹ Congress expressly overturned *Hammond Lead* in the Trade Act of 1974 by providing for judicial review of negative countervailing duty determinations.

II

THE ZENITH CASE

Against this background, Zenith Radio Corporation, an American manufacturer of electronic products, filed a complaint in 1970 with the Commissioner of Customs,⁵⁰ alleging that the Japanese Government was paying bounties or grants on the export of certain electronic products⁵¹ to the United States. Zenith charged *inter alia* that Japanese electronics exporters were receiving remittances of a Japanese Commodity Tax—an excise tax of between five and forty percent imposed on Japanese goods consumed domestically but remitted on exported products.⁵² Accordingly, Zenith de-

46. Comment, *supra* note 1, at 845.

47. See 12 VA. J. INT'L L. 277, 279 (1972); Recent Decision, *Hammond Lead Products, Inc. v. United States: A Step Away From Protection For the Domestic Manufacturer?*, 4 LAW & POL'Y INT'L BUS. 146, 155 (1972).

48. H.R. REP. NO. 93-571, 93d Cong., 1st Sess. 76 (1973).

49. S. REP. NO. 1298, 93d Cong., 2d Sess. 183 (1974), reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7186, 7320, stated:

The amendments to the existing law adopted by the Committee are designed to balance the need for assuring effective protection of domestic interests from foreign subsidies, on the one hand, with the need to afford some flexibility in the application of the United States' law which is essential for achieving a negotiated international agreement to the problems arising from the use of subsidies and imposition of countervailing duties.

50. The complaint was filed pursuant to 19 C.F.R. § 16.24(b) (1970) (currently appearing at 19 C.F.R. § 159.47(b) (1977)).

51. These products were: television receivers, various parts of television receivers, radio receivers, radio-phonograph combinations, radio-television-phonograph combinations, radio/tape recorder combinations, tape players, record players and phonographs complete with amplifiers and speakers, and tape recorders. Notice of Countervailing Duty Proceedings, 37 Fed. Reg. 10,087 (1972), as amended by 37 Fed. Reg. 11,487 (1972).

52. TAX BUREAU, MINISTRY OF FINANCE (Japan), AN OUTLINE OF JAPANESE TAXES, 119-23 (1970).

phasizing that, in that case, the Russian scheme was composed of at least two inseparable elements: the remission of the excise tax and a transferable certificate of substantial market value. Thus, in the CCPA's view, any discussion in *Downs* concerning the remission alone was outside the scope of the Supreme Court's inquiry,⁶³ the passages in *Downs* relied upon by the Customs Court were not controlling, since they could not be read "as though they were divorced from all preceding and succeeding discussion, or as establishing a proposition of law to govern a fact (tax remission alone) not before the Court."⁶⁴ This argument was specifically challenged in a dissenting opinion in *Zenith*.⁶⁵ The dissent correctly pointed out that the Supreme Court in *Downs* might plausibly have considered either of the two elements alone to have constituted a bounty—that the Court's decision may have rested on two alternative grounds of equal validity.⁶⁶

The majority, however, after disposing of *Downs*, was able to view *Zenith* as a case of first impression. The court examined the statutory language of section 303, finding that it delegates broad discretion to the Treasury in the undefined phrase "bounty or grant."⁶⁷ The legislative history of the statute gives no indication of congressional intent on the meaning of this phrase, thus providing no guidance for the court.⁶⁸ With no case law to the contrary, a broad statute, and a silent legislative history, the CCPA's only "remaining tool in the decision-making inventory" was the longstanding Treasury interpretation.⁶⁹

III THE CCPA'S TREATMENT OF THE TREASURY PRACTICE

In the absence of any legal precedent on the issue, it is certainly not surprising or improper that the CCPA in *Zenith* gave special consideration to the longstanding Treasury practice. It is troublesome, however, that the court gave conclusive weight to this practice while refusing to analyze or justify it. The opinion correctly establishes that no legal basis exists for compelling the imposition of countervailing duties as a matter of law, as was urged by *Zenith*. But the opinion fails to establish that tax remissions

63. 562 F.2d at 1213.

64. *Id.* at 1215.

65. *Id.* at 1223 (dissenting opinion).

66. *Id.* at 1228.

67. The court said about this issue: "Congress' intent to provide a wide latitude, within which the Secretary of the Treasury (Secretary) may determine the existence or non-existence of a bounty or grant, is clear from the statute itself, and from the congressional refusal to define the words 'bounty,' 'grant,' or 'net amount,' in the statute or anywhere else, for almost 80 years." 562 F.2d at 1216.

68. *See id.* at 1216-18.

69. *Id.* at 1223.

mandated that the Treasury impose countervailing duties pursuant to section 303.

The Commissioner of Customs ordered an investigation⁵³ of Zenith's allegations,⁵⁴ which resulted in a determination that the Japanese Government had paid no bounty or grant, or that any bounty or grant paid was de minimis.⁵⁵ According to the Treasury, remission of the Commodity Tax did not incur countervailing duty liability under section 303, since the tax was imposed directly on the electronic products.

The Department's negative determination in *Zenith* presented the first opportunity for an American manufacturer to employ the provisions of the Trade Act of 1974 granting judicial review of negative countervailing duty determinations.⁵⁶ In the Customs Court, Zenith moved for summary judgment, asking the court to rule as a matter of law that remission of the Japanese Commodity Tax was a bounty or grant within the scope of section 303.⁵⁷ Relying heavily on the broad tax remission language in *Downs*,⁵⁸ the Customs Court held that the remission constituted a bounty or grant as a matter of law. The court thus overruled the Treasury's longstanding interpretation of section 303, holding that the Department's interpretation conflicted with the Supreme Court's construction of the statute.⁵⁹

On appeal, the CCPA reversed the decision of the Customs Court⁶⁰ and reinstated the Treasury determination, granting summary judgment in favor of the Government.⁶¹ The broad language in *Downs*, indicating that the remission of any excise tax is per se a bounty or grant,⁶² posed the most serious problem for the CCPA. But the court disposed of *Downs* by em-

53. The Commissioner of Customs has the authority to order an investigation pursuant to 19 C.F.R. § 16.24(d) (1970) (currently appearing at 19 C.F.R. § 159.47(c) (1977)).

54. See Notice of Countervailing Duty Proceedings, *supra* note 51.

55. The Notice of Preliminary Determination, 40 Fed. Reg. 5378 (1975), listed three programs found to constitute de minimis bounties or grants under § 303: (1) preferential interest rate loans from the Japanese Development Bank, (2) promotional assistance from the Japan External Trade Organization (JETRO), and (3) tax deferrals under the Overseas Market Development Reserves (only tentatively found to be de minimis). In an amendment to the Notice of Preliminary Determination, 40 Fed. Reg. 19,853 (1975), Customs announced that other programs alleged in Zenith's complaint were found not to constitute bounties or grants. The Final Negative Countervailing Duty Determination appears at 41 Fed. Reg. 1298 (1976).

56. 19 U.S.C. § 1516(d), also applies to negative Treasury determinations of sales at less than fair value under the Antidumping Act, 19 U.S.C. §§ 160-173 (1976). See *SCM Corp. v. United States Int'l Trade Comm'n*, 549 F.2d 812 (D.C. Cir. 1977), for a discussion of the review of negative determinations of injury under the antidumping law by the U.S. International Trade Commission.

57. *Zenith Radio Corp. v. United States*, 430 F. Supp. 242, 243 (Cust. Ct.), *rev'd*, 562 F.2d 1209 (C.C.P.A. 1977).

58. 430 F. Supp. at 244-45. See note 29 *supra* and accompanying text.

59. 430 F. Supp. at 249.

60. *United States v. Zenith Radio Corp.*, 562 F.2d 1209 (C.C.P.A. 1977).

61. *Id.* at 1223.

62. See note 29 *supra* and accompanying text.

as a matter of law *cannot* be countervailed—a finding necessary for summary judgment to lie in favor of the Government. Rather, the court seems to have acquiesced in the Treasury's interpretation of section 303 simply because it is the Treasury's interpretation, not because it is the correct, or even a reasonable, application of the law.

Such summary review does not comport with the congressional purpose in enacting section 516(d).⁷⁰ The section's legislative history indicates that Congress clearly intended to create a judicial check on Treasury discretion in making countervailing duty determinations. The *Zenith* decision does not evince a willingness on the part of the CCPA to implement the "balance" sought by Congress.⁷¹ Yet the court's own past approach to review of affirmative countervailing duty orders suggests that it considers some examination of the Treasury's interpretations of section 303 an essential part of its review function. Although the court has not consistently articulated a standard of review, some measure of review has been available. For example, in *Energetic Worsted Co. v. United States*⁷² the Customs Court applied the arbitrary and capricious standard to uphold the method by which the Treasury had calculated a bounty or grant.⁷³ On appeal, the CCPA employed the substantial evidence test to reverse the Customs Court and the Treasury determination.⁷⁴

Another approach taken by the CCPA in past cases has been to evaluate the Treasury's interpretation of section 303 in light of international practice. In *American Express Co. v. United States*,⁷⁵ the court cited a decision of the European Economic Community (EEC) Court of Justice and a GATT Working Party Report in support of the Treasury's position.⁷⁶ These cases are significant not because they demonstrate that one or the other of these standards should apply in every case, but because they show that at least some standard has traditionally been available by which to review Treasury determinations. Prior to *Zenith*, the CCPA had never refused completely to review a Treasury countervailing duty determination under section 303. Of course, more exhaustive treatment by the court, as urged here, would not necessarily require reversal of the Treasury determination in this or other cases. In fact, throughout the history of section 303, only one counter-

70. See notes 48-49 *supra* and accompanying text.

71. See note 49 *supra*.

72. 224 F. Supp. 606 (Cust. Ct. 1963), *rev'd*, 53 C.C.P.A. 36 (1966).

73. 224 F. Supp. at 615.

74. 53 C.C.P.A. at 42, 45-46.

75. 472 F.2d 1050 (C.C.P.A. 1973).

76. *Id.* at 1059-60. In *Zenith*, the court could easily have cited significant international support for the Treasury determination, since the Treasury's interpretation is consistent with the GATT rule. See notes 25-27 *supra* and accompanying text. Moreover, further support for the Treasury rule exists in current economic theory. See, e.g., Barceló, *Subsidies and Countervailing Duties—Analysis and a Proposal*, 9 LAW & POL'Y INT'L BUS. 779, 813 (1977).

vailing duty order has been overturned.⁷⁷ The problem in *Zenith* lies in the court's approach, rather than in the outcome of the case.

A major objection to the court's deference to the Treasury Department is that it exacerbates Treasury secrecy, already a hindrance to the attempts of private interests to understand and implement the countervailing duty statute.⁷⁸ Judicial challenge has traditionally been the most effective means of forcing the Treasury to defend and justify its interpretation of the statute, since litigation usually necessitates disclosure of the facts collected during the investigation and the methods used in determining the payment of a bounty or grant. Without the "elucidation" provided by judicial analysis of Treasury policy, Treasury silence may become complete.⁷⁹

The CCPA in *Zenith* offered several arguments to support its deference to the Treasury. The court began by explaining that judicial review of the Treasury practice on its merits would usurp a duty of Congress, violating the separation of powers doctrine.⁸⁰ The court also expressed concern that changing the Treasury ruling would involve so many complex economic issues, as well as other nonjudicial problems, "that it is fit that the Judiciary recuse itself."⁸¹

Further, the court noted that an unpredictable judicial reaction to the Treasury determination would have unsettling effects on world trade.⁸² The force of this argument is reduced somewhat by the Trade Act of 1974, which delegated to the Treasury the discretion to waive the imposition of countervailing duties under certain conditions.⁸³ Nonetheless, *Zenith* caused concern both in the Carter Administration⁸⁴ and at the GATT nego-

77. *Energetic Worsted Co. v. United States*, 53 C.C.P.A. 36 (1963).

78. See notes 11-21 *supra* and accompanying text.

79. Comment, *supra* note 1, at 864. *American Express Co. v. United States*, 472 F.2d 1050 (C.C.P.A. 1973), illustrates how Treasury data and methods are revealed by litigation.

80. 562 F.2d at 1221-22 n.30. Although the court does not cite specific constitutional provisions showing that the problems here discussed fall more properly within the competence of other branches of government, they are presumably (1) Congress power to collect duties and regulate commerce with foreign nations, U.S. CONST. art. I, § 8, and (2) the Executive's power to conduct foreign policy, *id.* art. II, § 2.

81. 562 F.2d at 1223. This phrase is borrowed from a majority opinion by Mr. Justice Douglas in *Saxbe v. Bustos*, 419 U.S. 65, 79 (1974).

82. 562 F.2d at 1221 n.27.

83. The Trade Act granted the Treasury discretion to suspend imposition of countervailing duties even where a bounty or grant had been found to exist. In order for suspension of the countervailing duty to be authorized, three conditions must exist: (1) steps must have been taken to reduce the adverse effects of the bounty or grant, (2) there must be a reasonable prospect of a new trade agreement, and (3) imposition of countervailing duties must be likely to jeopardize the successful completion of the trade negotiations. 19 U.S.C. § 1303(d)(2) (1976). This power of suspension has been exercised frequently by the Treasury. See, e.g., *Cheese from Austria*, T.D. 76-11, 10 Cust. B. & Dec. No. 3, at 29, 41 Fed. Reg. 1275 (1976); *Canned Hams from EEC*, T.D. 75-301, 9 Cust. B. & Dec. No. 50, at 11, 40 Fed. Reg. 55,639 (1975).

84. After the decision in the Customs Court, the *Wall Street Journal* quoted Robert Strauss,

tiations in Geneva⁸⁵ because of its potentially wide-ranging adverse effects on world trade. This concern continues to exist at least in part because of a similar and even more portentous case now pending before the Customs Court, involving an American steel manufacturer's challenge of remission of the EEC's Value Added Tax.⁸⁶

Overzealous court review of negative Treasury determinations could have the further detrimental effect of overcrowding the courts, as was eloquently noted by the CCPA in *Zenith*.⁸⁷ While this and other arguments of the court might apply with some force to whether courts should exercise de novo judicial review of Treasury determinations, they do not necessarily justify denial of review by some other, less rigorous standard—for example, the reasonableness of the Treasury practice. But the *Zenith* court refused to scrutinize the Treasury determination even to that extent.⁸⁸ At one point in its opinion, the court implied that since the Treasury is not required to publish hearings and hearing records of its investigations, the entire process is thereby rendered completely unreviewable.⁸⁹ Even disregarding the section 516(d) review provision, this argument is fallacious for at least two reasons.

First, review of a matter of law, such as the inclusion of excise tax remissions under the phrase "bounty or grant" in section 303, would not necessarily entail review of factual findings. The court could review the Treasury's interpretation of section 303 by substituting its legal judgment in construing "bounty or grant," or it could review the determination according to some less rigorous standard.⁹⁰ Neither of these alternatives would require a complete review of factual findings.

Second, lack of a hearing record normally would not completely preclude

Carter Administration Trade Specialist, as saying, "There isn't any way I can overstate the potential for destruction' of the trading system posed by the Zenith case." Wall St. J., June 24, 1977, at 2, col. 3.

85. See, e.g., Wall St. J., June 6, 1977, at 6, col. 2, which stated: "A working party of the General Agreement on Tariffs and Trade expressed 'serious concern' over the recent United States Customs Court decision to impose countervailing duties on imported Japanese electronic goods. It referred the matter to the GATT council, requesting 'urgent action.'"

86. See *United States Steel Corp. v. United States*, No. 76-2-00456 (Cust. Ct., filed Feb. 18, 1976). Asserting that the VAT rebate is legally indistinguishable from the rebate of the Japanese Commodity Tax, *United States Steel* moved for summary judgment in the Customs Court following the Customs Court's decision in *Zenith*. Robert Strauss viewed the action as "threatening to the whole world trade system." Wall St. J., June 14, 1977, at 14, col. 3.

87. The court said: "The growing tendency of those who fail in their objective before the Congress to thereafter submit the same plea to the undermanned federal courts is one factor contributing to the current appellate flood, which threatens to drown justice in the thrashings of a litigious sea." 562 F.2d at 1221 n.26.

88. "The United States cites the reasonableness of its practice and numerous cases setting forth guidelines for judicial review of agency action under the Administrative Procedure Act. We are not, however, reviewing a record under that Act in this case." *Id.* at 1220 n.21.

89. *Id.* at 1216 n.13.

90. See generally K. DAVIS, *ADMINISTRATIVE LAW OF THE SEVENTIES* § 30.00 (1976).

the review of administrative factual determinations.⁹¹ Although some disagreement exists as to what the standard of review should be, it is clear that lack of a hearing record does not free an agency from all judicial control.⁹² Moreover, although the statute and the Treasury regulations do not require hearings on a Treasury determination to impose countervailing duties, past judicial scrutiny of affirmative orders has often included a thorough review of the complete Treasury investigatory record.⁹³ The enactment of section 516(d) added nothing to indicate that the standard of review is less stringent in the case of negative determinations.⁹⁴ Thus, the court's suggestion that lack of a hearing record precludes review of Treasury determinations appears to be without foundation.

IV RECOMMENDATIONS

In the aftermath of *Zenith*, American manufacturers may justifiably feel that their right to judicial review of negative countervailing duty determinations has been thwarted by the CCPA. But several alternative approaches remain available which may help resolve not only the problems created by the decision, but also the general issue of countervailing duty assessment.

First, *Zenith* petitioned for a writ of certiorari which has been granted by the Supreme Court.⁹⁵ The decision to hear *Zenith* may indicate that the Court is concerned over the extreme deference given to the Treasury by the CCPA. If so, the Court has several options for the disposition of the case. For instance, the Court could remand the case to the Customs Court for further development of the facts or for an examination of the disputed Treasury interpretation of section 303. Alternatively, the Court could uphold the Treasury interpretation on the basis of its reasonableness⁹⁶ or some related standard,⁹⁷ possibly relying for support on international practice as embodied in the GATT.⁹⁸

91. See, e.g., *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971). See generally K. DAVIS, *supra* note 90, at § 29.01-.08.

92. See, e.g., *First Nat'l Bank of Smithfield v. Saxon*, 352 F.2d 267 (4th Cir. 1965), holding that, in the absence of a hearing record at the administrative level, the district court should hold a trial de novo to determine if the facts were properly established.

93. See, e.g., *Energetic Worsted Co. v. United States*, 224 F. Supp. 606 (Cust. Ct. 1963), *rev'd*, 53 C.C.P.A. 36 (1966).

94. See Remarks by Stewart, *supra* note 21.

95. *United States v. Zenith Radio Corp.*, 562 F.2d 1209 (C.C.P.A. 1977), *cert. granted*, 46 U.S.L.W. 3526 (U.S. Feb. 21, 1978) (No. 77-539).

96. The CCPA in *Zenith* expressly refused to evaluate even the reasonableness of the Treasury practice. See 562 F.2d at 1220 n.21; note 88 *supra* and accompanying text.

97. The lower courts have not applied a uniform standard of review to Treasury orders and determinations. See notes 72-74 *supra* and accompanying text.

98. GATT, *supra* note 25, art. VI(3). See also notes 25-27 *supra* and accompanying text.

The Court may, however, venture into the complex economic issues presented by the case. If the Court decides to overturn the Treasury determination, it may resurrect the broad construction of "bounty or grant" which appears in *Downs*.⁹⁹ A final possibility is that the Court will formulate its own independent construction of the statutory phrase in either affirming or reversing the CCPA. The likelihood of a new Supreme Court construction of "bounty or grant" is diminished, however, in light of the Tokyo Round of international trade negotiations currently in progress in Geneva.¹⁰⁰ These negotiations will probably result in a comprehensive international solution to the general problem of subsidies and countervailing duties, including revision of the American countervailing duty law.¹⁰¹ The Justice Department has already expressed concern that the mere decision to grant certiorari in *Zenith* may cause "uncertainty" in the U.S. Government's bargaining position in these negotiations.¹⁰² It is unlikely that the Supreme Court will further complicate the issues involved by articulating new standards under the existing American law.

A second possible approach to resolution of the countervailing duties controversy is for American manufacturers to urge congressional reform of the countervailing duty statute.¹⁰³ But Congress may be unwilling to act while *Zenith* is before the Supreme Court or while international negotiations are in progress. Assuming that the Tokyo Round negotiations will be successful in establishing acceptable and timely standards for regulating subsidies generally, the best alternative is probably to wait for the results of those negotiations. But in the event that international negotiations fail to produce acceptable results, Congress should act immediately to ensure the establishment of the "balance" between Treasury discretion and the interests of American industry which it intended to establish in the Trade Act of 1974.¹⁰⁴

Past decisions of the CCPA have invoked international practice to support the Treasury interpretation of § 303. See notes 75-76 *supra* and accompanying text.

99. The *Downs* case is discussed at notes 28-33 *supra* and accompanying text.

100. The Trade Act of 1974, 19 U.S.C. § 2131(a) (1976), authorizes the United States to enter into these negotiations. See generally Marks & Malmgren, *Negotiating Nontariff Distortions to Trade*, 7 LAW & POL'Y INT'L BUS. 327 (1975).

101. For a recent status report on the subsidy and countervailing duty aspects of the negotiations, see SUBCOMM. ON TRADE, HOUSE COMM. ON WAYS & MEANS, 94TH CONG., 1ST SESS., BACKGROUND AND STATUS OF THE MULTILATERAL TRADE NEGOTIATIONS Supp. I, 13-14 (Comm. Print 1975).

102. See N.Y. Times, Feb. 22, 1978, at 55, col. 1.

103. An amendment to the statute specifically providing for disclosure by the Treasury of its reasoning in countervailing duty determinations is desirable. See Butler, *supra* note 3, at 144. Also, American manufacturers have long sought to have Congress define the phrase "bounty or grant" by expressly enumerating the practices which would incur countervailing duty liability. See, e.g., *Trade Reform: Hearings on H.R. 6767 Before the House Comm. on Ways and Means*, *supra* note 41, at 2171.

104. See note 49 *supra* and accompanying text.

CONCLUSION

By its failure to evaluate the Treasury practice not to countervail excise tax remission under section 303, the Court of Customs and Patent Appeals in *Zenith* has abdicated its congressionally mandated responsibility effectively to review negative countervailing duty determinations. Moreover, although the court may be justified in refusing to grant de novo review of Treasury determinations, the court's own prior practice and administrative law principles governing review of agency action require some measure of judicial review. The court's approach has further insulated Treasury policy from public analysis and, indeed, casts serious doubt upon the availability under section 516(d) of meaningful judicial review.

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As this Note went to press, the U.S. Supreme Court rendered its decision in *Zenith Radio Corp. v. United States*, 98 S. Ct. 2441 (1978). The Supreme Court affirmed the judgment of the CCPA, but based its decision upon a much more careful review of the disputed Treasury practice of not countervailing against nonexcessive excise tax remissions. Citing the legislative history of section 303, successive reenactments of the statute by Congress, consistent economic theory, and the international practice of the GATT, the Court found that the Treasury practice was "sufficiently reasonable" to be accepted by a reviewing court." The Court was not persuaded by *Downs*, concluding that the "isolated statement" in that case could not overcome the longstanding and uniform Treasury practice. This outcome in the *Zenith* litigation now paves the way for international resolution of the countervailing duty issue by the Tokyo Round of trade negotiations.
