Denver Journal of International Law & Policy

Volume 8
Number 2 *Spring*

Article 7

January 1979

Hard Times for Bounty Hunters: Zenith Radio Corporation v. United States, 98 S. Ct. 2441 (1978)

Dwight C. Seeley

Hard Times for Bounty Hunters: Zenith Radio Corporation v. United States, 98 S. Ct. 2441 (1978)

Keywords
Radio, States, Rebates

CASE COMMENT

Hard Times for Bounty Hunters: Zenith Radio Corporation v. United States, 98 S. Ct. 2441 (1978)

DWIGHT C. SEELEY*

The long-standing doubts surrounding United States countervailing duties policy were recently unraveled by the United States Supreme Court in *Zenith Radio Corporation* v. *United States* (98 S.Ct. 2441) (1978). Eight years of administrative review and judicial interpretation ended in a denial of Zenith's appeal for countervailing duties to be assessed against imported Japanese electronic products.[1]

Zenith, the large Chicago-based electronics firm,[2] found its original complaint for assessment of duties denied by the Customs Bureau of the Treasury Department. The Treasury policy, backed by some eighty years of administrative precedent, requires a showing that if a foreign producer rebates taxes or fails to tax products upon export, then that rebate must be "excessive," that is, more than the item was initially taxed in the domestic market. If such a rebate is nonexcessive, then it fails to provide the exporter an unfair competitive advantage and therefore will not trigger a countervailing duty against it. The legislative history, economic theories, and prior Supreme Court pronouncements advanced by Zenith proved insufficient to override this longstanding Treasury policy and its reasonableness in light of past and present United States countervailing duty laws. The unanimous Supreme Court opinion consequently upheld the Treasury practice and the economic policy that it reflects.

* B.A., 1970, University of Wisconsin; J.D. candidate, 1980, University of Denver College of Law.

1. 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, tape recorders, and parts of television receivers: color television picture tubes, resistors, transformers (deflection components), and tuners for receivers with integrated circuits. 37 Fed. Reg. 10,087 (1972) *as amended by* 37 Fed. Reg. 11,487 (1972).

2. Zenith has also been the standard bearer for the industry in litigating dumping claims against Japanese electronics producers. *See* Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. 251 (1975).

Background

In the arena of world trade, a manufacturer faced with an inelastic demand for his product may find that a decrease in domestic price will not increase demand sufficiently to cover the loss in revenue of a price decrease. The manufacturer may well find an elastic demand in a foreign market, where selling at a lower price will stimulate sales and increase profits as well as provide him market penetration. By exporting, his "profits will be maximized by maintaining the high price at home and selling at a lower price abroad."[3] This is dumping, a practice which is specifically outlawed in the United States by the Revenue Act of 1916[4] and the Anti-Dumping Act of 1921[5] as recently amended by the Trade Act of 1974.

Another practice, sharing an "interlocking conceptual basis"[6] with dumping is that of subsidies, usually provided by a foreign government to promote export. Typically, a government makes a political decision to bolster the economic position of a particular group of industries. Reasoning for this may vary. Sometimes the intent is to protect a weak domestic industry already glutted by competition; at other times the purpose is to protect the domestic economy through increased foreign exchange earnings and a stable balance of payment position. Whatever the reason and by whatever method the government chooses to provide the subsidy, the recipient industry becomes more competitive in the world market because of the subsidy and not because it has produced more efficiently.[7] The Countervailing Duties provision of the Tariff Act of 1930[8] provides statutory protection for American industries from this kind of subsidized export. Access to the Anti-Dumping and Countervailing Duty measures has been expedited through the recently expanded concept of judicial review of negative decisions,[9] resulting in a flurry of legal activity. The dumping stat-

3. *See* Meyerson, *A Review of Current Antidumping Procedures: United States Law and the Case of Japan*, 15 COLUM. J. TRANSNAT'L L. 167, 168 (1976).

4. 15 U.S.C. § 72 (1976).

5. 19 U.S.C. §§ 160-173 (1976).

6. Feller, *Mutiny Against the Bounty: An Examination of Subsidies, Border Tax Adjustments and the Resurgence of Countervailing Duty Law*, 1 LAW & POL'Y INT'L BUS. 17, 33 (1969).

7. Butler, *Countervailing Duties and Export Subsidization: A Reemerging Issue in International Trade*, 9 VA. J. INT'L L. 82, 83 (1968).

8. Tariff Act of 1930, § 303, *as amended by* 19 U.S.C. § 1303 (Supp. IV 1974).

9. 19 U.S.C. § 1516(d) (1976).

ute was applied only 77 times between 1954 and 1971, whereas roughly 65 cases were under review from 1971 to 1974.[10] The major thrust of countervailing duty complaints in the 1960's was directed against European Economic Community and Canadian exporters.[11] However, the 1970's have seen Japan assume the position as the leading exponent of dumping. While countervailing duty determinations have been more infrequent,[12] there too the recent activity has concerned Japan, with the case of *Zenith Radio Corporation v. United States*[13] providing the definitive standard for determination of illegal subsidies.

"Japan, Inc."

The pressures of a growing population, racial homogeneity, and a capacity for high productivity have created a business image of Japan as a monolith, where government and industry go hand-in-glove to dominate the world's industries. This image portrays the government as the economic center or "home office" with each industry a branch or division of the corporation. Although this image tends to distort the true picture, principally by minimizing the private activity of the major corporations and the considerable competition between them,[14] there is no arguing that post-war Japan has seen a remarkable consensus of national goals where business and government officials have collaborated to promote economic growth.[15]

With the dismantling of the huge, family-controlled corporations (the *zaibatsu*) and the regulation of monopolistic enterprises under the Occupation, new and independent business initiatives arose. From the beginning, post-war growth was forged by a unique "participatory partnership" where the government defined the economic priorities of the nation, and industries, assisted by a variety of supports and subsidies, endeavored to fulfill them.[16] In the 1950's, the Japanese government's

10. Silbiger, *Trade Act of 1974: New Remedies Against Unfair Trade Practices in International Trade,* 5 DEN. J. INT'L L. & POL'Y 77, 80 (1975).

11. Meyerson, *supra* note 3, at 197.

12. Butler, *supra* note 7, at 126.

13. Zenith Radio Corp. v. United States, 98 S. Ct. 2441 (1978).

14. E. Kaplan, Japan: The Government-Business Relationship 15 (1972).

15. Meyerson, *supra* note 3, at 197.

16. E. Kaplan, *supra* note 14, at 17. The United States Commerce Department analogizes this relationship as one similar to the American government's creation of the Atomic Energy Commission (AEC) and the National Aeronautics and Space Administration (NASA). Because the U.S. government desired certain national goals and

goals centered around the "big four" industries (coal, electricity, marine transportation, and iron and steel) which received top priority and the largest proportion of investment funds.[17] What emerged from that experiment was a rebuilt economy and a government-industrial relationship that mutually strives for what the Ministry of International Trade and Industry (MITI) has called a "concerted economy":

> Out of discussions between the government and private enterprise, mutually determined national targets are worked out. Private enterprise pledges to carry these out. Government, on its side, pledges special favors . . . such as subsidies and taxation measures.[18]

The economic infrastructure, fueled by large scale concessions from the U.S. military during the Korean and Vietnamese conflicts, grew so rapidly that by 1964 the balance of trade between the United States and Japan shifted in Japan's favor and has grown every year thereafter, totaling $3 billion in 1971, just after Zenith filed its complaint.[19]

The rapid expansion of the Japanese economy has not been entirely smooth, however, and the industrial system has developed in such a fashion that domestic troubles (such as a recession) will have international repercussions. For one, a high equity/debt ratio (20.8% versus 44% in the U.S.)[20] has put a continuing burden on Japanese industries. This, combined with a system of lifetime employment with a variety of employee benefits, means that Japanese companies have a high level of fixed costs. These costs encourage a "full capacity policy," which requires each industry to operate at full capacity to recover high fixed costs.[21] Full capacity results in surplus production which will find its way abroad as exports.

In times of stress the planned oligopolistic structure functions poorly. Each industry has its ranking within the domestic economy and will receive its commensurate "market share" in import licensing and borrowing quotas. In a rapid growth pe-

---

because of the large amounts of capital, high technology and high risk involved, only the government could successfully underwrite such projects.

17. *Id.* at 73, n.11.

18. MITI, Industrial Research Paper #100, "A discussion of Cooperative Industrial Organization," *quoted in* E. HADLEY, ANTITRUST IN JAPAN 398 (1970).

19. E. Kaplan, *supra* note 14, at 6.

20. Meyerson, *supra* note 3, at 198.

21. *Id.* at 198-99.

riod a given industry will grow and invest in production capacity commensurate to its market share and new enlarged credit capacity.[22] Overproduction results when the economy falters, thus:

> in times of recession or when overcapacity results from the corporation investing to protect its market share, the excess produce is sold abroad (even dumped) by the ubiquitous trading sibling as long as the variable costs are recovered, since high fixed costs for debt (interest) and wages (life employment) cannot be avoided anyway.[23]

Consumer electronics, like coal and shipbuilding in the 1950's, has been deemed a "high priority growth industry"[24] in the 1970's and no industry has been more responsive to the need for export marketing.[25] This responsiveness has resulted in a highly defensive stance by various U.S. industries, which has resulted in increased complaints and litigation. Where the decade 1960-1970 saw only six dumping cases lodged against Japan, aggressive sales have catapulted that figure to thirty-two complaints during the four years from 1971 to 1975.[26] In that regard "renewed and continued activity may be anticipated."[27]

The Law

A highly competitive world sugar market aroused the protective instincts of the U.S. Congress which passed the first general countervailing duty statute under the Tariff Act of 1897.[28] This act delegated to the Secretary of the Treasury the power to determine the amount of "bounty" or "grant" by which a foreign government subsidized exports. The Secretary was required to assess a duty equal to that amount. Subsequent enactments in 1909, 1913, and 1930 altered the act only slightly.

The Countervailing Duty Law as it stands today provides

22. D. HENDERSON, FOREIGN ENTERPRISE IN JAPAN 157 (1975).

23. *Id.*

24. E. Kaplan, *supra* note 14, at 7.

25. "Hitachi (a major electronics firm) has traditionally placed great emphasis on the promotion of exports. *The future development of the company's business is based squarely on export, and this policy is in accord with the requirements of the nation as a whole.*" (Emphasis added.) (1968 annual report.) Zenith Radio Corp. v. Matsushita Elec. Indus. Co., 402 F. Supp. 251, 289 (1975).

26. Meyerson, *supra* note 3, at 197.

27. Silbiger, *supra* note 10, at 80.

28. 30 Stat. 205 (1897).

for the assessment of a special duty on imported merchandise equal to the net amount of any "bounty or grant" paid "directly or indirectly" by a foreign government or other entity with respect to the manufacture, production, or exportation of such merchandise.[29] The administration of section 303 of the Tariff Act of 1930 lies with the Treasury Department[30] which delegates its authority to the Commissioner of Customs.[31] Where investigation shows that a "bounty or grant" exists on dutiable merchandise, the Commissioner is *required* to assess a countervailing duty.[32]

Anyone can invoke the Countervailing Duty Law although it is a domestic producer who generally initiates the investigation.[33] If the Commissioner fails to find a bounty and consequently makes no assessment, the U.S. manufacturer, producer, or wholesaler may contest the no-bounty determination in the United States Customs Court.[34] Failing there, an appeal may be filed with the United States Court of Customs and Patent Appeals,[35] and the Supreme Court may grant *certiorari*.[36] The impact of the Trade Act of 1974 was to extend to American manufacturers the right to contest a no-bounty determination; conversely, foreign producers had rights to a judicial review of an assessment from section 514 of the Tariff Act of 1930.[37]

Although in existence for better than eighty years, the Countervailing Duty statute has been difficult to apply. No statutory language within the law defines what constitutes a "bounty or grant." Nor do the implementing regulations shed any light.[38] Of the two Supreme Court cases before *Zenith* that had taken countervailing duty assessments on review,[39]

29. 19 U.S.C. § 1303(a) (1976).

30. Except for duty free merchandise which will be reviewed by the International Trade Commission. The standard applied there is consistent with a dumping standard—that the item has caused "injury" to a U.S. industry. 19 U.S.C. § 1303(b) (1976).

31. 19 C.F.R. § 159.47 (1977).

32. 19 U.S.C. § 1303 (1976).

33. W. STERLING & D. WALLACE, A LAWYER'S GUIDE TO INTERNATIONAL BUSINESS TRANSACTIONS 132 (2d ed. 1977).

34. 19 U.S.C. § 1516(d) (1976).

35. 28 U.S.C. § 2601 (1976).

36. 28 U.S.C. § 1256 (1976).

37. 19 U.S.C. § 1514 (1976).

38. 19 C.F.R. § 159.41-47 (1977).

39. Downs v. United States, 187 U.S. 496 (1903); and Nicholas v. United States, 249 U.S. 34 (1919).

neither had been explicit enough in its definition to provide reliable precedent for either subsequent court decisions or commentators.[40] A wealth of legislative history can be called upon to support either the position that a "bounty" means only an *excessive* remission or the contrary position that *any* remission constitutes a bounty. Also, the Customs Court in *Zenith v. United States*[41] accepted the *Downs* holding as a viable precedent, while the Court of Customs and Patent Appeals, with two dissents, ruled to the contrary.[42]

The Tax

The difficulty in deciding whether an indirect tax exemption or remission of the type complained of in the *Zenith* case is a bounty or grant lies in the nature of indirect taxes generally. In *Zenith* the tax was a "single stage consumption tax"[43] levied on goods at the manufacturing level. The tax emanates from the Japanese Commodity Tax Law (March 31, 1962, Law No. 48) which sets a consumer tax on items such as television sets.[44] It also provides that previously paid taxes on exempt products (*e.g.*, exports) are refunded.[45] As such it is merely an excise or consumer-type indirect tax, not unlike those of the United States, some of which are remitted upon export.[46]

The classical theory of taxation holds that indirect taxes differ from direct ones in that direct taxes (production and materials taxes, income taxes, etc.) will be absorbed by the manufacturer whereas indirect taxes are fully *shifted forward* to the consumer in the price of the product. It is thought that a seller will raise his prices by the equivalent amount of his indirect tax burden, and the consumer becomes the *de facto* taxpayer.[47] If the tax were not rebated on export, the exported product would be taxed by the exporting country *and*

40. *See e.g.*, that the Supreme Court definition of "bounty" in the *Downs* case is dictum: Butler, *supra* note 7, at 119; and Feller, *supra* note 6. *But see, e.g.*, that the bounty definition is a holding: American Express v. United States, 332 F. Supp. 191, 197-99 (Cust. Ct. 1971); and King, *Countervailing Duties—An Old Remedy with New Appeal*, 24 BUS. L. 1179, 1182-83 (1969).

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

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

43. 430 F. Supp. at 242.

44. Way, Brockman & Otsuka, 51-6th T.M., Business Operations in Japan A-44 (1978). On television sets the tax is 15%.

45. *Id.*

46. 26 U.S.C. §§ 4221(a)(2), 6416(b)(2)(A) (1976).

47. Feller, *supra* note 6, at 51.

the importing country, making it noncompetitive when marketed against the importing country's product.[48] Both the General Agreement on Tariffs and Trade (GATT) and the Treasury Department/Customs Bureau are apprised of this potential double taxation. Both hold that a countervailing duty will not be imposed merely because the exporting country has rebated a domestic tax upon export of the product. In fact, if the principles of GATT had been applied to the *Zenith* case, there would have been no appeal since the statutory language of GATT (in Article VI(3)) makes it clear that neither the *exemption* nor the *refund* of an indirect tax by the exporting country will trigger a countervailing duty.[49] However, Article II of GATT recognizes the superiority of prior inconsistent domestic legislation under the protocol arrangement.[50] Thus, since the Tariff Act's Countervailing Duty provision precedes GATT, it is the interpretation of that statutory language along with the Supreme Court decisions that provide the resolution to the *Zenith* case.

The above analysis of indirect taxes is no longer absolute under the modern view, which holds that the forward shifting on indirect taxes is incomplete. Thus a $100 production-cost Japanese television which is assessed at 15% tax would sell for $115 in Japan if the tax were fully shifted forward. However, if the producer sold the item for $110 in the foreign market, the $15 he would receive in remitted tax from exporting his product would be in excess of his indirect tax liability by $5 per unit. Thus, his exports would be subsidized by the government tax remission. In response to the above situation, the U.S. position has been that a countervailing duty will be imposed to the extent that the rebated, indirect tax *is not shifted forward in the cost of the item.*[51]

Since *Zenith* was neither argued from a factual transcript,[52] nor did it evidence the extent to which the Japanese tax was shifted, no economic guidelines were set by any of the

48. *See generally* EXECUTIVE BRANCH GATT STUDIES, SENATE COMMITTEE ON FINANCE, 93rd Cong., 2d Sess., 17-18 (1974).

49. The General Agreement on Tariffs and Trade (GATT), Oct. 30, 1947, 61 Stat. A24, T.I.A.S. No. 1700, 55 U.N.T.S. 187.

50. The "grandfather clause." Protocol of Provisional Application of the General Agreement on Tariffs and Trade, Oct. 30, 1947, art. 1(b), 61 Stat. A 2051, T.I.A.S. No. 1700, 55 U.N.T.S. 308.

51. Butler, *supra* note 7, at 116.

52. The Customs determinations generate no formal hearing record.

three courts which heard the *Zenith* case. It is safe to say, however, that the weight of modern authority supports the theory that indirect taxes are *not* fully shifted forward and direct taxes are not fully shifted backward.[53] To the degree that an indirect tax is even partially shifted backward (that is, absorbed by the manufacturer) a full refund of an indirect tax becomes a subsidy for exports.[54] Also, there is no generally agreed-upon method for determining the degree of discrimination that results from this indirect/direct tax problem.[55] Complex economics, coupled with the divergent goals and methods of economists, have caused the courts to adopt neither of these competing points of view. This is not to say that the courts are not aware of these complexities. There are ample indications that both the Court of Customs and Patent Appeals[56] and the Supreme Court[57] are fully apprised of the negative commentary directed against the economic principles on which the Treasury has based its policy.

Zenith Radio Corporation v. United States (430 F. Supp. 242) (1977)

The *Zenith* case shows the countervailing duty determination procedures through each stage of review. Zenith Radio Company first petitioned the Treasury Department in 1970, alleging that the remission of the Japanese Commodity Tax (on various consumer electronic items) constituted a bounty or grant and asked for an imposition of countervailing duties. The Customs Bureau began an investigation and solicited information from all parties, which ultimately resulted in publication of preliminary findings on February 5, 1975.[58] The notice distinguished three export-inducing programs under which "benefits had been received" which constituted "bounties or grants" within the meaning of section 303 of the Tariff Act. The Commissioner of Customs further stated that the amounts consid-

53. Rosendahl, *Border Tax Adjustments: Problems and Proposals*, 2 LAW & POL'Y INT'L BUS. 85, 109 (1970). *See also* K. DAM, THE GATT—LAW AND INTERNATIONAL ECONOMIC ORGANIZATION, 214 (1970).

54. Rosendahl, *supra* note 53, at 110; and K. Dam, *supra* note 53, at 215.

55. Rosendahl, *supra* note 53, at 112. *See also*, McNamara, *Tax Adjustments in International Trade; The Border Tax Dispute*, 3 J. MAR. L. & COM. 339, 361 (1972).

56. 562 F. 2d 1209, 1219 n. 19.

57. 98 S. Ct. 2441, 2449 n. 14.

58. *See* 37 Fed. Reg. 10,087 (1972) (notice of proceedings) and 40 Fed. Reg. 5,378 (1975) (preliminary determination).

ered were *de minimis,* that is, not excessive and therefore not to be countervailed. Because the program providing the benefits was available to firms capitalized at less than one billion yen, the Commissioner prolonged the investigation in order to determine whether "significant" benefits would accrue to a few smaller firms. On January 7, 1976, a final negative determination was made.[59] The findings showed that two export-inducing programs had been abandoned by the Japanese government. The third involved an aggregate amount considered *de minimis* per dollar value of the exported product. Thus, no countervailing duty was assessed.

Zenith chose to contest the determination, resulting in a plea before the Customs Court for a summary judgment on the matter.[60] Plaintiff Zenith, arguing directly from *Downs* v. *United States,* said that the Supreme Court's decision as well as that of special customs tribunals had repeatedly held that a remission of taxes on exportation constituted a bounty or grant. They buttressed this argument with reference to the legislative history of section 303. The defendant averred that the countervailing duty provision was intended to apply only to "excessive remission of taxes directly related to the imported product."[61] Furthermore, because the Congress had been apprised of the Treasury practice (countervailing only "excessive" remissions), this amounted to a legislative approval of the administrative practice.[62]

The court found for plaintiff Zenith and ordered the Secretary of the Treasury to assess countervailing duties equal to the "net amounts of bounty or grant paid or bestowed."[63]

The court's reading of the 1903 *Downs* case is at the center of the argument. In *Downs* the Supreme Court addressed itself to a tax rebate on sugar exported from Russia. Exporters were not only relieved of the 1.75 rubles per pood[64] domestic excise tax, but received a certificate upon export. This certificate could then be sold to other sugar producers entitling them to the same excise rebate on sugar they sold domestically. The

59. 41 Fed. Reg. 1,298 (1976).
60. 430 F. Supp. at 242.
61. *Id.* at 244.
62. *Id.* at 243.
63. *Id.* at 265.
64. 36.113 pounds avoirdupois. T.D. 22,814, 4 TREAS. DEC. 184 (1901).

critical language of the Supreme Court's decision was straightfoward:

> [T]wo facts . . . appear clearly . . . : 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.[65]

The unequivocal language, taken literally, supports the Custom Court's reading. However, it remains unclear whether the Court in *Downs* condemned the mere *excise remission* or whether the sugar *certificate* was the object of the countervailing duty. The literal reading was cited in a subsequent (1903) Board of General Appraisers (predecessor to the Customs Court) decision and in a House Ways and Means Committee document (1908) where it was understood to mean that an excise remission on exported goods was a bounty.[66] However, the Secretary of the Treasury never interpreted *Downs* in that fashion and subsequent determinations have consistently denied that a tax remission on exports is always a bounty.[67]

United States v. Zenith Radio Corporation (562 Fed. 2d 1209) (1977)

The United States Court of Customs and Patent Appeals, in a case the majority called "first impression," would not accept the Customs Court's reading of *Downs* and reversed the decision. The lower court's reading, said the majority opinion, was to take the straightforward language of the *Downs* decision out of the context of the facts—that there was a *dual* benefit in the Russian remission-and-certificate scheme. The original Board of General Appraiser's opinion had noted the combination of the two benefits. The Board and the appellate courts were faced with a "decision resting not on either of two independent grounds but on a single ground having at least two important elements."[68] Therefore, there was no need for the court to decide whether a nonexcessive remission was a *per se*

65. 187 U.S. at 515.

66. 430 F. Supp. at 245.

67. Butler, *supra* note 7, at 120 n. 188. The Secretary interpreted the *Downs* case as requiring a refund *plus* something else of *cash value* in order to trigger countervailing duties.

68. 562 F. 2d at 1213.

bounty or grant. In the context of the entire opinion, then, the strong language cited by the Customs Court was not necessary to the decision and was not the *ratio decidendi*.[69] Additional findings of the majority included: (1) that Congress has not required that every remission constitute a bounty, as demonstrated by the refusal to define "bounty" or "grant" in the statute; (2) that while legislative history can be cited for either position, there is nothing to indicate a congressional intent that countervailing duties be imposed in response to "non-excessive remissions";[70] and (3) that a long-continued administrative practice is entitled to great weight, particularly when Congress has failed to revise the statute while on notice of the administrative practice.[71]

That Congress has acquiesced to the administrative practices of the Treasury was, in the opinion of dissenting Judges Miller and Baldwin, a myth. Moreover, (1) the case was not one of first impression because the key language has been dealt with by the Supreme Court before; (2) the interpretation of the Court in *Downs* was holding, not dictum; and (3) judicial interpretation prevails over any long-continued administrative practice.[72]

As the Customs Court decision had done before, the dissenters zeroed in on the unequivocal language cited in *Downs* but referred to by the majority as "unnecessary." To bolster the argument that *either* the remission or the certificate would classify as a bounty the dissenters quote the language in the *Downs* decision referring to the export certificate as an *additional* bounty:

> If the additional bounty paid by Russia upon exported sugar were the result of a higher protective tariff upon foreign sugar, and a further enhancement of prices by a limitation on the amount of free sugar put upon the market, we should regard the effect of such regulations as being simply a bounty on production, al-

69. *Id.* at 1215.

70. *Id.* at 1217.

71. The government argued that if the *Downs* case held as Zenith claimed it did, the Secretary's interpretation nevertheless emerged supreme. Because the Secretary did not change his interpretation after either the *Downs* or *Nicholas* cases and because Congress—with full knowledge of the Secretary's practice—continued to re-enact the statute without substantive change, Congress in effect "overruled" *Downs* and *Nicholas* insofar as they conflicted with the Secretary's practice. Reply Brief for Appellant at 6-7, United States v. Zenith Radio Corp., 562 F. 2d 1209 (C.C.P.A. 1977).

72. 562 F. 2d at 1223.

> though it might incidentally and remotely foster an increased exportation of sugar; *but where in addition to that these regulations exempt sugar exported from excise taxation altogether,* we think it clearly falls within the definition of an indirect bounty upon exportation.[73] (Emphasis added.)

The dissenters concluded that both the remission and the certificate were bounties. Also referred to is the definition provided by the Supreme Court itself in the 1919 countervailing duty case *Nicholas & Co. v. United States.* There, bounties were determined to have been granted on whiskey and gin exported from Great Britain and countervailing duties were assessed. In interpreting the relevant statute the Court wrote:

> 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 on another. And if the "something" be conferred by a country "upon the exportation of any article or merchandise" a countervailing duty is required . . .[74]

In the *Nicholas* case as well as other subsequent decisions[75] the courts relied on the broad language used in *Downs* to justify assessment of duties. Likewise, the majority in the Court of Customs and Patent Appeals was mindful of the "subsequent references to broad statements"[76] made in *Downs.* Nevertheless, the majority was not swayed by this line of interpretation. The court's decision left to the Secretary of the Treasury that "lawfully permissible"[77] discretion which the Secretary has exercised since—and perhaps despite—the *Downs* decision.

Zenith Radio Corporation v. United States (98 S. Ct. 2441) (1978)

The Supreme Court decision wholly embraced the thinking of the C.C.P.A. majority on the three contested issues: (1) the correct interpretation of the statutory language and legislative history of section 303; (2) the *Downs* holding; and (3) the economic effects of the remission of the Japanese tax. As the Supreme Court's findings parallel those of the C.C.P.A. on

---

73. 187 U.S. at 513.

74. Nicholas & Co. v. United States, 249 U.S. at 39.

75. *See, e.g.,* American Express Co. v. United States, 332 F. Supp. 191 (Cust. Ct. 1971), *aff'd on other grounds* 472 F. 2d 1050 (C.C.P.A. 1973).

76. 562 F. 2d at 1215.

77. *Id.* at 1223.

both law and policy, the lower court's decision is unanimously affirmed.

The opinion of Justice Marshall clearly delineates two principles that govern the Court's thinking. First, because of the long-standing Treasury interpretation of the statute and congressional "acquiescence" to this interpretation, the C.C.P.A. had correctly affirmed the interpretation as "lawfully permissible"[78] within the language of section 303. Second, the Court found no rule emanating from *Downs* which explicitly decided the question whether "nonexcessive remission of taxes, standing alone, would have constituted a bounty on exportation."[79] The Court went on to rule on a third issue, that the Treasury's interpretation was "reasonable" in light of the "economic result" of the Japanese tax remission. Actually, as petitioner Zenith had based its cause of action squarely on its interpretation that *Downs* declared a tax remission, upon exportation, as a *per se* bounty or grant, this third issue as to the reasonableness or arbitrariness of the Treasury policy was never put into contention.[80] The fact that the Supreme Court sought to identify it (as had the C.C.P.A.) as fundamental to the resolution of the issue, shows that the decision also had strong roots in economic policy.

Statutory Interpretation

The Court noted that the Treasury had adopted its interpretation of the 1897 statute the following year[81] and that that interpretation has been both unchanged and consistent in application since that time. Such a long-standing statutory interpretation by an administrative agency is entitled to "considerable weight."[82] That interpretation has "particular weight" when the administrative practice involves a "contemporaneous construction of a statute" by those "charged with the responsibility of setting its machinery in motion."[83] Additionally, as the Department's interpretation

78. *Id.*

79. 98 S. Ct. at 2451.

80. Brief for the United States in Opposition at 11 n. 9, Zenith Radio Corp. v. United States, 98 S. Ct. 2441 (1978).

81. May 6, 1898 in T.D. 19321, 1 Synopsis of Decisions 696 (1898). *See* Brief for the United States in Opposition at 6 n. 4.

82. Udall v. Tallman, 380 U.S. 1, 16 (1965), quoting Unemployment Compensation Commission v. Aragon, 329 U.S. 143, 153 (1946).

83. Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933); *see, e.g.*, Power Reactor Co. v. Electricians, 367 U.S. 396, 408 (1961).

was "sufficiently reasonable," it was acceptable to a reviewing court.[84] In summary the Court finds:

> Our examination of the language, the legislative history, and the overall purpose of the 1897 provision persuades us that the Department's initial construction of the statute was far from unreasonable; and we are unable to find anything in the events subsequent to that time that convinces us that the Department was required to abandon this interpretation.[85]

Petitioner Zenith's claim that the statute is clear and unambiguous by a plain meaning approach to the language is implicitly rejected by the Court's broader view of the legislative activity that forged the statute.

Legislative History

The Marshall opinion zeroed in on two critical periods in the murky legislative history of this act. The first target of analysis concerned the subtle changes brought about when the first act, an exclusively sugar-protecting provision in 1890,[86] was expanded to cover general imports in 1897. While no definition of "bounty or grant" was provided by any of the measures as enacted, there is evidence that supporters[87] of the measure intended to countervail only against "net" bounties (where monies rebated upon export exceeded the domestic excise tax). Such subsidization schemes were then practiced by "several" European governments.[88] This concept was more explicitly covered in the 1894 Act which excepted American importers from duties on bounty-fed exports where those importers could produce a certificate from the exporting government that "*no indirect bounty has been received upon said sugar in excess of the tax collected upon the beet or cane*

84. Train v. Natural Resources Council, 421 U.S. 60, 75 (1975).

85. 98 S. Ct. at 2445.

86. Tariff Act of 1890, 26 Stat. 584.

87. Appellant U.S. Government maintained in its reply brief before the C.C.P.A. that "Statements of sponsors are to be accorded substantial weight in the interpretation of a statute." Reply Brief for Appellant at 4, United States v. Zenith Radio Corp., 562 F. 2d 1209 (C.C.P.A. 1977). The Government advanced a similar argument before the Supreme Court. Brief for the United States in Opposition at 11 n.8, Zenith Radio Corp. v. United States, 98 S. Ct. 2441 (1978). This point was contested by Zenith, but the Supreme Court did not address it in the opinion. Instead, the Court relied on statements made by both sides in the floor debates insofar as both sides were in accord as to the amounts of countervailing duties discussed. This obviated the need to rely on the sponsor's intentions.

88. 98 S. Ct. at 2446.

from which it was produced."[89] (Emphasis added.) Although the same provision was not incorporated into the 1897 Act, the term "net amount of such bounty or grant"[90] was incorporated. By that phrase the concept of "net bounty" was transposed from the 1894 to the 1897 Act, and in so doing the intent was "to incorporate the prior rule that nonexcessive remission of indirect taxes would not trigger the countervailing requirement at all."[91]

Second, the Court studied the Senate floor debates surrounding the passage of the 1897 Act. The Senate debate makes clear the intention to countervail only against excess remissions and provides an illustration of the concept through a German export scheme then under scrutiny. The House version of the 1897 Act had in fact utilized explicit language concerning countervailing against only "net" bounties on exported sugar. That language was deleted in the Senate (and final) version because the Senate wished to expand the coverage of the act to all imports, not merely sugar.[92] The offending German scheme concerned a "bounty" on exported raw and refined sugar. The "bounty" figures used in the debates were 38¢ per hundred pounds of refined sugar and 27¢ per hundred pounds of raw sugar. Consequently, the countervailing duties under discussion were in the same amounts. But the crucial fact revealed in the debates was that the full amount remitted from domestic consumption tax upon export from Germany was *$2.16 per hundred pounds.* It follows from this discrepancy that the figures of 38 and 27 cents must have been what the Treasury had determined to be the "excess" or "net" bounty; otherwise if remission of the entire indirect tax were regarded as the "bounty," the necessary duty would have to have been the full $2.16.[93]

Downs Revisited

Ultimately, the resolution to the *Zenith* case rests upon the *Downs* decision. The Court acknowledges that "this would be a very different case"[94] if the Secretary's interpretation were

89. Paragraph 182½ of the Act of August 27, 1894. Tariff Act of 1894, 28 Stat. 521.

90. Section 5 of the Tariff Act of July 24, 1897, 30 Stat. 205.

91. 98 S. Ct. at 2446.

92. 30 CONG. REC. 1635 (1897).

93. 98 S. Ct. at 2447.

94. *Id.* at 2449.

contrary to the Court's holding in *Downs*.

The facts in that case revealed two relevant tax adjustments: (1) the remission of excise taxes on sugar exported from Russia, and (2) receipt of a valuable certificate upon export, this certificate relieving the exporter of excise taxes on his sugar sold domestically. The issue that came before the *Downs* Court was whether a nonexcessive remission of indirect tax together with the granting of an additional benefit (the certificate) constituted a "bounty or grant."[95] Because petitioner Downs, the importer, did not challenge the amount of the duty assessed on the sugar by the Treasury, the Court's attention was not concentrated on the distinction between the mere remission of the tax and the certificate. Thus, Zenith arrived at court arguing that a mere remission alone was sufficient to trigger a countervailing duty. They bolstered their argument with the same broad language used in *Downs* that had proven persuasive in the Customs Court.[96]

The modern Court finds this passage wholly incompatible with language in *Downs* both preceding and subsequent to the general language in *Downs*. The *Downs* Court understood the "bounty" to refer to the certificates, as had the Board of General Appraisers[97] and the Fourth Circuit Court of Appeals[98] before it. The *Downs* Court, equally concerned with the "economic effect" of the disputed activity as the modern Court, noted:

"The amount he [the exporter] receives for his export certificate, say, R. 1.25, is the *exact amount of the bounty he receives upon exportation,* and this enables him to sell at a profit in a foreign market."[99] (Emphasis added.) Further, the *Downs* Court went on to specifically concur with the conclusion of the Fourth Circuit, which it incorporated verbatim into its own opinion:

> We find that the Russian exporter of sugar obtains from his government a certificate, solely because of such exportation, which is worth in the open markets of that country from R. 1.25 to R. 1.64 per pood, or from 1.8 to 2.35 cents per pound. Therefore we

95. *Id.* at 2450.

96. *See* note 65 *supra.*

97. T.D. 22,984, 4 TREAS. DEC. 405, 410-11, 413 (1901).

98. Downs v. United States, 113 Fed. 144, 145.

99. Downs v. United States, 187 U.S. 496, 515.

> hold that the government of Russia does secure to the exporter of that country, as the inevitable result of its action, a money reward or gratuity whenever he exports sugar from Russia.[100]

The occurrence within the same page of the same opinion of statements that have given rise to legal arguments for the opposing sides in the *Zenith* case is what makes *Downs* an "admittedly opaque opinion."[101] Nevertheless, the weight of the evidence does not allow the modern Court to take the broad statements relied upon by Zenith as the holding of the *Downs* decision. Because no one argued in *Downs* that a mere remission by itself constituted a bounty, and because the Court did in fact support the Secretary's decision countervailing only as against the excess remission,[102] the Court finds that "the isolated statement in *Downs* relied upon by petitioner cannot be dispositive here."[103]

Economic Effects

Both petitioner Zenith and respondent U.S. Government supported their legal points with economic and policy arguments. The Court was much less definitive in its discussion of these issues than in its clean-cut resolutions to the interpretation of the legislative history and the *Downs* holding. While the Court did not deny the validity of Zenith's position, it did not alter its affection for the reasonable nature of the Treasury policy.

The main thrust of Zenith's economic argument was that the Treasury policy is based on outdated economic theory which favors foreign tax structures. The Supreme Court acknowledged that remissions of indirect taxes may be in fact an incentive to export.[104] Additionally, such remissions as sanctioned by GATT may work to the detriment of those countries relying primarily on direct taxes (as the United States) and to the advantage of those dependent on indirect taxes (as Japan). Thus, where indirect taxes are a primary revenue source, foreign exporters "are able to receive tax rebates on exportation far greater than U.S. exporters, without fear of countervailing under either the GATT rules, or the countervailing duty law as

100. *Id.* at 516.

101. 98 S. Ct. at 2450.

102. T.D. 22,814, 4 TREAS. DEC. 184 (1901). The final sums assessed against the Russian sugar ranged from .38 ruble per pood to .50 ruble per pood.

103. 98 S. Ct. at 2451.

104. *Id.* at 2449.

it traditionally has been construed by the Treasury Department."[105] The possible competitive advantage gained by foreign producers has been fully debated in Congress. Legislative dissatisfaction with present policy has resulted, *inter alia,* in some protectionist language from the Senate Finance Committee[106] and promulgation of Section 121(a)(5) of the Trade Act of 1974, which mandates presidential action on a revision of GATT articles "with respect to the treatment of border adjustments for internal taxes to redress the disadvantages to countries relying primarily on direct rather than indirect taxes."[107] Although cognizant of the dissatisfaction, the Court bows to the complexity of the economic situation and states that "given the present state of economic knowledge" it would be difficult to measure the effect of the remission of indirect taxes.[108] Nor does the Court think it wise to substitute its judgment for that of the Secretary in economic matters.[109] Clearly the Court feels the economics of the issue are too nebulous for judicial resolution and therefore does not defeat Zenith's arguments so much as side-step them.

Economics aside, the Court feels the successful application of the Treasury policy over eight decades has been reasonable. That policy has sought to analyze a tax remission or other subsidy in terms of its economic effect on the United States. The policy is best encapsulated in the C.C.P.A. analysis: "Neither form nor nomenclature being decisive in determining whether a bounty or grant has been conferred, it is the economic result of the foreign government's action which controls."[110] In fact, the analysis is a balancing test; measuring the effect of the offending practice against the purpose of countervailing duty legislation. Indeed the history of judicial review of countervailing duty cases contains both of these themes.[111]

105. Marks & Malmgren, *Negotiating Non-tariff Distortions to Trade,* 7 LAW & POL'Y INT'L BUS. 327, 352 (1975).

106. "[T]he United States can no longer stand by and expose its markets, while other nations shelter their economies . . . with . . . export subsidies . . . and a host of other practices which effectively discriminate against U.S. trade and production." S. REP. No. 1298, 93rd Cong., 2d Sess. 19 (1974).

107. Trade Act of 1974, § 121(a)(5), adding 19 U.S.C. § 2131. *See generally,* Marks & Malmgren, *supra* note 105, at 354-355.

108. 98 S. Ct. at 2449.

109. *Id.*

110. 562 F.2d at 1216.

111. *See, e.g.,* T.D. 22,984 at 414; and *Downs,* 187 U.S. at 514-515.

The modern Court notes that while the legislative history might not be such as to *compel* a Treasury policy against only "net" bounties, there is no question of the reasonable nature of the policy "in light of the statutory purpose."[112] The statutory purpose of countervailing duties is to control and negate the competitive advantage gained through export subsidization. In holding that nonexcessive remissions of indirect taxes did not sponsor the competitive advantage that the legislation was enacted to prevent, the Treasury acted "in accordance with the shared assumptions of the day as to the fairness and economic effect of that practice."[113] Thus the Secretary's policy, based on assumptions still current if not fully subscribed to by all observers, remains as permissible today as it was in 1898.

The Future of Countervailing Duty Policy

The immediate effect of the Supreme Court decision is twofold: (1) to lend judicial sanction to the "lawfully permissible" countervailing duties policy of the Treasury Department, and (2) to distinguish *Downs* as *not* holding that all remissions of indirect taxes are bounties or grants. While the latter result would certainly deny future petitioners their strongest legal precedent in cases with similar facts, it does not necessarily follow that countervailing duty complaints will decrease. Indeed, as the last decade has seen a marked increase in countervailing duty reviews, there is the strong likelihood that the combination of economic pressures and the increased accessibility of the courts will result in a commensurate upsurge in litigated complaints. This trend may focus needed light on the Treasury's review procedures, which have often been criticized for delay and secrecy.

The *Zenith* case was a pointed illustration of agency foot-dragging. Eight years elapsed between the filing of Zenith's complaint and the rendering of the Supreme Court decision; nearly six years was spent in administrative investigation and review. Fortunately, Congress addressed that situation directly in the Trade Act of 1974 while *Zenith* was still under review. The Secretary of the Treasury is now obligated to decide if a

112. 98 S. Ct. at 2448.
113. *Id.*

foreign country has bestowed a bounty or grant within twelve months of the filing of a complaint.[114]

Certain to come under renewed scrutiny is the wide range of Treasury discretion, uninhibited by the need to produce a factual record to justify bounty or no-bounty determinations. As it stands today, when the Treasury imposes or denies a countervailing duty claim, only the fact of the bounty or grant is published along with the amount assessed against it, if any. As noted by the C.C.P.A., this profoundly circumscribes judicial review as there are no transcripts from which a reviewing court can determine whether the Secretary's findings were supported by the evidence or if they were in fact arbitrary or capricious. The Administrative Procedure Act[115] allows for such a review and Congress does provide for hearings in antidumping cases,[116] but in countervailing duty review the Treasury is not reached by either.[117] This deficiency leads to the incongruous situation faced by the C.C.P.A. in the *Zenith* case where it acknowledged, on the one hand, that it is the economic effects of a foreign government's action that determine whether a subsidy has been bestowed, and on the other hand, that in the *Zenith* case "the record is silent regarding the economic result of the mere remission of the Japanese Commodity Tax."[118] This says, in effect, that the court maintains a standard of judgment but receives no facts to apply to the standard. In the *Zenith* case, the C.C.P.A. presumed[119] that the economic result of the Japanese tax did not confer a subsidy, and then went on to decide whether the Treasury policy was justifiable as a matter of law. Faced with the same lack of data, the Supreme Court merely notes that the debate over the economic effects of remitted indirect taxes is far from over,[120] and faced with the complexity of the issues it is "not the task of the judiciary to substitute its views as to fairness and economic effect for those of the Secretary."[121] It would seem improbable that this "it's-fair-because-the-Secretary-says-it's-fair" reasoning will stand

114. Trade Act of 1974 § 331(a), adding 19 U.S.C. § 1303(a)(4).
115. 5 U.S.C. § 551-559 (1976).
116. 19 U.S.C. § 160(d) (1976).
117. 562 F.2d at 1216, n.13.
118. *Id.* at 1216.
119. *Id.*
120. 98 S. Ct. at 2449.
121. *Id.*

without challenge. Such a challenge would likely emerge in the situation where a complainant wished to contest the data which forms the basis of the final judgment whether a remission was "excessive" or not.

From the point of view of a prospective litigator, *Zenith* provides little guidance to the standard of what constitutes a bounty or grant. True, this very definition is a major policy decision and should be the responsibility of congressional legislation and executive (Treasury) interpretation and application. However, as Congress has avoided a fixed definition, and the facts and pleadings of the *Zenith* decision are hazy as to how the Treasury determinations are made, it would follow that it is the responsibility of the courts to provide some standards against which the petitioner can measure his chances for successful review.

On the other hand, it can be strongly argued that the effect of an arbitrary standard defined by statute would be detrimental to U.S. trading flexibility. This line of reasoning would allow the Treasury the widest discretion possible in its determinations so as to strike a better balance between the changing economics and politics of international trade and U.S. interests. The judicial support that the *Zenith* decision lends to the Treasury's practices has at its base a very compelling policy rationale. The entire countervailing duties area is undermined by a haunting specter, which like the Treasury policy is a legacy of 1898—the fear of economic retaliation leading to a protective tariff war.

Because the imposition of countervailing duties is *required* by the statute upon a finding of a bounty or grant; because there need be no factual showing of "injury" to a domestic industry; and because judicial review is subject to the aforementioned limitations, some would view the imposition of countervailing duties as a "sleeping giant"[122] with a dangerous potential to disrupt the flow of world trade. In a 1971 countervailing duties case the C.C.P.A. cautioned: "Countervailing duties are strong medicine, well calculated to arouse violent resentment in countries whose trade practices are branded by

122. Davis, *The Regulation and Control of Foreign Trade*, 66 COLUM. L. REV. 1428, 1446 (1966).

the court as unethical."[123] The desire to avoid incitement of "violent resentment" from one of America's foremost trading partners is the overriding theme of the government's policy arguments in *Zenith*. In its brief before the Supreme Court, the government urged the Court to view the facts and policies in the same light as the Secretary in order to avoid a "significant breakdown" in American trading relations and "retaliatory actions" from trading partners. It also pleaded for favorable review so as not to undermine the government's "negotiating flexibility" in the 1978 Multilateral Trade Negotiations (under the auspices of the GATT).[124] Additionally, any decision which would encourage a wider application of countervailing duties (in response to a worsening balance of payments deficit or import glut) as has been predicted[125] would certainly be contrary to the spirit and language of GATT and likely put a severe strain upon that system.[126] There is a strong inference to be drawn from the decision in the *Zenith* case that a factor in the Court's approval of the Treasury practice was the Secretary's restraint in applying the duties pursuant to the congressional grant of the discretion to determine what constitutes a bounty or grant. It is for this reason that "bounty" or "grant" have no statutory definition, indicating Congress' intent to refrain "from calling all the countervailing duty plays in advance."[127]

Conclusion

In refusing to grant Zenith's request for reversal of a negative determination on Japanese electronic goods, the Supreme Court has established two significant guidelines. Future complainants who contest a no-bounty determination will no longer have the broad language of the *Downs* decision to cite as precedent. Also, potential litigators are on notice that the Treasury policy that refuses to assess duties against nonexcessive remissions has been given full approval by a unanimous Court. What remains to be clarified is a Treasury standard for "bounty" or "grant" which is sufficiently well-defined to pro-

123. United States v. Hammond Lead Products, Inc., 440 F.2d 1024, 1031 (C.C.P.A. 1971).

124. Brief for the United States in Opposition at 7-8, Zenith Radio Corp. v. United States, 98 S. Ct. 2441 (1978).

125. King, *supra* note 40, at 1192.

126. Rosendahl, *supra* note 53, at 122.

127. 562 F.2d at 1217.

vide guidance for potential complainants as well as to reviewing courts.

Most significant in *Zenith* is the lack of evidence in the language of the statute, or in eighty years of legislative history, judicial review, and administrative practice, that could convince the Court that the broad powers of countervailing duty determinations should not be left to Treasury discretion. Holding that the Treasury policy is "lawfully permissible" under the statute is little more than saying that this discretionary power has been reasonably exercised. The Congress, long aware of the Treasury practices, has made no effort to overrule them. The Treasury practice is also compatible with the GATT system. The *Zenith* decision merely adds the judicial imprimatur to the Treasury policy.

In so doing, the Court puts the countervailing duties problem in a broad international perspective. Countervailing duties come to us from the late 19th century, a time when protective tariffs were commonplace and retaliatory legislation was the first response called for by U.S. industries, particularly a nascent one as was the sugar industry at the turn of the century. Similarly, massive imports of highly competitive Japanese consumer electronic goods had the U.S. industry reeling in the early 1970's. Continuing problems of a similar nature require constant bilateral negotiations at the highest executive level between the United States and Japan. The *Zenith* decision, more than just another comment on *Downs,* lends judicial backing to the Secretary's attempts to balance the anger of domestic industry against the export necessities of a major trading partner and ally. The Court's decision minimizes the effect an arbitrary standard might have on world trade and continues the discretionary license the Treasury has exercised since the creation of the statute.