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Export Subsidies: Countervailling Duties

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RECENT DEVELOPMENTS

EXPORT SUBSIDIES: COUNTERVAILING DUTIES—*Zenith Radio Corp. v. United States*, 98 S. Ct. 2441 (1978).

In April 1970, Zenith Radio Corporation filed a petition with the Commissioner of Customs[1] alleging that Japan had bestowed a "bounty or grant" upon the export of certain consumer electronic products[2] through the remission of commodity taxes[3] that would have been imposed[4] had the products been sold in Japan. Petitioner, pursuant to section 303(a) of the Tariff Act of 1930,[5] requested an assessment of

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[1] The Secretary of the Treasury has delegated the authority to make countervailing duty determinations to the Commissioner of Customs, subject to the Secretary's approval. 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)).

[2] The products included television receivers, radios, phonograph combinations, radio tape recorder combinations, record players and phonographs, complete with amplifiers and speakers, tape recorders, tape players, and color television tubes. Notice of Countervailing Duty Proceedings, 37 Fed. Reg. 10,087, *as amended by* 37 Fed. Reg. 11,487 (1972).

[3] Under the Commodity Tax Law of Japan, a variety of consumer goods, including the electronics products at issue here, are subject to an "indirect tax," a tax levied on the goods themselves and computed as a percentage of the manufacturer's sales price rather than the income of purchaser or seller. The tax applies to both goods manufactured in Japan and those imported into Japan. On goods manufactured in Japan the tax is levied on shipments from the factory; imported products are taxed when they are withdrawn from the customs warehouse. Only goods destined for consumption in Japan are subject to the tax. However, products shipped for export are exempt, and any tax paid is refunded if the product is exported. Thus, the tax is "remitted" on exports.

[4] For the products at issue here the rate of taxation ranges from 5 to 20 percent. TAX BUREAU, MINISTRY OF FINANCE (Japan), AN OUTLINE OF JAPANESE TAXES 128-29 (1970).

[5] Tariff Act of 1930, § 303, 19 U.S.C. § 1303 (1976). Section 303, 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

countervailing duties on those products upon their entry into the United States. In January 1976, after soliciting the views of interested parties and conducting an investigation, the acting Commissioner of Customs published, "Notice of Final Negative Countervailing Duty Determination,"[6] rejecting Petitioner's request. Petitioner then filed suit in the United States Customs Court contesting the determination under section 516(d) of the Tariff Act.[7] The Customs Court,[8] on cross-

such articles 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 imported, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

. . . .

(5) The Secretary shall from time to time ascertain and determine, or estimate, the net amount of such bounty or grant, and shall declare the net amount so determined or estimated.

(6) The Secretary shall make all regulations he deems necessary for the identification of articles and merchandise subject to duties under this section and for the assessment and collection of such duties. All determinations by the Secretary under this section, and all determinations by the Commission under subsection (b)(1) of this section (whether affirmative or negative) shall be published in the Federal Register.

[6] The Notice stated in relevant part that:

[O]n the basis of the facts gathered and the investigation conducted pursuant to customs regulations, a final determination is hereby made . . . that . . . no bounty or grant is being paid or bestowed directly or indirectly within the meaning of § 303 . . . upon the . . . exportation of certain consumer electronics products from Japan.

Final Negative Countervailing Duty Determination, 41 Fed. Reg. 1298 (1976).

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

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

(1) under section 160 of this article that a class or kind of foreign merchandise is not being, nor likely to be sold in the United States at less than its fair value, or

(2) under section 303 of this title 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 a 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.

[8] Zenith Radio Corp. v. United States, 430 F. Supp. 242 (Cust. Ct. 1977). For a

motions for summary judgment, ruled in favor of Petitioner and ordered the assessment of countervailing duties on all Japanese consumer products specified in the complaint.[9] The Customs Court based its decision on *Downs v. United States.*[10] On appeal, the Court of Customs and Patent Appeals (CCPA) distinguished *Downs,*[11] and, in a three to two decision, reversed the lower court.[12] The CCPA relied primarily upon the long standing and uniform interpretation of section 303(a) by the Department of the Treasury.[13] The United States Supreme Court, on certiorari, affirmed the holding of the CCPA that the remission of commodity taxes on certain consumer electronic products by Japan does not constitute a "bounty or grant" under section 303 of the Tariff Act of 1930.[14]

American manufacturers were first afforded protection against export subsidies conferred by foreign governments under the Tariff Act of 1897.[15] This legislation directed the Secretary of the Treasury to impose a countervailing duty upon the importation of "any article or merchandise . . . upon which a bounty or grant has been bestowed."[16]

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brief review of the Custom Court's other considerations, see 10 CASE W. RES. J. INT'L L. 577 (1978).

[9] 430 F. Supp. at 249. Relying heavily on broad tax remission language in Downs v. United States, note 10 *infra*, the Customs Court held that the Japanese remission constituted a "bounty or grant" as a matter of law.

[10] Downs v. United States, 187 U.S. 496 (1903). The case held that an export "bounty" had been conferred by a complicated Russian scheme for the regulation of sugar production and sale involving remission of excise taxes in the event of export, as well as a transferable export certificate. The value of this certificate was based on the difference between the domestic and foreign market prices of sugar at the time of export.

[11] The majority distinguished *Downs* on the ground that it did not decide the question of whether a non-excessive remission of an indirect tax, standing alone constitutes a bounty or grant. The majority emphasized that the Russian scheme was composed of two inseparable elements: the transferable certificate of substantial market value and the remission of the excise tax.

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

[13] *Id.* at 1218-23.

[14] Zenith Radio Corp. v. United States, 98 S. Ct. 2441 (1978).

[15] Act of July 24, 1897, 30 Stat. 151.

[16] The language of the 1897 statute evolved out of two earlier countervailing duty provisions that were applicable only to sugar imports. *See* Tariff Act of 1890, 26 Stat. 584 (1890). Section 5 of the Tariff Act of July 24, 1897, 30 Stat. 205, provided in full:

> That whenever any country, dependency, or colony shall pay or bestow, directly or indirectly, any bounty or grant upon the exportation of any article or merchandise from such country, dependency, or colony, and such article

Although the statute has been reenacted five times without modification, the Congress has never provided a definition for the term "bounty or grant."[17] Based on its view of the Congressional intent, the Department of the Treasury adopted its own interpretation of the term "bounty or grant," less than one year after the passage of the Act.[18]

For over eighty years, the Treasury has maintained the position that a "bounty or grant"[19] is not conferred by an indirect tax[20] remission unless it is excessive. In the Department's terminology, a remission is excessive only if it exceeds the amount of tax paid or otherwise

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or merchandise is dutiable under the provisions of this Act, then upon the importation of any such article or merchandise into the United States, whether the same shall be 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 the duties otherwise imposed by this Act, an additional duty equal to the net amount of such bounty or grant, however the same be paid or bestowed. The net amount of all such bounties or grants shall be from time to time ascertained, determined, and declared by the Secretary of the Treasury, who shall make all needful regulations for the identification of such article and merchandise and for the assessment and collection of such additional duties.

[17] The current version of section 303 represents the fifth reenactment of the 1897 provision without any modifications relevant here. Tariff Act of 1909, § 6, 36 Stat. 85; Tariff Act of 1913, § IV(E), 38 Stat. 193; Tariff Act of 1922, § 303, 42 Stat. 935; Tariff Act of 1930, § 303, 46 Stat. 687; Trade Act of 1974, § 331(a), 88 Stat. 2049.

The Customs Simplification Act of 1951, H.R. 1535, introduced at the request of the Secretary of the Treasury, would have amended section 303 of the Tariff Act of 1930 to agree with the Treasury's interpretation of the term "bounty or grant." The Congress rejected this Amendment as well as a similar provision recommended by the State Department. *Hearings on H.R. 1535 before the House Committee on Ways and Means,* 82 Cong., 1st Sess. 2, 16, 35 & 79 (1951); *Hearings on H.R. 1612 before the Senate Committee on Finance,* 82 Cong., 1st Sess. 11 (1951).

[18] *See* T.D. 19,321, 1 TREAS. DEC. 696 (1898).

[19] The Treasury's interpretation of the terms "bounty or grant" is derived from language in the Tariff Act of 1897 providing for the levying of duties on sugar imports equal to the "net amount" of bounty or grant. This concept of "net bounty" as adopted in the Tariff Act of 1897 suggests that the Congress envisioned that only a remission in excess of taxes paid or otherwise due would trigger the countervailing duty requirements. *See* 30 CONG. REC. 1721 (1897).

[20] The term "indirect tax" refers to those taxes on the product itself rather than on a person or entity. *See* Marks & Malmgren, *Negotiating Nontariff Distortions to Trade,* 7 LAW & POL. INT'L BUS. 327, 351 (1975).

due.[21] This position has been incorporated into articles VI and XVI[22] of the General Agreement on Tariffs and Trade (GATT).[23] Both the Treasury's position and the international standard embodied in the GATT are based on the principle that because exports are not consumed in the country of production, they should not be subject to consumption or indirect taxes[24] in that country. The premise follows that insofar as the sale of foreign goods in the United States is subject to federal excise and state and local sales taxes, the application of a countervailing duty would have the effect of double taxation.[25] This view is considered a narrow approach to the effects of export subsidization by most commentators and economists.[26]

The courts have taken a more expansive view of the application of United States countervailing duty law and its controlling language "bounty or grant." The broadest judicial interpretation of the term

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[21] Thus, for example, if a $5.00 tax is levied on goods at a factory, the return of $5.00 upon exportation would be "nonexcessive," whereas a payment of $8.00 from the government to the manufacturer upon exportation would be "excessive" by $3.00.

[22] The General Agreement on Tariffs and Trade, *done* 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]. Article VI(3) provides in pertinent part:

> No countervailing duty shall be levied on any product . . . in excess of the amount of subsidy determined to have been granted . . . the term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed directly or indirectly upon the manufacture, production or export of merchandise.

Id. art. XVI, para. 4 provides in pertinent part:

> The exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, on the remission of such duties or taxes in amount not in excess of those which have accrued shall not be deemed a subsidy.

[23] *See generally* K. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1970).

[24] Indirect taxes are those on special goods and include consumption, sales, excise or turnover taxes. Direct taxes are those on a person or entity and include income and social security taxes. *See* Marks & Malgren, *supra* note 20, at 351.

[25] This principle regarding double taxation was the economic basis of the 1897 Statute. Tariff Act of 1897, note 16 *supra*.

[26] *See e.g.*, Marks & Malmgren, *supra* note 20, at 351-55; THE UNITED STATES SUBMISSION OF BORDER TAX ADJUSTMENTS, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT (1966); K. DAM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 210-16 (1970); Butler, *Countervailing Duties and Export Subsidization: A Re-Emerging Issue in International Trade*, 9 VA. J. INT'L L. 82 (1968).

"bounty or grant" is found in the dicta of two early Supreme Court opinions.[27] In *Downs v. United States*,[28] the Court reviewed a Russian export scheme, which, while imposing a tax on all sugar produced, remitted the tax on all sugar exported.[29] In upholding the Treasury's imposition of countervailing duties upon the importation of Russian sugar, the Court stated: "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."[30]

Sixteen years later, the Supreme Court in *G. S. Nicholas & Co. v. United States*,[31] examined a British tax plan which provided rebates to distillers upon the export of spirits. In concluding that the British scheme fell within the ambit of the United States statute, the Court stated:

> A word of broader significance than "grant" could not have been used [by the Congress]. Like its synonyms "give" and "bestow" it expresses a concession, the conferring of something by one person upon another. And if "something" be conferred by a country "upon the exportation of any article or merchandise" a countervailing duty is required . . . .[32]

The dicta in *Downs*[33] and *G. S. Nicholas*[34] suggest that the term "bounty or grant" applies to all tax remissions, direct as well as indirect. The holdings on the other hand, stand for the limited proposition that a "bounty or grant" exists only to the extent that a government conferred remission exceeds the taxes otherwise due. Consistent with long standing administrative practice[35] and the GATT, the

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[27] Downs v. United States, 187 U.S. 496 (1903); G.S. Nicholas & Co. v. United States, 249 U.S. 34 (1919).

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

[29] *See* note 10 *supra*.

[30] 187 U.S. at 515.

[31] 249 U.S. 34 (1919). The British scheme involved payment to an exporter of spirits from the United Kingdom the sum of three to five pence per gallon. *Id.* at 36-37.

[32] *Id.* at 39.

[33] 187 U.S. at 502.

[34] 249 U.S. at 39. In neither *Downs* nor *Nicholas* did the Supreme Court decide the issue of whether a non-excessive remission of an indirect tax standing alone would constitute a "bounty or grant."

[35] *See* notes 21-22 *supra* and accompanying text.

Department of the Treasury has construed the *Downs* and *G. S. Nicholas* cases in accordance with the holdings, rather than dicta. The apparent conflict between the administrative interpretation of the statute and the dicta espoused in those cases has remained unresolved through the successive reenactments of section 303 by the Congress.

American importers since the inception of the Tariff Act of 1930 have enjoyed the statutory right to contest countervailing duty assessments in the United States Court of Customs and Court of Customs and Patent Appeals.[36] It was not until 1967[37] that an American manufacturer sought to contest a Treasury Department "negative countervailing duty determination."[38] In *United States v. Hammond Lead Products, Inc.*,[39] the Court of Customs and Patent Appeals held that it lacked jurisdiction to review an appeal of a negative countervailing duty determination under the Tariff Act of 1930. The decision rested largely on recognition of the policy implications of countervailing duty impositions.[40] The court reasoned that absent an explicit provision for judicial review, the Congress had not intended that United States manufacturers by-pass the executive branch through a judicial proceeding.[41] In direct response to *Hammond Lead Products* the Congress, in the Trade Act of 1974,[42] provided American

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[36] Such challenges are brought pursuant to procedures outlined in section 516 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1516 (1976).

[37] Every countervailing duty case prior to 1967 was brought by an importer. *See, e.g.*, United States v. Passavant, 169 U.S. 16 (1897); F.W. Woolworth v. United States, 115 F.2d 348 (C.C.P.A. 1940).

[38] Hammond Lead Prod. Inc. v. United States, 306 F. Supp. 460 (Cust. Ct. 1969), *rev'd*, 440 F.2d 1024 (C.C.P.A. 1971).

[39] 440 F.2d 1024 (C.C.P.A. 1971), *cert. denied*, 404 U.S. 1005 (1971).

[40] *Id.* at 1030.

[41] *Id.* at 1031.

[42] Pub. L. No. 93-618, 88 Stat. 1978 (amending 19 U.S.C. §§ 1202-1654 (1976)). In reporting out the amended bill, the Senate Finance Committee Report (S. REP. NO. 92-1221, 92d Cong., 2d Sess. 8 (1972)) stated:

> The Committee Amendments providing judicial review to domestic producers in countervailing duty cases is necessitated because of a 1971 decision of the Court of Customs and Patents Appeals (United States v. Hammond Lead Products, Inc.) holding that judicial review was not available to American producers in countervailing duty cases. The Committee is concerned that the decision might affect the ability of American producers to obtain meaningful relief against subsidized import competition . . . because of administrative inaction or insufficient action, or because of excessive delay in the administrative process.

manufacturers with the right to judicially contest negative countervailing duty determinations.[43]

Zenith Radio Corp. v. United States, is the first case to be tried under the courts' expanded jurisdiction. In *Zenith*, the Court was not faced with a question requiring a review of the record or a factual inquiry as to the effect of Japanese tax remission on the subject consumer products.[44] Petitioner did not dispute that the Treasury's negative determination was based solely on its long standing position that a non-excessive remission of an indirect tax is not a "bounty or grant." Further, Petitioner conceded that the Japanese tax remission was both indirect and non-excessive in nature.[45] The sole "question," as the Court phrased it, was "whether the Department's interpretation is sufficiently reasonable to be accepted by a reviewing court."[46]

At the outset, the Court adopted a deferential standard of review, affording "considerable weight" to the Treasury's long standing administrative practice.[47] Justice Marshall, writing for a unanimous Court found that the legislative history may not have compelled the Treasury

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[43] 19 U.S.C. § 1516(d) (1976). In mandating judicial review of exporter protests the Act is silent as to the standard of review to be employed. Language in the Senate Finance Committee report on the bill, note 42 *supra*, suggests that the Congress contemplated that exporters be afforded the same standard of review that has been applied with respect to importer protests. Although the Customs Court and CCPA have not consistently articulated a standard of review in these cases, standards specified under the Administrative Procedures Act have been applied. 5 U.S.C. § 551 *et seq.*, § 701 *et seq.* (1976). In Entergetic Worsted v. United States, 224 F. Supp. 606 (Cust. Ct. 1963), *rev'd*, 53 C.C.P.A. 36 (1966), the court applied an arbitrary and capricious standard in upholding the Treasury's determination as the amount of "bounty" conferred upon "worsted wool tops" exported from Uruguay. On appeal, the CCPA employed the substantial evidence test to reverse the Customs Court and Treasury determination. 53 C.C.P.A. at 42, 45-46.

[44] The queston of whether a non-excessive tax remission should be included under the term "bounty or grant" involves review as a matter of law. *See generally* K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 30.01-30.14 (1958).

[45] 98 S. Ct. at 244.

[46] *Id.* at 2445.

[47] *Id.* The Court stated:

> When faced with a problem of statutory construction, this Court shows great deference to the interpretation of the statute by officers or the agency charged with its administration. To sustain [an agency's] application of [a] statutory term, we need not find that it is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings.

Id. at 2445.

to adopt its position.[48] He concluded, however, that the Treasury's interpretation is "reasoanble in light of the statutory purpose" and "repeated Congressional reenactment of the statute without modification."[49] The *Downs* and *G. S. Nicholas* cases were distinguished by the Court on the ground that neither involved the issue of whether a non-excessive remission of indirect taxes, standing alone[50] would have constituted a "bounty or grant" upon export.[51]

The Court's deference to the Treasury's interpretation is consistent with a line of decisions in which the Supreme Court has chosen not to substitute its judgment for that of an administrative agency or department.[52] In *Zenith,* the Court had cogent reasons for deferring to the Treasury's administrative practice.[53] Among these reasons are the complexity of issues surrounding the imposition of countervailing duties,[54] the comparative expertise of the Treasury with respect to tariff and non-tariff trade barriers, and "the lack, internationally, of any satisfac-

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[48] *Id.* at 2448.

[49] *Id.*

[50] In *Downs,* the Russian Sugar scheme encompassed a non-excessive remission of consumption taxes as well as the granting of export certificates, entitling the bearer to additional rebates. The bounty conferred in *Downs* resided n the value of the export certificates in conjunction with the tax remission. As the *Zenith* court recognized, the *Downs* decision is not dispositive of the question here. In *G.S. Nicholas,* the only question before the Court was whether a direct bounty on exportation of liquor from Great Britain was a "bounty or grant;" the Court did not address the question of whether non-excessive remission of an indirect tax fell within the statute.

[51] Marshall's treatment of the dicta in *Downs* and *G.S. Nicholas* puts to rest any doubts raised with respect to judicial interpretation of the term "bounty or grant." 98 S. Ct. at 2451.

[52] Mourning v. Family Publications Service, Inc., 411 U.S. 356, 374 (1973); Griggs v. Duke Power Co., 401 U.S. 424, 434 (1971); Zuber v. Allen, 396 U.S. 168, 193 (1969); Red Lion Broadcasting v. FCC, 395 U.S. 367, 381 (1969); Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933).

[53] The exercise of a reviewing court's discretion in choosing between substitution of judgment and adoption of a deferential review standard is influenced by many factors that usually remain inarticulate, including the court's attitude toward the agency, the need for stability of a particular law or policy, the comparative qualifications of courts and agency to decide the particular issue and the extent to which the legislative body has committed particular problems to administrative or judicial determination. *See generally* K. DAVIS, *supra* note 44, at §§ 30.05-.14.

[54] Because countervailing duty impositions tend to strain United States relations with the country against which the imposition is made, foreign policy considerations are significant. Moreover, imposition of a countervailing duty always carries with it the risk of retaliatory measures by United States trading partners.

tory agreement, on what constitutes a fair as opposed to unfair [export] subsidy."[55] While each of these factors may have influenced the decision, careful analysis of the opinion reveals that the only major justification for the Court's deference to the Treasury's interpretation was its recognition of the need to maintain stability in the international framework of trade agreements embodied in the GATT. In this regard the Court stated:

> The [Treasury's] position has been incorporated into the General Agreement on Tariffs and Trade (GATT), which is followed by every major trading nation in the world; foreign tax systems as well as private expectations thus have been built on the assumption that countervailing duties would not be imposed on nonexcessive remissions of indirect taxes. In light of these substantial reliance interests, the long-standing administrative construction of the statute should not be disturbed . . . .[56]

In the Court's view, these "substantial reliance interests," outweighed findings acknowledged in the Trade Act of 1974,[57] which suggest that the economic underpinnings of articles VI and XVI of the GATT, and thus the Treasury's position, are faulty.[58]

Under both the GATT and United States countervailing duty law, indirect tax remissions, unless excessive, are not countervailable. This position is based on the economic assumption that indirect taxes are shifted forward and reflected in a product's purchase price.[59] This assumption has come under attack by economists of the view that indirect taxes are often not *fully* shifted forward.[60] They suggest that

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[55] 98 S. Ct. at 2449. *See* S. REP. NO. 1298, 93d Cong., 2d Sess. 183 (1974).

[56] 98 S. Ct. at 2449.

[57] Trade Act of 1974, 19 U.S.C. § 2131 (1976).

[58] In its report transmitting the Trade Act of 1974 to the House, the Committee of Ways and Means commented:

> GATT provisions on tax adjustments in international trade should be revised to ensure that they are trade neutral. Present provisions permit adjustments on traded goods for certain direct taxes but not for indirect taxes. The Committee expects that the President will seek modification of present rules as would remove any disadvantage to countries like the United States relying primarily on direct taxes and put all countries on an equal footing.

Trade Reform: Hearings on H.R. 6767 Before the House Comm. on Ways and Means, 93d Cong., 1st Sess. 2171 (1973).

[59] K. DAMM, THE GATT: LAW AND INTERNATIONAL ECONOMIC ORGANIZATION 214 (1970).

[60] *Id.* at 214-16.

since the United States is one of the few countries where indirect taxes are a primary revenue source, foreign exporters in countries where indirect taxes are a primary revenue source[61] are able to receive tax remissions, far greater than American exporters, without fear of countervailing duties under GATT rules or United States law.[62]

Recognition by the Congress of this line of economic reasoning is found in section 121(a)(5) of the Trade Act of 1974. This section directs the President to take action to bring about "the revision of GATT articles with respect to the treatment of border adjustments for internal taxes to redress the disadvantage to countries relying primarily on indirect taxes for revenue needs."[63] Whether or not the economics upon which section 121(a)(5) is premised are valid, it is clear that the Congress disapproved through the Trade Act of the different treatment presently afforded direct and indirect tax remissions under the GATT. Assuming that GATT rules do not operate to the disadvantage of American manufacturers, then, in keeping with the statutory purpose of the earlier enacted trade laws, that disadvantage should be remedied. As the *Zenith* Court recognized, the reciprocal nature of trade agreements and tariff bindings requires that any such disadvantage be remedied, through international agreement rather than through judicial intervention.[64] In this sense, the Court's opinion is consistent with the Trade Act's mandate that resolution of the issue be sought through multilateral negotiation.

The alternative, adoption of a statutory remedy through modification of the United States law, has been repeatedly rejected by the Congress in the prospect of retaliatory measures by American trading partners and in the hope of reaching an international solution through

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[61] These indirect taxes are comprised, principally, of consumption, turnover, excise and sales taxes. *See* note 24 *supra*.

[62] This view is based on a study by the staff of the Senate Committee on Finance. SENATE COMM. ON FINANCE, 92D CONG., 1ST SESS., FOREIGN TRADE: A SURVEY OF CURRENT ISSUES TO BE STUDIED BY THE SUBCOMMITTEE OF THE INT'L TRADE OF THE SENATE COMMITTEE ON FINANCE 6 (Comm. Print 1971). For an additional study supporting the views of the Senate Committee on Finance, see Marks & Malmgren, *supra* note 20, at 353.

[63] Trade Act of 1974, 19 U.S.C. § 2131 (1976).

[64] The recognition by Congress of the need to resolve such issues through international agreement is also found in section 1303(d)(2) of the Trade Act. The section provides the Treasury with discretion to suspend imposition of countervailing duties even where a bounty or grant has been found to exist. In order for suspension of the countervailing duty to be authorized, the following conditions are required: (1) steps must be taken to reduce the adverse effects of the bounty or grant; (2) there must be a

revision of the GATT.[65] The GATT system, unlike most legal systems is not designed to exclude self-help.[66] Retaliation subject to established procedures is the heart of the GATT system of enforcement. However, the possibility that statutory adoption of a protectionist posture with respect to countervailing duty impositions would unravel the interwoven system of tariff bindings is readily apparent.[67]

As acknowledged in the Trade Act, the United States interests will best be served through an international agreement to abolish non-tariff barriers which distort world trade patterns. Central to the Tokyo Round of multilateral trade negotiations should be the establishment of acceptable international rules governing the use of export subsidies.[68] The revision of the GATT to provide a case by case approach to export subsidization without the direct—indirect tax dichotomy would focus concern on the question of whether the remission *in fact* had a subsidizing effect.[69] This approach would be acceptable to American negotiators as it would be neutral in application.[70] American trading partners relying heavily on indirect taxation for their revenue needs will be reluctant to accept such an approach. They will argue that the disparity in treatment of direct as opposed to indirect tax subsidies, in the long-run, tends to adjust itself through price adjustments, exchange rate adjustments, and capital flow changes.[71]

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reasonable prospect of a new trade agreement, and (3) imposition of the countervailing duty must be likely to jeopardize the successful completion of trade negotiations. 19 U.S.C. § 1303(d)(2) (1976).

[65] *See* S. REP. NO. 1209, 93d Cong., 2d Sess. 183 (1974).

[66] K. DAMM, *supra* note 23, at 80.

[67] Following the Customs Court decision, the *Wall Street Journal* quoted Special Trade Representative, Robert Strauss, 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.

[68] The Treasury presently views the following as "subsidies:"

1) Direct payments made by a foreign government to an exporter where the effect is to improve the international competitiveness of such exports.

2) Rebates upon exportation of indirect taxes where the remission exceeds the amount of tax originally assessed.

3) Multiple exchange rate systems involving a preferential rate for exports.

4) Rebates upon indirect taxes, where the tax paid was not directly related to the product exported or components thereof.

Marks & Malmgren, *supra* note 20, at 348-49.

[69] *See* K. DAMM, *supra* note 23, at 214.

[70] *Id.*

[71] *See* Barceló, *Subsidies and Countervailing Duties—Analysis and a Proposal*, 9 LAW & POL. INT'L BUS. 779, 813-15 (1977).

Should multilateral negotiations fail to provide the United States with a satisfactory alternative to the GATT's present approach to indirect tax remissions, the Congress may be forced to provide a statutory solution.[72] While it is true that an expanded statutory remedy could result in retaliation by United States trading partners, use of this device would focus attention on trade distortions created by subsidization. This recognition could lead to the international community a step closer towards revision of the GATT to provide some form of international regulation of subsidization. *Zenith's* impact in this regard is significant. The Supreme Court's unwillingness in *Zenith,* to expand the protection afforded under the United States law may compel the Congress, in the absence of an international accord and in face of intensive lobbying by American manufacturers and labor interests, to adopt a more protectionist posture with respect to foreign export subsidies. It is the prospect of such action by the Congress which may provide American negotiators with their strongest bargaining chip in the Tokyo Round of multilateral negotiations.

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[72] The Congress in the Trade Act clearly recognized the need to protect American manufacturers from subsidized foreign goods. S. REP. NO. 93-1298, 93d Cong., 2d Sess. 183 (1974) states:

> 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 the impositions of countervailing duties.

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