TRADE ACT OF 1974—COUNTERVAILING DUTIES—NONEXCESSIVE REMISSION OF FOREIGN EXCISE TAX ON PRODUCTS IMPORTED INTO THE UNITED STATES DOES NOT CONSTITUTE A BOUNTY OR GRANT REQUIRING THE LEVY OF COUNTERVAILING DUTIES

In 1970, plaintiff Zenith, a domestic producer of electronic equipment, petitioned[1] the Commissioner of Customs,[2] alleging that Japan was bestowing bounties or grants upon the export of certain electronic products[3] to the United States; therefore, such imported products had to be subject to a countervailing duty under section 303 of the Tariff Act of 1930, as amended by the Trade Act of 1974 (section 303).[4] Plaintiff's allegation was based solely upon the Japanese Commodity Tax Law[5] which applied an

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[1] After the Secretary of the Treasury has made a determination that a bounty or grant has not been bestowed, an American manufacturer, producer, or wholesaler of merchandise of the "same kind or class" as reviewed by the Secretary has thirty days to file written notice of intent to contest the determination. 19 U.S.C. § 1516 (Supp. V 1975).

[2] *See* Kaye & Plaia, *The Relationship of Countervailing Duty and Antidumping Law to Section 337 Jurisdiction of the U.S. International Trade Commission*, 2 INT'L TRADE L. J. 1, 27-29 (1977) for an explanation of the procedure for instituting a countervailing duty investigation. Although the countervailing duty statute, 19 U.S.C. § 1303 (Supp. V 1975) imposes the burden of making countervailing duty determinations upon the Secretary of the Treasury, regulations require that the petition be sent to the Commissioner of Customs who then institutes the investigation. 19 C.F.R. § 159.47(b)(c) (1977).

[3] The products included primarily television, radio, and phonograph components. *See* United States v. Zenith Radio Corp., 562 F.2d at 1211 n. 2.

[4] 19 U.S.C. § 1303 (Supp. V. 1975) § 1303 Countervailing Duties

(a) Levy of Countervailing Duties

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

[5] Shōhō (Commodity Tax Law) (Law No. 48, *as revised* March 31, 1962). The Japanese Commodity Tax is considered a transfer tax, which is levied upon manufacturers, importers, or retailers on the sale of eighteen types of merchandise. Exported goods are exempt. These articles are divided into three classes each of which fixes the tax base and determines whether the manufacturer, importer, or retailer pays it. This suit involved items in the second classification, which also includes motor vehicles, sporting goods, fueled appliances, television and sound appliances, musical instruments and parts, photographic equipment, furniture, clocks and watches, smoking paraphenalia, luggage, toiletries, and soft drinks. Retailers of these class two products have one month following the month of the sale of the goods to file a return. The base of the tax is the manufacturer's selling price and is paid by the manufacturer. Tax rates range from 5% for radio accessories to 10% for radios to 15% for phonographs to 20% for televisions and their component parts.

excise tax on domestic, but not export, sales of electronic products.[6] The Commissioner of Customs, with the approval of the Assistant Secretary of the Treasury, ruled that a nonexcessive remission of excise taxes on exported merchandise did not constitute the bestowal of bounties or grants under section 303.[7] Plaintiff then sought judicial review of the Commissioner's determination in the United States Customs Court.[8] On a motion for summary judgment, plaintiff argued as a matter of law that any remission of domestic excise taxes upon exportation conferred a bounty or grant which must be countervailed. In its cross-motion for summary judgment, defendant contended that both the legislative history and the 75 years of administrative practice[9] in applying section 303 required that a remission of excise taxes must be excessive before a countervailing duty could be imposed.[10] The three judge Customs Court[11] unanimously granted plaintiff's motion for summary judgment, holding that the remission of the Japanese excise tax on electronic products exported from Japan constituted a bounty or grant within the meaning of section 303 as a matter of

[6] "Remission" denotes both tax exemption and tax refund, which the CCPA found to be legally indistinct. United States v. Zenith Radio Corp., 562 F.2d at 1211 n.4 (1977).

[7] 41 Fed. Reg. 1298 (1976).

Prior to its amendment, section 303 stated that once the Secretary of the Treasury determined that a bounty or grant was being bestowed, he had no discretion but was required to impose a countervailing duty. Also, there was no time period within which the Secretary had to act. V. Mueller & Co. v. United States, 115 F.2d 354, 28 C.C.P.A. 249 (1940) and Robert E. Miller & Co. v. United States, 34 C.C.P.A. 101 (1947). Under section 303, as amended, the Secretary must make a preliminary determination within six months of the filing of a complaint and a final determination within one year from the filing of the petition. 19 U.S.C. § 1303(a)(4)(Supp. V 1975).

[8] The Trade Act of 1974 authorized the United States Customs Court to review a negative countervailing duty determination made by the Secretary of the Treasury at the request of American manufacturers, producers, or wholesalers. Although importers have always had the right to judicial review of countervailing duty assessments imposed by the Treasury, judicial review of negative countervailing duty determinations was not sought by manufacturers, producers, or wholesalers before 1971.

In United States v. Hammond Lead, Inc., 440 F.2d 1024 (1971), *cert. denied*, 404 U.S. 1005 *reversing* Hammond Lead, Inc. v. United States, 306 F. Supp. 460 (1969) the Court held that countervailing duties are a penal exaction, which Congress did not intend for the courts to impose merely because of the protest of an American manufacturer, producer, or wholesaler. The decision was reversed in effect when Congress amended the 1974 Trade Act which authorized such petitions as the present one, the first of its kind. Also, countervailing duties are now to be considered remedial, not penal. 19 U.S.C. § 1516(d) (1974).

[9] Actually the Treasury practice dates from 1897 and thus has continued for 80 years.

[10] *See, e.g.*, T.D. 43634, 56 TREAS. DEC. INT. REV. 342 (1929) and T.D. 49355, 73 TREAS. DEC. INT. REV. 107 (1938).

[11] Under § 108 of the Customs Court Act, 28 U.S.C. § 255 (1970) a three judge panel was convened. A three judge trial is permissible upon the petition of any party to a civil action before the Customs Court or at the direction of the Chief Justice of that court whenever a case raises an issue of (1) the constitutionality of an Act of Congress, a proclamation of the President or an executive order, or (2) has broad or significant implications in the administration or interpretation of the customs laws. Decisions need not be unanimous.

law.[12] On appeal by defendant to the United States Court of Customs and Patent Appeals, in a 3-2 decision, *held,* reversed. Under section 303 a remission of Japanese domestic excise taxes on merchandise exported to the United States does not confer a bounty or grant authorizing the levy of countervailing duties upon the exporting industry. *United States v. Zenith Radio Corp.*, 562 F.2d 1209 (C.C.P.A. 1977), *cert. granted,* 46 U.S.L.W. 3511 (1978).

While the congressional[13] power to levy countervailing duties on imports stems from the Constitution,[14] this power was not exercised until the Tariff Act of 1890,[15] which provided for the imposition of such duties on sugar imports only. The Tariff Act of 1894,[16] which was also restricted to sugar imports, expressly disallowed countervailing duties where the bounty or grant conferred by the exporting nation took the form of a nonexcessive tax remission. Section 5 of the Tariff Act of 1897, the basis of the present section 303, first provided for the imposition of countervailing duties on imports other than sugar.[17] This section, also eliminated the 1894 Act's exemption for nonexcessive tax remissions and instead mandated a countervailing duty equal to the "net amount of such bounty or grant."[18] Al-

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[12] Zenith Radio Corp. v. United States, 430 F. Supp. 242 (1977) (both concurring justices filed separate opinions.).

[13] Imposing customs duties is essentially a legislative act. Nonetheless it has been expressly held that the President or the Secretary of the Treasury may be deemed the agent of Congress to determine the circumstances under which duties will be imposed. Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294 (1933).

[14] Congress has the power to lay and collect taxes, duties, imposts, and excises. The authority to impose duties on imports and the prohibition against duties on exports applies exclusively to foreign trade. U.S. CONST. art. 1, § 8, cl. 1.

[15] *See* Tariff Act of 1890, 26 Stat. 583, providing for an additional duty on imported sugar from a country "which paid a higher bounty on exportation of sugar than upon unprocessed sugars with less saccharin." Spurred by increased competition from the German cane industry which was partially subsidized by that foreign government, the Congress passed the Tariff Act of 1894, 28 Stat. 521 which imposed duties upon sugar imports from any country which granted bounties to that industry.

[16] 28 Stat. 521.

[17] 30 Stat. Section 5 of the 1897 Tariff Act provided:

> whenever any country . . . shall pay or bestow . . . any bounty or grant upon the exportation of any article or merchandise from such country . . . and such article or merchandise is dutiable . . . there shall be levied and paid . . . an additional duty equal to the net amount of such bounty or grant . . . .

*Compare* section 5 *with* 19 U.S.C. § 1303 (Supp. V 1975). The dutiable act under the 1897 legislation was the exportation itself, whereas the modern statute triggers a countervailing duty if the bounty or grant is conferred upon manufacturing or producing as well as exporting the article or merchandise.

Under the 1974 Trade Act, nondutiable imports may be subject to a countervailing duty only if there is a finding of a bounty or grant, and if there is a determination of injury. That determination of injury, however, is to be made by the International Trade Commission. 19 U.S.C. § 1303(a)(2) (Supp. V 1975). *See* Pub. L. 93-618, Title III, § 331(a), 88 Stat. 2049, and [1974] U.S. CODE CONG. & NEWS 7186 for a discussion of the relevant legislative history.

[18] *Compare* statutes at notes 15-20, *infra, with* 19 U.S.C. § 1303(1)(a), for that language. When Congress substituted the "net amount" terminology for the "nonexcessive" language

though the subsequent Tariff Acts of 1909,[19] 1913,[20] 1922,[21] and 1930[22] expanded the application of countervailing duties, they retained the basic provisions of section 5 without substantial change. The purpose of the countervailing duty statute was once considered penal[23] in character; however, it is now essentially a remedial measure intended to protect United States industry by offsetting unfair price advantages afforded foreign exporters through government subsidies.[24] Thus, whenever a foreign government[25] has given any bounty[26] or grant[27] for goods imported into the United

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of the 1894 Act, it is not known whether Congress intended for the Treasury to countervail the full amount of the bounty or grant or only continue to assess the excessive remission. In the instant case the Customs Court unanimously concluded that the Treasury practice was in error and has been in error because that court interpreted the congressional amendment to indicate disagreement with the then Treasury practice. 430 F. Supp. 242, 246 (1977). But the majority of the CCPA decided that there was nothing in the legislative history of the disputed statute to support such a proposition. 562 F.2d 1209, 1220 (1977).

[19] 36 Stat. 11. Section 6 of the 1909 Tariff Act added "province or other political subdivision of government."

[20] 38 Stat. 114. This Act allowed countervailing duties upon goods not otherwise dutiable, where a bounty or grant had been bestowed. *See* note 17 *supra*.

[21] 42 Stat. 858. This Act added manufacturing or producing as well as exporting to the acts which could trigger a countervailing duty determination. *See* note 18 *supra*.

[22] 46 Stat. 687.

[23] *See* note 8 *supra*.

[24] Downs v. United States, 187 U.S. 496 (1903); Nicholas & Co. v. United States, 249 U.S. 34 (1919); and Energetic Worsted Corp. v. United States, 224 F. Supp. 606 (1963).

[25] The antidumping statute, 19 U.S.C. § 160-171(1970 & Supp. V 1975) and the countervailing duty statute are related conceptually. On the one hand, antidumping measures are designed to protect domestic industries from a foreign company, acting privately, unfairly selling below cost in the United States market. The countervailing duty statute, on the other hand, protects domestic industry where a foreign company sells merchandise here more cheaply as a result of some form of public assistance. Feller, *Mutiny Against the Bounty: An Examination of Subsidies, Border Tax Adjustments, and the Resurgence of the Countervailing Duty Law*, 1 LAW & POL. INT'L BUS. 17, 33 (1969).

[26] Generally, a "grant" is more comprehensive in meaning than a "bounty," although many courts have failed to distinguish the two. United States v. Hill Bros. Co., 107 F. 107 (1901) and Nicholas & Co. v. United States, 249 U.S. 34 (1919). Bounties or grants may take many forms. Multiple exchange rate systems can result in bounties or grants. Energetic Worsted Corp. v. United States, 224 F. Supp. 606 (1963). Requiring payment in the more expensive registered reichsmarks instead of the cheaper free reichsmarks can result in a bounty or grant. F. W. Woolworth Co. v. United States, 115 F.2d 348, (C.C.P.A. 1940). Payments to silk exporters by the Italian Government to encourage that industry is a bounty. 39 OP. ATT'Y GEN. 261 (1939). Where Italy refunded Basic Rates Taxes on capital equipment and land mortgages, exported goods were subject to a countervailing duty. American Express Co. v. United States, 472 F.2d 1050 (1973).

In a case strikingly similar to the instant one, the CCPA in dicta stated that where an exporter is relieved from a tax on property which would otherwise be imposed in Japan, the country of origin, then no bounty or grant has been conferred. United States v. Iwai & Co., 16 C.C.P.A. 56 (1928).

[27] The "allowance" of three or five pence authorized by British revenue legislation upon each gallon of certain exported spirits was a grant within the meaning of § 4 of the Tariff Act of 1913. Nicholas & Co. v. United States, 249 U.S. 34 (1919).

States, regardless of its form or purpose,[28] the Secretary of the Treasury must[29] impose a countervailing duty equal to the "net amount of such bounty or grant."[30]

This 1897 legislative definition of a countervailing duty was accompanied by the administrative precedents of the Tresury Department, which have construed the mere remission of foreign excise taxes on exported goods not to be a "bounty or grant" within the meaning of the statute.[31] In order for a countervailing duty to be levied, a remission of a foreign excise tax must be in *excess*[32] of the taxes collected on the exported product.

Few judicial decisions deal with tax remissions as a "bounty or grant."[33] The leading case is *Downs v. United States*,[34] decided in 1903, which interpreted "net amount of such bounty or grant" under section 5 of the Tariff Act of 1897.[35] *Downs* dealt with a complicated[36] Russian Government system for controlling the production and price of sugar, through which Russian sugar exporters were relieved of paying the domestic excise tax. Not only was the tax remitted if the sugar was exported, but the exporter also received marketable certificates which were transferrable to domestic manufacturers and refiners; therefore, a domestic producer, who purchased a marketable certificate from an exporter, could sell his sugar in Russia free of the domestic tax burden, while the exporter could receive a cash benefit from the domestic seller. The *Downs'* Court held that the Russian system for controlling the price and production of sugar was an indirect "bounty or grant" under section 5.

Whether the *Downs'* holding was based upon that Court's finding that the "bounty or grant" consisted of one element—either the tax remission

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[28] The use of the word "bonification" by the German Government in the remission of duties upon exportation did not change the fact that the industry was receiving a special advantage. United States v. Passavant, 169 U.S. 16 (1898).

[29] American Express Co. v. United States, 472 F.2d 1050 (C.C.P.A. 1973).

[30] The decision of the Secretary of the Treasury as to the actual amount of the countervailing duty to be imposed where the circumstances require a duty is conclusive and not reviewable by the courts. Energetic Worsted Corp. v. United States, 224 F. Supp. 606 (1963); V. Mueller & Co. v. United States, 115 F.2d 354, (C.C.P.A. 1940); Franklin Sugar Refining Co. v. United States, 178 F. 747 (1910) and American Express v. United States, 472 F.2d 1050 (C.C.P.A. 1973). There is a presumption in favor of the Secretary's determination on the issue of whether or not a bounty has been conferred. V. Mueller & Co. v. United States, 115 F.2d 354, (C.C.P.A. 1940) and Franklin Sugar Refining Co. v. United States, 178 F. 743 (1910).

[31] 1 TREAS. DEC. 696, T.D. 19321 (1898); 2 TREAS. DEC. 157, T.D. 19729 (1898); 2 TREAS. DEC. 996, T.D. 20407 (1898); 26 TREAS. DEC. 825, T.D. 34466 (1914); 54 TREAS. DEC. 101, T.D. 42895 (1928); 56 TREAS. DEC. 342, T.D. 43634 (1929) and 73 TREAS. DEC. 107, T.D. 49355 (1938).

[32] *See* SENATE COMM. ON FINANCE 93D CONG., 2D SESS. EXECUTIVE BRANCH GATT STUDIES, 11-12 (Comm. Print 1974); Rosendahl, 2 LAW & POL. INT'L BUS. 85 (1970).

[33] *See* notes 26-28 *supra* for examples.

[34] 187 U.S. 496 (1903).

[35] "Net amount" was added in 1897. *See* note 17 *supra*.

[36] The scheme is explained fully at 4 TREAS. DEC. 405, 409-13, T.D. 22984 (1901).

or marketable certificate alone—or two elements—the tax remission together with the marketable certificate—is unclear. The Court of Customs and Patent Appeals (CCPA), found[37] that it was the entire scheme in *Downs*—the tax remission plus the marketable certificate—that conferred the "bounty or grant." Since *Downs* involved a "bounty or grant" composed of two elements whereas the instant case involved only one element—the nonexcessive tax remission—the CCPA was not bound by precedent and could decide this case as an issue of first impression.[38] Because the *Downs* holding consisted of broad language,[39] it was *obiter dicta*[40] which, when read in light of the facts before the *Downs* Court, did not constitute a Supreme Court holding that every nonexcessive excise tax remission constituted a "bounty or grant" as a matter of law.[41] Even though subsequent cases had followed *Downs'* broad language,[42] the CCPA did not consider it to be binding authority.[43]

The CCPA buttressed its interpretation of *Downs* by construing the

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[37] 562 F.2d at 1213-14 (1977). As the Customs Court read *Downs*, the net amount of the bounty or grant was the full benefit actually conferred upon the exporters. In other words the Russian sugar exporters received two bounties or grants: the first was remission of the domestic excise tax and the second was the transferable certificate. 430 F. Supp. at 245, 252 and 260 (1977).

[38] 562 F.2d at 1213-14 (1977).

[39] As the CCPA viewed the matter, the *Downs* Court went too far when it said, "[w]hen a tax is imposed upon all sugar produced, but is remitted upon all sugar exported, then by whatever process or in whatever manner, or under whatever name it is disguised, it is a bounty upon exportation." 187 U.S. at 515. The CCPA held that the Customs Court erred by relying upon that broad language since generalities must be construed within the context of the case in which they arise. 562 F.2d at 1213.

As pointed out in *Downs*, there were two elements to the bounty. The remission of the excise tax alone, the first element, was insufficient to trigger the countervailing duty. But, the transferable certificate, the second element, was excessive and justified the protective duty. Although, the *Downs* Court referred to the certificate as an additional bounty, 187 U.S. at 512-13, it appears that the term "bounty" was used for convenience to describe the effect of any tax remission.

[40] *See* Butler, *Countervailing Duties and Export Subsidization: A Re-Emerging Issue in International Trade*, 9 VA. J. INT'L L. 82 (1968-69); Note, *The Michelin Decision: A Possible New Direction for U.S. Countervailing Duty Law*, 6 LAW & POL. INT'L BUS. 237 (1974) and Feller, note 24 *supra*.

To the dissent, the "double bounty" interpretation of *Downs* was fundamental to that decision and was not *obiter dictum*. Hence, the instant case could not be one of first impression. 562 F.2d at 1223.

[41] Since the Treasury refused to apply countervailing duties unless the remitted taxes were excessive, and since manufacturers, producers, and wholesalers could not file complaints before 1975, it is not surprising that the Treasury's practice was unchallenged until the instant case.

[42] Broad language unnecessary to the Court's decision is not to be blindly accepted as binding authority, although it has been quoted in many subsequent cases and even though the language has been described as stating the principle of the old case. Kastigar v. United States, 406 U.S. 441, 454-55 (1972).

[43] 562 F.2d at 1215.

statutory language in light of the legislative history[44] and the Treasury's administrative practice.[45] In construing the statutory language,[46] the court found that the congressional purpose[47] was to equalize the economic result of a foreign government's subsidy.[48] Because the levying of countervailing duties is likely to have political and economic ramifications beyond United States borders,[49] Congress refused to define the terms "bounty or grant"[50] and "net amount."[51] Therefore, the statute gave the Secretary of the Treasury discretion[52] to decide whether to levy a counterveiling duty after the

[44] As the Customs Court viewed the legislative history of section 303, Congress had been informed of the *Downs* case at the latest by 1908 and had "ratified" it the next year when it reenacted section 5 of the 1897 Tariff Act without substantial amendment. But it was precisely the meaning of *Downs* which was the focus of this dispute. If that court was correct in its "either/or" double bounty interpretation of that turn of the century case then it would follow that the Treasury's administrative procedure conflicted with the congressionally approved practice and would have to conform because when Congress reenacts statutory language after a judicial ruling there is a presumption that Congress approved of the decision. Furthermore, as the Customs Court viewed the situation, the Congress refused the defendant's proposed legislation during the 1950's to amend the countervailing duty law to conform to the administrative practice. The Customs Court also noted that in 1975 when the national legislature amended the Antidumping Act of 1921 to agree with the countervailing duty law, neither the House nor the Senate Committees would endorse the Treasury's enforcement of the disputed law. Again, fundamental to the lower court's logic was the correctness of its double bounty interpretation of *Downs,* a conclusion which the CCPA found to be unwarranted.

[45] Since 1897 the Treasury practice has been not to countervail mere remissions of foreign excise taxes. *See* notes 9 and 10 *supra.*

[46] *See* note 4 *supra.*

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

[48] 562 F.2d at 1222.

[49] The language of section 303 "whenever any country . . . shall pay or bestow . . . any bounty or grant," suggests a factual inquiry into the laws and practices of the foreign country. If the Secretary of the Treasury imposes a countervailing duty, the amount of the duty is not subject to judicial review. *See* note 30 *supra.* But the question of whether or not a country is paying or bestowing a bounty or grant where such a determination depends upon the construction of foreign law, is judicially reviewable. *Downs* v. United States, 187 U.S. 496 (1903). Judges Boe and Newman in their separate concurring opinions would dismiss the international economic and political reprecussions. For example, Judge Newman said, "the proper exercise of our judicial function requires that we interpret and apply the law unrestrained by extra-legal considerations more appropriately addressed to legislative policy." 430 F. Supp at 250. *See* United States v. Hammond Lead, Inc., 440 F.2d 1024 (1971); Butler, *supra* note 40, at 147-48. *See also* JOINT ECONOMIC COMMITTEE OF CONGRESS, 90TH CONG., 1ST SESS. THE FUTURE OF UNITED STATES TRADE POLICY (Comm. Print 1967).

[50] For case law on the terms, *see* notes 26-28 *supra.*

[51] While the Customs Court conceded that "net amount" as used by the 54th Congress in tariff measures preceeding the 1897 Tariff Act should have the construction suggested by the Treasury, measures passed by the 55th Congress, including the Tariff Act of 1897, were intended to impart greater flexibility to the United States Customs Authority to counter rapidly changing foreign, particularly German, tax laws. The Tariff Act of 1897 specifically deleted the provision of the Tariff Act of 1894 which limited the application of the statute only to excessive tax remissions. 30 CONG. REC. 316, 317, 318, 2204, 2224. *See also* notes 15-22 *supra* and accompanying text.

[52] Unlike the antidumping law there is no requirement of "injury" before a countervailing

domestic economic impact[53] of the foreign government's action had been assessed by a factual inquiry.[54] Because Congress assigned the Treasury this factual inquiry[55] and because the economic result of the remission of the Japanese Commodity Tax was not mentioned in the lower court,[56] the CCPA presumed that the economic result did not confer a benefit requiring that a remedial duty be imposed.[57]

Examining the legislative history of section 303, the CCPA found that subsequent legislation had not ratified the interpretatin of *Downs*,[58] that a tax remission alone constituted a countervailable "bounty or grant." Even though Congress was aware of this interpretation,[59] it was also informed of contrary executive publications[60] and judicial decisions.[61] While

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duty will be imposed upon otherwise dutiable imports. Feller, *supra* note 25, at 33.

[53] Since the case was framed for summary judgment, the dissent argued that the majority's own reasoning would have compelled that the case be remanded to establish a factually reviewable record. The majority, however, presumed that the record's silence regarding the economic impact of Japan remitting its tax meant that the Secretary had already determined that there would be no deleterious effect to American industry. 562 F.2d at 1225.

[54] The Treasury argued that Article IV (4) of Part II of GATT expressly prohibited contracting parties from levying countervailing duties against each other's products to offset export bounties which take the form of *indirect* tax remissions or exemptions. But the Customs Court dismissed that argument quoting American Express Co. v. United States, 472 F.2d 1050 (1973) that a law of Congress prevails over a trade agreement and that the United States undertook Part II of the GATT which includes IV (4) to the fullest extent not inconsistent with existing legislation. *Protocol of Provisional Application of the GATT*, 61 Stat. A 2051 (1947).

However, had the Japanese tax been a direct tax, such as those levied upon income or profits in contrast to an indirect tax such as an excise, sales, or turnover tax, it is conceivable that the decision might have been different. *See* Malcom and Malgrem, *Negotiating Nontariff Distortions to Trade*, 7 LAW & POL. INT'L BUS., 327, 351 (1975) and King, *Countervailing Duties—An Old Remedy With New Appeal*, 24 BUS. LAW. 1179, 1185-86 (1969). But many economists and the Treasury Department believe that there is no difference in effect between the two taxes. *See* Statement of John R. Petty, Assistant Secretary of the Treasury, to the Twenty-First Annual Conference of the Canadian Tax Foundation, Toronto, Canada, Nov. 20, 1968.

[55] *See* notes 2, 13, and 49 *supra*.

[56] *See* note 53 *supra*.

[57] 562 F.2d at 1222-23.

[58] The CCPA said, "An assumption that Congress had the quoted paragraph in mind, when it acted in 1909, would not warrant the further assumption that it thereby ratified a holding that excise tax remission alone is a bounty . . . . We shall never know whether he interpreted *Downs* as merging remission and certificate elements of the Russian scheme or whether he considered the saleable certificates alone an excessive remission." 562 F.2d at 1218.

[59] On the issue of whether or not Congress was aware of Treasury's 80 year policy, the dissent conceded that Congress was at least aware of it for 21 years. 562 F.2d at 1232. *See* note 18, *supra*, for an appropriate response.

[60] UNITED STATES TARIFF COMMISSION, RECIPROCITY AND COMMERCIAL TREATIES, 434 (1919). *See* note 32 *supra*.

[61] A review of the cited and researched cases established that the bounty or grant in each case was measured by an excess over the remission of the excise tax. *See* notes 26-28,31, *supra*.

In Marion R. Gray v. United States, 70 TREAS. DEC. 811, T.D. 48679 (1936), the Customs

Congress in the 1950's[62] refused to enact legislation conforming section 303 to the Treasury's practice, the CCPA would not infer that "Congress would harbor in its breast a disapproval of an administrative practice for 80 years while remaining so supine or irresponsible as not to change it."[63] In addition, Congress in amending the pricing system[64] of the Antidumping Act[65] to conform to the countervailing duty statute in the Trade Act of 1974, expressed "neither approval nor disapproval" of Treasury's practice.[66] The determinative test[67] of legislative intent was the successive reenactment of statutory language without substantial change since 1897,[68] despite legislative cognizance of the Treasury's long-continued, uniform practice.

The dissent disagreed with the majority on all points. First, it believed that the Treasury's determination of the economic result of the Japanese Commodity Tax was not a factual inquiry, but rather a conclusion of law, subject to appellate review.[69] Second, it interpreted *Downs* to hold that the

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Court stated, "at least a part of the excess of Great Britain's drawback paid to the manufacturer constitutes a bounty or grant under section 303 of the Tariff Act." *Id.*, at 813.

[62] *See Hearings on H. Res. 1535 Before the House Comm. on Ways and Means*, 82d Cong., 1st Sess., 2, 79 (1951) and *Hearings on H. Res. 5505 Before the Senate Comm. on Finance*, 82d Cong., 2d Sess. 115, 124-25 (1952).

[63] 430 F. Supp. at 254. Quoting Judge Newman, the dissent viewed congressional inaction to mean that Congress was satisfied with the way that it had earlier written the statute and with the way that the Supreme Court had so construed the law. 562 F.2d at 1232.

[64] The amendment to the Antidumping Act provided that in determining the "purchase price" of imports the following shall be added to the importer's price:

> (a) the amount of any taxes imposed in the country of exportation *directly* upon the exported merchandise or components thereof, which have been rebated, or which have not been collected, by reason of the exportation of the merchandise to the United States . . .; and
>
> (b) plus the amount of any taxes rebated or not collected, by reason of the exportation of the merchandise to the United States, *which rebate or noncollection has been determined by the Secretary to be a bounty or grant within the meaning of section 303 of the Tariff Act of 1930.* (Emphasis added) P.L. 93-618, § 321(b), 88 Stat. 2045 (amending 19 U.S.C. § 162 (1970)).

[65] 19 U.S.C. § 203. "It should be kept in mind that the Countervailing Duty Law and the Antidumping Statute are opposite sides of the same coin. The former deals with subsidized imports entering this country; the latter deals with imports being sold at less than fair value in this country," King, *supra*, note 54 at 1181.

[66] "However, your committee, in recommending this amendment does not express approval or disapproval of the standard employed by the Treasury Department in administering the countervailing duty law . . . ." HOUSE WAYS AND MEANS COMMITTEE, H. REP. No. 571, 93d Cong., 1st Sess. 69 (1973) and "However, the Committee in recommending this amendment does not express approval or disapproval of that . . . Treasury practice." SENATE FINANCE COMMITTEE S. REP. No. 1298, 93d Cong., 2d Sess. 172 (1974), *reprinted in* [1974] U.S. CODE CONG. & AD. NEWS 7186, 7309. "The effect of the Committees' mutually contradictory . . . statements did not disturb the status quo with respect to the administrative practice on countervailing duties." 562 F.2d at 1221-22.

[67] "A long continued administrative practice, if not contrary to or inconsistent with law is entitled to great weight." 562 F.2d at 1219.

[68] *See* notes 17-22 *supra*.

[69] 562 F.2d at 1223.

single element of remission of a nonexcessive excise tax was sufficient to constitute a "bounty or grant;" thus, in the instant case, *Downs* was binding precedent upon which the CCPA must rely.[70] Third, it found that even though the Treasury's administrative practice was long continued and uniform, it must yield to a judicial interpretation whenever a conflict occured.[71] Finally, the dissent questioned congressional acquiescence in the Treasury's administrative practice, especially in light of the 1974 Trade Act's provision authorizing judicial review of the Treasury's determination that a "bounty or grant" had not been conferred on foreign products.[72]

Under section 303, the United States indicated its intention to protect domestic industry from the threat of unfair foreign competition through government subsidies. A tension exists, however, between the policy of protecting American industry, which, if excessive, could provoke retaliation abroad,[73] and the policy of encouraging competition and free trade among nations.

The 1974 Trade Act authorized American producers, manufacturers, and wholesalers, for the first time,[74] to seek judicial review of negative countervailing duty determinations. Therefore, domestic industries threatened by international competition[75] could, in addition to requesting protective measures from Congress or the President, institute "self-help" by filing a court action.[76]

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[70] 562 F.2d at 1226-27.

[71] 562 F.2d at 1231.

[72] 562 F.2d at 1231-35.

[73] Nonetheless, since the Customs Court's decision in April, 1977 imposing countervailing duties upon mere remission of foreign excise taxes, there has been widespread concern that if the decision were upheld an international trade war would ensue. Rowe, *Retaliatory Tax by U.S. on Imports Ruled Unneeded*, Wash. Post, July 29, 1977, at 1, col. 3. Not only Japan, but most of the United State's European trading partners also impose a value added tax on goods sold in the domestic market but remit the tax upon export. Farnsworth, *TV Sets from Japan Escape Special Tax*, N.Y. Times, July 29, 1977, at 1, col. 4. In fact, the General Agreement on Tariffs and Trade (GATT) specifically authorizes remission under those circumstances. The Japanese Government and the European Community had told the United States to expect retaliatory action if the United States courts upheld plaintiff's complaint on appeal. *Penalty Tax Against Japanese Goods Rejected*, Wall St. J., July 29, 1977, at 3, col. 1.

[74] *See* note 8 *supra*.

[75] One analysis of Zenith Radio Corporation's business problems concluded that it was not so much foreign competition but mismanagement which prompted its troubles. In fact, this analysis claims that even had Zenith prevailed or if other protectionist measures had been instituted, those actions would only have slightly benefitted Zenith. Ingrassia, *Home Grown Woes, Zenith's Own Actions As Well As Imports Prompted Its Troubles*, Wall St. J., Oct. 25, 1977, at 1, col. 6.

[76] In fact, that is exactly what United States Steel Corporation has done. United States Steel recently filed suit in the Customs Court asking the court to declare that as a matter of law when the European Community rebated its value added tax on steel exports to the United States, it had conferred a bounty or grant equal to the amount of the Value Added Tax (more than $2 billion), which must be countervailed. Rowe, *supra* note 73.

But in resolving this conflict between protecting domestic industries and encouraging international trade, the CCPA reaffirmed the Treasury's administrative practice that protection will only be afforded where a foreign government subsidizes its domestic industries.[77] For the immediate future a mere remission of foreign excise taxes will not amount to a bounty or grant sufficient to trigger the application of the countervailing duty law.[78]

*Garry Seltzer*

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[77] Robert Strauss, the President's Special Trade Representative, was quoted as saying that he was very pleased with the decision. Secretary of the Treasury Michael Blumenthal feared that had the decision gone to the contrary, the White House would have been forced to attempt to defeat the decision with new legislation, a doubtful proposition in view of the mood of the Congress. *Id.*

[78] Even so, in May 1977, Japan "voluntarily" agreed to limit its exports to 1,560,000 completed television sets and 190,000 partially completed sets. There has been general industrial approval for this agreement. Farnsworth, *supra* note 73.