Perspectives on current developments

Oil Discharges and Oil Spills

There may be general agreement among environmentalists and the oil industry on the need to keep oil out of the oceans, but there is controversy as well. At the center of the controversy are proposed U.S. Coast Guard regulations appearing in the *Federal Register* on May 16.

These regulations, which would be promulgated under authority conferred on the Coast Guard by the Port and Waterway Safety Act of 1972, would apply to all tankers of 20,000 or more dead-weight tons that use U.S. ports (almost all imported oil is transported in tankers of more than 20,000 dead-weight tons). They would require (1) that all such tankers—including those now in operation—be fitted (or retrofitted) with segregated ballast systems and (2) that all such tankers built in the future have double bottoms. A bill passed by the Senate in May (S. 682) is less demanding: it would require segregated ballast systems for such tankers built after June 30, 1983, and double bottoms for those built after June 30, 1979.

The segregated ballast proposal is aimed at curbing that portion of ocean oil discharge that comes not from accidents or groundings but from normal tanker operations (85 percent of total discharge or 1.8 million metric tons). In most tankers, cargo (crude oil) and ballast (seawater) use the same tanks, so that when seawater ballast is discharged, some oil goes with it and pollutes the ocean. Also, oil tends to stick to the sides of the cargo tanks and to form a kind of sludge in the bottom: to restore full capacity (the sludge can run into many tons) and, of course, to recover the full cargo for discharge, the tanks have to be washed down. This washing can be done either with sea water or with crude oil from other cargo tanks. Some operators merely discharge the oily sea water after washing down the tanks; most do not.

Clearly the use of a segregated ballast system would reduce the amount of oil discharged with the sea-water ballast. It would also mean that some of the tanker's capacity could not be used to transport oil. The American Petroleum Institute, which represents owners of two-thirds of the privately owned U.S.-flag tankers, estimates that if the Coast Guard proposal were to go into effect 20 percent of present capacity would be lost. According to API, the cost of replacing this capacity plus the cost of retrofitting could run as high as $12 billion. The Coast Guard, without taking the lost capacity into account, estimates the cost at $1.5 billion. In the API's view, an equal reduction in oil discharge could come through washing the cargo tanks with crude oil rather than sea water and returning the crude oil to the cargo. (However, only tankers with inert gas systems that permit carbon dioxide to be introduced into the cargo tanks can be safely washed with crude oil.)

The double-bottoms proposal is aimed at reducing the probability of oil spills from accidental groundings. The Coast Guard estimates that double bottoms would prevent oil-tank penetration and spillage in nearly half of all groundings that now occur. On the other hand, according to the API, since tankers with double bottoms ride lower in the water, they run aground more frequently and (when they are hauling cargo) they have to jettison more oil for reflotation; thus, the amount of oil spillage and discharge prevented could be less than half the Coast Guard's estimate.

The major point at issue appears to be the retrofitting of present tankers with segregated ballast and whether crude-oil washing can be substituted for that. The Sierra Club and the Environmental Defense Fund argue that the crude-oil washing proposal, while it would reduce oil discharge, would do nothing about the problem of oil discharged with ballast. API argues that crude-oil washing would reduce oil discharge significantly and that the retrofitting requirement would be inflationary, greatly increasing the present cost of imported oil.

Curiously, the alternative of establishing accident liabilities and large pollution fines, as suggested by the Council on Wage and Price Stability, is not being given serious consideration. According to CWPS, such a program would force tanker owners and operators to employ the least costly measures to reduce accidental oil spillage. They would then have the flexibility to use segregated ballast, crude-oil washing, improved crew training, or future innovations to reduce oil discharges.

Cargo Preference: A Foot in the Door?

President Carter has endorsed—and a House committee has approved—legislation that would ensure tankers built in the United States and flying the U.S. flag a minimum share of the U.S. oil-import market. The President's proposed standard—4.5 percent, rising in five years to 9.5 percent—is far lower than the 30 percent proposed by Chairman John Murphy (Democrat, New York) of the House Merchant Marine and Fisheries Committee and included in the energy transportation security bill of 1974 (vetoed by President Ford). But it is larger than the 3-to-4 percent currently being carried in the absence of a cargo preference requirement. Moreover, if enacted, it would represent a foot in the door for the maritime unions and the shipbuilding industry, which have long insisted that the defense, environmental, and job benefits of generous cargo preference more than justify the costs.

A sizable U.S.-flag fleet is needed, so the argument runs, because in wartime U.S.-owned ships operating under foreign flags might not be available for our use (that is, the registering country—Panama, for example—might prevent it). Also, U.S.-flag tankers and crews are alleged to be less accident prone than foreign-flag tankers and crews. Moreover, according to the Shipbuilding Council of America, the President's proposal would create some 10,000 new jobs in shipbuilding and 30,000 new jobs in related industries.

Critics of cargo preference argue that it would lead to higher prices for imported oil and to increased subsidy payments. (These payments are made because the construction and operation costs of domestic tankers are higher—currently about 200 percent higher—than those of foreign tankers.) The annual cost of Carter's proposal has been estimated at $110 million by the Maritime Administration and at $1 billion by the Federation of American Controlled Shipping (FACS). Using the Shipbuilding Council's figure of 40,000 jobs created and attributing all the cost to jobs, these estimates imply an annual cost per job created ranging from $2,750 to $25,000. The difference in the cost estimates may in part be attributable to the fact that, according to testimony by Assistant Secretary of Commerce for Maritime Affairs Robert J. Blackwell, the administration does not intend to pay construction differential subsidies or operating differential subsidies to tankers built to carry part of the guaranteed percentage of U.S. oil imports.

Prices for imported oil would be higher because of the additional transportation costs and the market effects associated with cargo preference. Estimates of the additional transportation cost for oil carried in cargo preference ships (in 1985) range from 1.3 cents per gallon to 2.8 cents per gallon (1977 prices). Most of the difference between the low (Maritime Administration) and the high (FACS) comes from alternative estimates of the cost of building tankers in the United States instead of acquiring new (or used) tankers abroad. As for market effects, the General Accounting Office predicts a 10-percent markup by U.S.-flag carriers owing to excess demand for U.S.-tanker tonnage, and puts the total transport price differential at between 1.6 and 2.4 cents per gallon of oil carried by cargo-preference tankers. On this basis, GAO concludes that the average price of all imported oil would rise by 0.2 cents per gallon, which would increase consumer costs by $240 million, assuming oil imports of 8 million barrels annually. However, if oil imports amounted to over 10 million barrels annually (which GAO predicts for 1988) and if domestic oil prices adjusted to the world level, consumer costs would come to $600 million a year—more than five times the figure estimated by the Maritime Administration.

There is also dispute about the defense and environmental benefits that cargo preference might bring. FACS, which is made up of the owners of U.S. ships operating under foreign flags, argues that the registering foreign governments have agreed to cede control of U.S.-owned foreign-flag vessels if the United

States charters or requisitions them. It points to prior Department of Defense testimony rejecting the notion that cargo preference legislation is essential to national security. On the other hand, Secretary of the Navy Graham Claytor has testified that "current U.S.-flag tonnage, by itself, is inadequate to satisfy both defense and commercial needs in event of war or national emergency." FACS also disputes the view that foreign-flag tankers have a higher accident rate than U.S.-flag tankers. While they have more accidents, they carry approximately thirty times as much oil.

Critics have also suggested that the proposed policy might hamper U.S. efforts to maintain liberal trade relations with other countries, and might even contravene treaties. Assistant Secretary Blackwell's testimony on this point was inconclusive.

Unless future evidence shows that these estimates are grossly high, it would appear that American society is being asked to pay a large price to increase employment in the U.S. shipping industry. The House of Representatives is expected to complete action on the proposal by late September and then the action will move to the Senate.

The Home Box Office Case: A Summer Rerun

A major aspect of the *Home Box Office* opinion (see our July/August issue) has been cast into doubt by another panel of the very court that rendered that opinion. In *Action for Children's Television* (ACT) v. *FCC*, decided by the United States Court of Appeals for the District of Columbia Circuit on July 1, 1977, ACT challenged the FCC's decision to leave the special problem of children's television to industry self-regulation for the time being and to reject mandatory requirements proposed by ACT. This decision had followed a closed-door meeting between the commission chairman and National Association of Broadcasters' officials in which, according to ACT, "the industry was . . . coerced" into adopting self-imposed restrictions on the length and character of advertising in children's programming. One of ACT's major contentions was that this ex parte contact (an off-the-record contact without opportunity for other parties to reply) invalidated the FCC's decision, pursuant to the principle enunciated in *Home Box Office*.

The court rejected this contention. It purported not to overrule *Home Box Office*, explaining that it was merely declining to apply that case's new ex parte prohibition "retroactively." In any event, the panel in *ACT* v. *FCC* made clear that it did not agree with the broad sweep of the *Home Box Office* decision and that it would limit the prohibition of ex parte contacts to rulemakings which involve "competing claims to a valuable privilege."

Since the new decision clearly disapproves the broad principle established by *Home Box Office* but does not explicitly overrule that case, it poses a nice problem for federal regulatory agencies and the parties involved in rulemakings before them: which of the two inconsistent opinions should be used as a guide for future action? The legal point may be resolved by the Supreme Court if it agrees to accept the *Home Box Office* appeal. It is also possible that the full bench of judges of the court of appeals will agree to resolve the conflict between their two panels in connection with a petition for rehearing in the ACT case. If the matter is not settled in one of these fashions, it may be difficult to frame a case that will present the issue: to do so, an agency would have to proceed in contravention of the *Home Box Office* principle, thereby running the risk of having its rulemaking invalidated. Until the matter is settled, it seems unlikely that ex parte contacts in informal rulemaking will be entertained.

"Excess Gastric Acidity"?

The Federal Trade Commission has concluded hearings on a trade regulation rule that would tightly circumscribe the claims that over-the-counter drug manufacturers may make on behalf of their products. The rule, which would limit OTC drug advertising to the exact words and phrases (no synonyms) approved by the Food and Drug Administration for use in labeling, would cover over 200,000 OTC brands currently being reviewed by the FDA in a series of twenty-seven monographs.

Proponents of the rule view OTC drug advertising as particularly likely to deceive—and harm—consumers. It is argued that consumers pay attention to advertising claims but ignore

labels and thus end up using drugs in ways that are dangerous or ineffective or both. In this view, the language commonly used by advertisers to promote OTC drugs distorts consumers' tastes by increasing the demand for drugs in general (as well as consumer dependence on drugs) and by leading consumers to buy one drug when another would offer better treatment at less risk.

An example of the practices that proponents aim to eliminate may be found in the television claims to the effect that a particular preparation "contains twice as much of the pain-killer doctors recommend most"—that is, twice as much as is contained in ordinary aspirin—or "contains a pain-killer recommended by doctors four-to-one over aspirin-substitutes." In each case, of course, the pain-killer is aspirin, as the label would reveal. The first claim means only that this preparation comes in larger or more concentrated tablets than ordinary aspirin while the second means that four out of five times doctors will recommend "take two aspirin" rather than "take two Tylenol."

Opponents of the FTC's proposal describe it as a meat-ax approach to the problem of disseminating accurate consumer information on a complex subject. The Council on Wage and Price Stability urges that the promulgation of the rule be postponed until a full cost/benefit analysis can be carried out—which cannot be done until more of the FDA monographs on permissible language for OTC drug labels are completed. At present one has been finished (on antacids), and twenty-six are still to come.

The council suggests that the rule might decrease the cost-effectiveness of self-medication (1) by restricting the dissemination of useful information, since standardized language would be required, and (2) by requiring the use of technical medical language (for example, "excess gastric acidity") rather than language consumers would readily understand ("indigestion from too much stomach acid"). The pre-selected standardized terms advertisers would have to use might thus confuse, rather than aid, consumers, causing them to shift from OTC drugs to inferior home remedies or to choose OTC drugs that do not match their conditions.

Moreover, the council suggests that the standardization of language, by reducing the effectiveness of advertising in conveying information or persuading consumers to buy, would reduce competition among the many similar drugs now in the OTC drug market (as when an aspirin compound is different from straight aspirin) and would retard the introduction of new drugs to replace or compete with the old—in both cases leading to higher prices.

If, as expected, the proposed rule is promulgated before the FDA completes its evaluation of the remaining twenty-six drug categories, regulators will have rushed in where even economists fear to tread. And, given the Supreme Court's recent extension of First Amendment protection to commercial advertising, constitutional challenges of the rule will be likely.

Tris and Children's Sleepwear: A Two-Edged Sword

The government's imposition of safety standards for children's sleepwear has had unforeseen consequences. Five years ago, textile manufacturers began using the flame retardant Tris-BP in children's sleepwear as the most economical way to meet federal flammability standards set by the Flammable Fabrics Act and the Hazardous Substances Act (as amended). On April 8 of this year, the Consumer Product Safety Commission, at the urging of the private Environmental Defense Fund, cited the Hazardous Substances Act in prohibiting any further use of Tris. National Cancer Institute laboratory tests had shown that rats exposed to Tris developed cancer.

The commission ordered apparel manufacturers to end their use of Tris and to repurchase all unwashed Tris-treated garments from retailers and consumers (washing greatly reduces the amount of Tris on the garment's surface). The American Apparel Manufacturers Association appealed the order in the U.S. District Court for the District of Columbia. Judge George L. Hart, Jr., found the repurchase order unlawful and held that the costs of repurchase should be spread among all parties having a hand in the manufacture of the Tris-treated garments—chemical companies, textile mills, and apparel manufacturers. Not long thereafter, on an appeal from Spring Mills, Inc., U.S. District Court Judge Robert Chapman, in

Columbia, South Carolina, invalidated the Consumer Product Safety Commission order on the ground that the commission had not properly followed its own rules of procedure.

After the National Cancer Institute evidence came to light, manufacturers voluntarily ceased making garments from Tris-treated fabrics and most retailers ceased selling them. Unfortunately, though Tris is used in only 40 percent of children's sleepwear, there is no easy way of telling which 40 percent of the sleepwear now in the hands of retailers and consumers contains Tris, since garments are not so labeled. Moreover, there is increasing concern about Tris substitutes: tests suggest that at least one of them is mutagenic and therefore probably carcinogenic. Thus, if the CPSC's order stands, it looks as though the only children's sleepwear on the market next spring may be heavy cotton pajamas and blanket sleepers, items that do not have to be treated.

The AAMA has estimated that the CPSC order would require the repurchasing, transporting, and destruction of up to 32 million garments at a one-time cost of $150 million. Moreover, using more expensive substitutes for Tris might entail a 25-percent increase in the cost of children's sleepwear—some $60 million a year for the present 60 million garments selling yearly at an average price of $4.00. If the $150 million cost of recall were spread out over time (at a 10-percent discount rate), it would come to $15 million a year. Thus the total yearly cost for the ban on Tris would be $75 million.

National Cancer Institute tests indicate that Tris may enter children's systems—through skin absorption and through the common habit of "mouthing" sleepwear—in sufficient amounts to cause 6,000 cancers per year. The cost per cancer prevented by the ban would thus be $12,500. (Of course, this assumes that any Tris substitute will not be carcinogenic—probably a false assumption.)

The Tris episode, though maybe an extreme case, exemplifies a common regulatory dilemma. If the agency does not act (say, to protect children from the danger their sleepwear will catch fire), it will be blamed. But if it does act, it runs the risk of creating a new problem (for example, causing more deaths through cancer than through burning). Sometimes the regulator's risk can be thankless.

Belts, Buckles, and Bags

On July 1, Secretary of Transportation Brock Adams announced that all cars sold in the United States after 1983 must have "passive" (that is, automatic) passenger protection in the front seats—either a combination of lap belts and airbags that inflate on impact or a system of lap/shoulder belts that automatically fasten around the passenger as he or she gets into the car. Secretary Adams's decision will become final unless overridden by a joint resolution of Congress before October 19.

According to the Department of Transportation, *proper use* of current lap/shoulder belts would prevent some 16,300 auto fatalities and 231,000 injuries each year; but these figures have to be reduced to 6,300 and 86,000, respectively, because of the failure of an estimated 65 percent of car occupants to buckle up. It is this situation that has led to calls for mandatory passive restraints. Also according to DOT, a full front airbag system with lap belts would prevent between 12,100 and 13,500 fatalities and between 104,000 and 115,000 injuries, depending on whether the lap belt were used 20 percent or 40 percent of the time (for protection against other-than-frontal collisions, the lap belt must be worn). Passive belts, on the other hand, would save between 9,800 and 10,700 lives and avoid between 117,000 and 129,000 injuries, depending on whether 40 percent or only 30 percent of drivers disabled the system.

Current lap/shoulder belts (with buzzers) add about $80 to the price of an automobile. In comparison, passive belts would add about $105 per automobile, according to DOT, whereas airbag/lap belt systems would add $177—a figure that industry says is far too low. But, accepting DOT's figures and assuming further that the average cost of an injury is $3,100 (a rough, tentative estimate provided to us by DOT staff), we can conclude that airbags (with lap belts) would save between 5,800 and 7,200 more lives annually than lap/shoulder belt systems and would cost $970 million more, or between $122,236 and $157,621 per additional life saved. Passive belts would save between 3,500 and 4,400 more lives than lap/shoulder belts at a cost of $250 million, or between $26,523 and $43,971 per additional life saved.

Critics of the secretary's decision point to DOT figures showing that if laws requiring

the use of current lap/shoulder belts produced 70 percent compliance (the rate observed in countries that have such laws), some 5,200 additional fatalities and 123,000 additional injuries would be prevented annually at no increase in the price of automobiles. (This, of course, excludes the cost of enforcing the law and the cost the consumer perceives in buckling up. Critics also question certain of DOT's assumptions about the effectiveness of airbag systems.) They point out, for example, (1) that in the sixteen recorded tow-away accidents involving airbag-equipped cars, not one of the occupants had buckled up, (2) that in three of these accidents the bags had failed to inflate, and (3) that, because of the cost, many owners may not replace their airbags after inflation has occurred.

Getting consumer compliance with auto safety regulations is obviously a difficult and uncertain business—as the widespread negative reaction to the belt-interlock system has shown. Even proponents of passive restraints recognize the possibility that Congress will veto the secretary's decision, and many of them oppose making such restraints mandatory, at least until additional evidence becomes available to bolster consumer acceptance. In light of the fairly certain costs of passive restraints and the uncertainties about their benefits, resistance to the standard and interest in the lower cost alternative of a mandatory seat-belt law can be expected.

Miles per Gallon: Steps to 1985

Rumor has it that cars produced in 1985 will be a lot better than cars produced now. They will be more streamlined and they will weigh less. They will have better automatic transmissions. Although they will not accelerate as well, they will have less aerodynamic drag, less rolling resistance, and better lubrication. The spark-ignition system will be more efficient, and there may even be new kinds of engines. On average, they will get more than 27 miles per gallon of fuel. At least, all this will come about if the domestic auto industry is to meet the fuel economy standards laid down by Secretary of Transportation Brock Adams on June 26.

In a 1975 amendment to the Motor Vehicle Information and Cost Savings Act, Congress established fuel economy standards for passenger automobiles of 6,000 pounds or less. The standards set were 18, 19, and 20 miles per gallon for model years 1978, 1979, and 1980 respectively, and 27.5 mpg for 1985 and after, with the secretary of transportation to announce standards for 1981-1984 no later than July 1, 1977. Operating under requirements that the standards reflect the "maximum feasible average fuel economy level" and make "steady progress" towards the 1985 goal, the National Highway Traffic Safety Administration asked everyone from consumer groups to foreign automobile manufacturers to submit information and argument relevant to these objectives. The focal point for the discussion (or most of it) was not *whether,* but *how rapidly,* the 1985 standards could be met. The answer came out at 22 mpg for 1981, 24 for 1982, 26 for 1983, and 27 for 1984.

The analysis released by NHTSA paints a rosy picture of the benefits these standards will bring in consumer savings, jobs, and energy conservation. Although the retail price of the average car will have risen by at least $175 (constant dollars) by 1984, the total consumer costs over the lifetime of the car should have declined by $450 (constant dollars). In other words, decreased maintenance costs (from the use of lightweight noncorrosive materials) and lower fuel costs should more than offset the expected rise in the initial retail price caused by design changes needed to meet the standards. As for jobs, NHTSA expects the fuel economy measures to expand the capital outlay of the domestic automobile industry by $3 billion over "business-as-usual" investments for the years 1981-1984—increasing industry jobs by 77,000, chiefly by stimulating production of such lightweight materials as aluminum and plastics. NHTSA also expects that these job gains will more than offset job losses from a predicted 150,000-unit drop in sales over that period. Finally, and central to NHTSA's analysis, oil savings over the average lifetime of the new cars are estimated at 1.2 billion barrels.

Auto manufacturers have expressed concern that the new standards could produce a severe slump in sales. Consumers, they say, will tend to discount the savings that NHTSA alleges will occur. Moreover, the standards will require radical style changes—something the public has not responded to favorably in

the past. Also, the auto companies fear that the shift to smaller cars will mean that those customers needing larger cars will turn to the used-car market.

Even more disturbing to the auto industry —both domestic and foreign—are the uncertainties about future emission and safety standards. Because these standards have a heavy impact on fuel consumption, uncertainty makes it difficult if not impossible to project fuel economy levels with great accuracy. Congress recently eased the 1978 emission standards so that the 1978 model cars already produced could be sold legally, and the future of the new safety standards is in doubt) see discussion of Secretary Adams's decision requiring passive restraints, page 6, this issue). Engines now being considered for the early 1980s— especially the diesel engines—may not be able to meet the future emission levels embodied in the Clean Air Act Amendments of 1977 without sacrificing fuel economy. If this should be the case, new engine technologies might have to be pursued, adding to costs.

There are other relevant issues that NHTSA did not consider—costs to the six-person family that might not be able to buy as large a car in 1985 and costs to those who prefer more steel and less plastic in their cars. It is difficult to estimate costs of this sort, but they exist and it would surely have added credence to NHTSA's analysis if they had been addressed.

The traditional policy response to increasing scarcity of any commodity is to let the market ration off the available supply. This appears to be politically infeasible in the case of oil and oil products. Proposals to levy a gasoline tax (to reflect the opportunity costs of fuel) have been greeted with strong protest. Still, it appears that we must pay one way or another. The path taken suggests we are more willing to bear the costs through higher auto prices than through higher prices paid at the pump.

TVs, Border Taxes, and Executive Discretion

In a July 28 decision (*U.S.* v. *Zenith Radio Corporation, 1977*), the U.S. Court of Customs and Patent Appeals upheld the discretionary power of the executive branch over border tax adjustments. Under the U.S. Tariff Act, the Treasury Department is required to impose a duty on imports to offset bounties or grants paid to exporters by their countries. Reversing a lower court decision, the appellate court found that Japan's refunding of its excise tax on electronic products when exported did not constitute a "bounty" or "grant" within the meaning of the Tariff Act and therefore did not require a countervailing duty (one equal to the net amount of the tax refunded). The decision was a victory for the U.S. Treasury. It not only upheld Treasury's long-standing administrative practice, but also, for a time at least, obviated the need for what reportedly had been the Carter administration's intended response to the earlier adverse decision—a request that Congress clarify the Treasury's discretionary authority in this area.

Although the facts of the case are simple, the implications are complex. Japan imposes a tax on the manufacture and sale of certain electronic products, including TVs and radios. This tax, which ranges from 5 percent to 40 percent, is similar to the value-added tax (VAT) imposed by most countries in Western Europe. As with VAT, Japan's tax is refunded to the manufacturer when the product is exported. Therein lies the problem: it has been U.S. trade policy to resist attempts by foreign governments to subsidize exports to this country.

In 1970, Zenith Radio Corporation asked the Treasury to rule that this refund constituted a bounty or grant. In January 1976, however, the Treasury ruled against Zenith, and that corporation, taking advantage of the 1974 amendment to the Tariff Act that gave U.S. firms the right to seek judicial review, contested the ruling in U.S. Customs Court. In April 1977, a special three-judge panel reversed the Treasury, but on appeal, the Customs Court was itself reversed, and Zenith said it would appeal to the U.S. Supreme Court.

The *Zenith* case has attracted considerable attention because it raises the question of the compatibility of American law with the system of border tax adjustments generally sanctioned by the major trading nations through the General Agreement on Tariffs and Trade (GATT). This system seeks to resolve the clash in international trade between two different principles of taxation—the corporate income tax, predominant in the United States and Canada, and the VAT concept, predominant in Western Europe and Japan.

Under GATT, border tax adjustments are permitted only for *indirect* taxes, such as VAT and excise or sales taxes, and not for *direct* taxes, such as corporate income taxes. The basis for this distinction is the belief, now widely challenged by economists, that indirect taxes are borne by consumers in higher prices, whereas direct taxes are borne by producers out of profits. Economists argue that the question of who bears the burden of taxation depends not so much on the type of tax as upon how production and consumption respond to changes in price.

As the Court of Customs and Patent Appeals saw it, that difficult question did not have to be resolved in the *Zenith* case. Rather, the sole issue presented was whether the Treasury had the authority to define "bounty" and "grant." In ruling that the refund of a commodity tax is not, as a matter of law, a bounty or grant within the meaning of the Tariff Act, the court relied upon the Treasury's nearly eighty-year practice of applying this provision only to an "excessive" refund—that is, one that *exceeds* the tax paid. Also, the court noted that Congress had implicitly recognized the Treasury's practice—*and the secretary's authority to change it*—in other laws.

The italicized point is important. The *Zenith* decision, in addition to preserving executive policy-making in the complex field of border tax adjustments, removed an immediate threat to trade-liberalization negotiations in Geneva and to continued U.S. participation in the GATT system. Robert Strauss, U.S. special trade negotiator, said he was "very pleased."

Waterway User Charges and Balanced Transportation

Replacement of Locks and Dam 26 (located at Alton, Illinois) has been the subject of some controversy between environmentalists and Mississippi barge operators—but a Senate bill to fund the project has aroused a second controversy that overshadows the first. That bill tied this project, popular with Congress, to an unpopular provision requiring that, in ten years, commercial waterway users pay fees equal to *all* the operation and maintenance costs and *half* the construction costs of U.S. inland and intracoastal waterways.

Passed by the Senate on June 22 by a vote of 81 to 9, the bill died because of the constitutional requirement that revenue bills originate in the House of Representatives. And the House appears unenthusiastic about full user charges. H.R. 8309 (which also provides funds for Locks and Dam 26) would merely impose a tax on barge diesel fuel of four cents a gallon (the amount currently paid by truckers) in 1979 and six cents a gallon by 1981. A tax of six cents is only 14 percent of the estimated forty-cent tax needed to recover all operation and maintenance costs and half the construction costs.

User charges for inland waterways have always been a contentious issue in discussions of transportation policy. The barge operators obviously like the current system of no user charges, whereas the railroads (which own and therefore pay the costs of maintaining their tracks and rights-of-way) and the truckers (which pay federal taxes on fuel) want the system changed. Also, important questions of regulation hinge on the issue. For example, user charges would cause barge rates to rise, shifting some traffic to rail and truck.

The point at issue is efficient balance among the different forms of transportation. The most efficient use of resources occurs when the marginal cost of using each resource is equal to the marginal benefit that resource produces. When one form of transportation is subsidized, the true marginal cost of using that service tends to exceed the price users actually pay, and thus excessive amounts are used. Because the operation, maintenance, rehabilitation, and construction costs of waterways are highly subsidized by the federal government (at about $1 billion a year, reports the U.S. Department of Transportation), the cost of shipping commodities by barge is below real cost. Consequently, some shipments go by barge that could go more efficiently by rail or even truck. Of course, it may be argued that railroads and trucking are also subsidized. But trucks pay close to their full share of highway expenses through fuel taxes, according to studies by the Federal Highway Administration, and much of the federal support given to the railroads in recent years—for example, $2.1 billion to ConRail—is in the form of loans that are to be repaid.

User charges to barge operators could be expected to lead to a more efficient transpor-

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