

# DYNAMIC INTERPRETATION OF ECONOMIC REGULATORY LEGISLATION (COUNTERVAILING DUTY LAW)

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## INTRODUCTION

Dynamic statutory interpretation recognizes that statutes evolve as various interpreters apply them to changing circumstances over time. Hence, an interpretation rendered today may not be the same as the one that would have been rendered when the statute was originally enacted. The scholarship exploring dynamic statutory interpretation has thus far focused on statutes implicating civil and personal rights.<sup>1</sup> Scholars have focused on such statutes because they raise interesting issues and because the evolution of such statutes is dramatically influenced by evolving constitutional principles. By focusing on statutes implicating civil and personal rights, however, we have neglected the ways in which other types of legislation evolve. For example, economic regulatory legislation evolves as much as, and in some ways more dramatically than, civil rights statutes.<sup>2</sup> Just as civil rights statutes evolve in response to changing social patterns and new constitutional theories, regulatory legislation evolves in response to changing economic patterns and new economic theories.

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1. Leading dynamic statutory interpretation works deal with affirmative action under Title VII of the Civil Rights Act of 1964, *see* R. DWORKIN, *A MATTER OF PRINCIPLE* 316 (1985); Eskridge, *Dynamic Statutory Interpretation*, 135 U. PA. L. REV. 1479, 1488-94 (1987), private remedies under the Civil Rights Act of 1866, *see* Farber, *Statutory Interpretation, Legislative Inaction, and Civil Rights*, 87 MICH. L. REV. 3 (1988), income tax exemptions for segregated institutions, *see* Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, 343-45, 347-48 (1990), the exclusion of gay men and lesbians from the United States, *see* Aleinikoff, *Updating Statutory Interpretation*, 87 MICH. L. REV. 20, 47-54 (1988), the influence of constitutional principles generally in statutory interpretation, *see* Eskridge, *Public Values in Statutory Interpretation*, 137 U. PA. L. REV. 1007 (1989) [hereinafter Eskridge, *Public Values*]; Sunstein, *Interpreting Statutes in the Regulatory State*, 103 HARV. L. REV. 405 (1989), and even the statutory rights of the snail darter, *see* R. DWORKIN, *LAW'S EMPIRE* 20-23 (1986); Farber, *Statutory Interpretation and Legislative Supremacy*, 78 GEO. L.J. 281, 294-298 (1989).

2. For instructive analysis, *see* Langevoort, *Statutory Obsolescence and the Judicial Process: The Revisionist Role of the Courts in Federal Banking Regulation*, 85 MICH. L. REV. 672 (1987); Zeppos, *Judicial Candor and Statutory Interpretation*, 78 GEO. L.J. 353, 362-79 (1989).

This commentary applies dynamic statutory interpretation theory to Professor Richard Diamond's proposed interpretation of the countervailing duty statute.<sup>3</sup> Federal law imposes a "countervailing duty" on imported merchandise for which a foreign country provides a "subsidy" with respect to its production. The countervailing duty statute does not clearly define a "subsidy," but the agency administering the statute has issued a proposed rulemaking to clarify the term. Diamond proposes that subsidy be defined as a foreign government's payment that reduces the marginal costs of a foreign firm's exports to the United States. This definition is based on economic theory that has only recently been applied to develop a more rational countervailing duty law. As such, it is not the definition Congress had envisioned when it passed the original statute in 1930, or when it substantially revised the statute in 1979, or even when the statute was amended in 1984. Yet I argue that this economics-based definition of "subsidy" is one that the agency can use as the basis for its regulations, under established doctrine and sound theory.

This article will develop the doctrinal and theoretical reasons justifying dynamic interpretation of economic regulatory legislation generally and of the countervailing duty statute in particular. Three themes facilitate the evolution of such statutes. One theme is delegation. Most economic regulatory statutes delegate rulemaking responsibilities to agencies, which can either be independent or part of the executive branch. Congress delegates many of the analytically difficult issues, such as the subsidy issue, to agencies, partly to avoid making the hard political choices itself, and partly so that the agency can fill in the statutory details rationally and dynamically. Because agencies have some accountability to the political process and are formally given broad lawmaking duties, the Supreme Court has long deferred to reasonable agency interpretations. This deference has been given even when the agency has changed its interpretation over time and even when those interpretations are probably inconsistent with original legislative expectations. The Court is not deferential when those expectations are clearly expressed in the statutory text.

A second theme is the dynamic consequences of statutory purposes. The Court has long approved of interpreting statutes to fulfill their central purposes. While a statutory purpose may be invariable, new theories for best fulfilling that purpose can justify dynamic statutory interpretation.

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3. Diamond, *A Search for Economic and Financial Principles in the Administration of U.S. Countervailing Duty Law*, 21 LAW & POL'Y INT'L BUS. 507 (1990) [hereinafter Diamond, *Search for Principles*]. Diamond sets forth his economic model in greater detail in Diamond, *Economic Foundations of Countervailing Duty Law*, 29 VA. J. INT'L L. 767 (1989) [hereinafter Diamond, *Economic Foundations*].

By definition, economic regulatory legislation is aimed at solving, or ameliorating, an economic problem. There is always the danger of overregulating or underregulating, and the duty of the primary statutory interpreter—usually an agency—is to attempt to achieve optimal regulation, within the limits set by the statutory text. If a demonstrably superior theory is brought to the attention of the administering agency, that agency has an obligation to consider the theory; otherwise, the agency is not performing its duty to carry out the statute's purpose.

A third theme is the interaction of different statutes over time. The countervailing duty statute itself has evolved, as Congress has rewritten, revised, and amended it. That evolution is important guidance for the agency, as is the relationship of the statute to other laws. A statute's meaning might change in response to new legal developments, such as constitutional decisions, new statutes, and treaty obligations. An important dynamic consideration for interpreting the countervailing duty statute is the international obligations of the United States under the General Agreement on Tariffs and Trade (GATT). The GATT is itself a dynamic process of creating norms over time. As a matter of international obligation, as well as Congressional direction (in this instance), the agency must consider the consistency of its interpretation of the countervailing duty statute with U.S. GATT obligations.

#### DIAMOND'S DILEMMA: CAN THE TARIFF ACT OF 1930 BE INTERPRETED TO REFLECT SOPHISTICATED ECONOMIC THEORY?

The Tariff Act of 1930, as revised by the Trade Agreements Act of 1979 and subsequently amended, states that when a foreign government provides "a subsidy with respect to the manufacture, production, or exportation of a class or kind of merchandise imported into the United States . . . there shall be imposed upon such merchandise a countervailing duty . . . equal to the amount of the net subsidy."<sup>4</sup> The key term, "subsidy," is defined in section 771(5) of the Act, as revised in 1979.<sup>5</sup> Section 771(5) begins with the proposition that "'subsidy' has the same meaning as the term 'bounty or grant' as that term is used" in section 303

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4. Tariff Act of 1930, § 701(a), *as amended by* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 150-51 (codified as amended at 19 U.S.C. § 1671(a) (1988)).

5. Tariff Act of 1930, § 771(5), *as amended by* Trade Agreements Act of 1979, Pub. L. No. 96-39, § 101, 93 Stat. 176-78 (codified as amended at 19 U.S.C. § 1677(5) (1988)) (further cites to § 771 of the Tariff Act of 1930 will be made to the corresponding sections of U.S.C.).

of the original 1930 Act. This is not greatly helpful, because section 303 does not define "bounty or grant."<sup>6</sup>

Section 771(5) then provides specific examples of a subsidy. A subsidy "includes, but is not limited to" the "export subsidies" described in the Annex to the GATT Subsidies Code<sup>7</sup> and the following "domestic subsidies":

- (I) The provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations.
- (II) The provision of goods or services at preferential rates.
- (III) The grant of funds or forgiveness of debt to cover operating losses sustained by a specific industry.
- (IV) The assumption of any costs or expenses of manufacture, production, or distribution.<sup>8</sup>

Section 771(6) defines "net subsidy" as the "gross subsidy" minus three groups of permitted offsets.<sup>9</sup> In 1984, Congress further amended the statute to require a countervailing duty for domestic "upstream subsidies" by a foreign government.<sup>10</sup> The statute defines "upstream subsidy" as a payment with respect to input products (those used in the production of the merchandise), where the payment bestows a "competitive benefit on the merchandise"<sup>11</sup> and "has a significant effect on the cost of manufacturing or producing the merchandise."<sup>12</sup>

The determination whether a foreign government has bestowed a countervailable subsidy on imported merchandise is made by the Interna-

6. Tariff Act of 1930, § 303, Pub. L. No. 71-361, 46 Stat. 687 (codified as amended at 19 U.S.C. § 1303 (1988)) (stating a countervailing duty shall be imposed on imports for which any country "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").

7. 19 U.S.C. § 1677(5)(A)(i) (1988) (adverting to the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (relating to subsidies and countervailing measures), done Apr. 12, 1979, 31 U.S.T. 513, 546, T.I.A.S. No. 9619, at 29, 1186 U.N.T.S. 204, 240 [hereinafter GATT Subsidies Code]).

8. 19 U.S.C. § 1677(5)(A)(ii) (1988).

9. *Id.* § 1677(6).

10. Tariff Act of 1930, § 771A, *as amended by* Tariff and Trade Act of 1984, Pub. L. No. 98-573, § 613(a), (b), 98 Stat. 3035 (1984) (codified as amended at 19 U.S.C. §§ 1671(e) & 1677-1 (1988)). Section 771A(c) requires the competitive benefit accruing from an upstream subsidy to be countervailed. "Competitive benefit" is calculated according to § 771A(b), and "upstream subsidy" is defined in § 771A(a). 19 U.S.C. § 1677-1(a), (b) (1988).

11. 19 U.S.C. § 1677-1(a) (1988). Determination of "competitive benefit" is governed by *id.* § 1677-1(b).

12. *Id.* § 1677-1(a)(3).

tional Trade Administration (ITA) of the Department of Commerce.<sup>13</sup> The International Trade Commission (ITC) then determines whether an industry in this country has been materially injured by the subsidy.<sup>14</sup> If there has been a subsidy and material injury, then a countervailing duty, "equal to the amount of the net subsidy," is imposed.<sup>15</sup> In response to a suggestion from reviewing courts, the ITA published a notice of proposed rulemaking in 1989 to codify the approach that it uses to determine when foreign government payments are "subsidies" under the statute, as revised and amended.<sup>16</sup>

The ITA's proposed rule for determining the existence of a countervailable subsidy is the following:

A countervailable subsidy exists when the [ITA] determines that:

- (a) A program provides selective treatment to a product or firm; and
- (b) A program provides a countervailable benefit with respect to the merchandise.<sup>17</sup>

In its commentary to the proposed rules, the ITA explained that the regulations are derived from practices it followed in the 1980s. Underlying its methodology is a model "which generally defines a subsidy as a distortion of the market process for allocating an economy's resources."<sup>18</sup> Diamond suggests that the ITA's approach to subsidies rests upon two principles: (1) government action conveys a countervailable benefit on a foreign firm whenever the firm receives something of value which it would not have received in a freely operating market, and (2) the benefit is usually the difference in the firm's cash flow resulting from the government's providing something at lower-than-market rates.<sup>19</sup>

13. The statute refers this issue to the "administering authority," *id.* § 1671-1(a)(2). Reorganization Plan No. 3 of 1979 designated the ITA as that authority. 45 Fed. Reg. 993 (1980).

14. 19 U.S.C. § 1671(a)(2) (1988).

15. *Id.* § 1671(a).

16. Countervailing Duties, Notice of Proposed Rulemaking and Request for Public Comments, 54 Fed. Reg. 23,366 (1989) (to be codified at 19 C.F.R. § 355) (proposed May 31, 1989) [hereinafter Proposed Rulemaking].

17. *Id.* at 23,379 (to be codified at 19 C.F.R. § 355.42).

18. *Id.* at 23,367. The ITA characterized its regulations as based on the economic model developed in *Carbon Steel Wire Rod from Poland*; Final Negative Countervailing Duty Determination, 49 Fed. Reg. 19,374 (1984), *aff'd sub nom.* *Georgetown Steel Corp. v. United States*, 801 F.2d 1308, 1310 (Fed. Cir. 1986). There, the ITA said, "a subsidy (or bounty or grant) is definitionally any action that distorts or subverts the market process and results in a misallocation of resources, encouraging inefficient production, and lessening world wealth." *Id.* at 19,375.

19. See Diamond, *Search for Principles*, *supra* note 3, at 519-21.

Diamond vigorously criticizes the ITA's "economic distortion theory" on the grounds that the focus on a hypothetical market is unworkable on its own terms; that it will have bizarre deterrence effects because the theory will deter less valuable foreign subsidies while allowing many highly valuable subsidies; and that it is inconsistent with the United States' commitment to the GATT Subsidies Code.<sup>20</sup> He argues that the ITA should reconsider this approach and adopt a theory like his "entitlement model" for subsidies.<sup>21</sup>

Rather than starting with the proposition that countervailing duties should be assessed whenever there is a distortion in a "normally functioning" foreign market (the ITA's approach), Diamond starts with the proposition that countervailing duties should be assessed only when the foreign firm receives an unfair competitive advantage over U.S. companies in the U.S. market.<sup>22</sup> Thus, he argues that foreign government benefits should be countervailable only when the benefits lower the firm's marginal costs, thereby allowing the firm to lower its prices and/or ship more of the merchandise into the United States.<sup>23</sup> Diamond suggests that the primary difference between his entitlement approach and the ITA's economic distortion approach can be traced to an incorrect economic assumption made by the ITA—namely, if a firm producing a product receives a grant from its government, the firm will be able to lower its price and increase production as a matter of course, to the detriment of domestic firms in the U.S. market.<sup>24</sup>

While it is not entirely clear what the ITA's "distortion" approach exactly is, it does seem to be inferior to an "entitlement" approach.<sup>25</sup> Yet the ITA and Dean Ronald Cass, former Vice Chair of the ITC, believe that,

20. *Id.* at 522-33.

21. Diamond, *Economic Foundations*, *supra* note 3, at 775, develops the model from Goetz, Granet & Schwartz, *The Meaning of 'Subsidy' and 'Injury' in the Countervailing Duty Law*, 6 INT'L REV. L. & ECON. 17 (1986).

22. Diamond, *Search for Principles*, *supra* note 3, at 533-36.

23. *Id.* at 537-39. Even then, Diamond cautions, there is no need for a countervailing duty if demand for the merchandise is elastic, because the foreign firm's shipment of more merchandise into the United States would not necessarily affect the sales or profits of U.S. firms. *Id.* at 539.

24. *Id.* at 540-44.

25. An entitlement approach might be easier to administer because it is more economically coherent and is based upon more realistic assumptions, *see* Diamond, *Search for Principles*, *supra* note 3, at 533-36; an entitlement approach is more consistent with U.S. international obligations (mainly, the GATT) and with international opinion concerning subsidies and countervailing duties, *see* Trebilcock, *Is the Game Worth the Candle?*, 21 LAW & POL'Y INT'L BUS. 723 (1990); and an entitlement approach would in most cases yield results that better serve the statutory policy of protecting U.S. firms from unfair competition. *See* Diamond, *Search for Principles*, *supra* note 3, at 533. *But cf.* Sykes, *Second-Best Countervailing Duty Policy: A Critique of the Entitlement Approach*, 21 LAW &

whatever the practical or theoretical virtues of the entitlement approach, the ITA does not have the authority to adopt it, because it is inconsistent with the statute.<sup>26</sup> Diamond himself raises this as a legitimate question.<sup>27</sup> There are at least three statutory problems with an entitlement approach.

First, it can be argued that an entitlement approach narrows the broad statutory definition of "subsidy" in a way that Congress has not anticipated.<sup>28</sup> Section 771(5)(A) identifies subsidy with the concepts of bounty or grant, as traditionally understood. An entitlement approach is generally consistent with that understanding, and with section 771(5)(A)(i)'s inclusion of "export subsidies" listed in the GATT Subsidies Code, because these traditional payments by a foreign government to its domestic firms upon the export of the firms' products will reduce the firms' marginal costs, almost by definition.<sup>29</sup> However, an entitlement approach does not fit as well with the list of the four "domestic subsidies" found in section 771(5)(A)(ii). An entitlement approach, for example, would significantly narrow the first illustration, "provision of capital, loans or loan guarantees on terms inconsistent with commercial considerations," because it would only find a subsidy when such loans have the effect of lowering marginal costs, which they sometimes will not do.<sup>30</sup> This approach also does not perfectly fit the second and third illustrations, although neither does the distortion approach proposed by the ITA.<sup>31</sup>

Second, an entitlement approach might partially reverse a possible compromise suggested by the legislative history of the 1979 revision. Section 771(6) defines a "net subsidy" as the "gross subsidy" minus three enumerated offsets: (1) application fees paid to obtain the subsidy, (2) loss of value due to a subsidy's deferred payment, and (3) duties charged upon export of goods to the United States which are intended to offset subsidies

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POL'Y INT'L BUS. 699 (1990) (arguing that entitlement approach would sometimes fail to countervail the most "harmful" trade practices, while countervailing a number of less "harmful" practices).

26. See Cass, *Trade Subsidy Law: Can a Foolish Inconsistency Be Good Enough for Government Work?*, 21 LAW & POL'Y INT'L BUS. 609 (1990).

27. Diamond, *Search for Principles*, *supra* note 3, at 552.

28. See *id.* at 553-64 (raising and answering these objections).

29. The early countervailing duty statutes applied only to export duties. (It was not until the 1922 statute that domestic subsidies were contemplated.). *Id.* at 553-56. Two of the Supreme Court's interpretations of these early statutes contain broad characterizations of "bounty or grant" as "a concession, the conferring of something by one person on another." *Nicholas & Co. v. United States*, 249 U.S. 34, 39 (1919); see *Downs v. United States*, 187 U.S. 496, 501 (1903). For export subsidies, almost any "concession" will reduce marginal costs, but that is not the case for the newer types of subsidies. Hence, the early authorities are not very helpful in determining the meaning of "subsidy" (or "bounty" or "grant") in these new situations.

30. Diamond, *Search for Principles*, *supra* note 3, at 560-61.

31. See Cass, *supra* note 26, at 647-49, 650.

received.<sup>32</sup> This list is perfectly consistent with an entitlement approach, because all of the offsets would raise marginal costs of the export. But Cass notes that section 771(6) would not be necessary if section 771(5) defined "subsidy" by reference to the foreign firm's marginal costs.<sup>33</sup> This is true, although much of the same could be said for the ITA's distortion approach.<sup>34</sup> Cass further argues, however, that the reason Congress added section 771(6) in 1979, was to limit the discretion of the administering agency.<sup>35</sup> Based upon the legislative history, Cass suggests that section 771(6) was a careful legislative compromise, which *assumed* that a subsidy existed when foreign government benefits were conferred.<sup>36</sup> If that assumption was incorrect (as Diamond argues), then section 771(6) becomes virtually superfluous, and the legislative deal is written out of the statute.

Third, an entitlement approach, if adopted, could change the operation of the statute in ways not contemplated by Congress. Section 701(a) apportions responsibility for administering the countervailing duty law between the ITA and the ITC.<sup>37</sup> The former determines whether there is a "subsidy" and what the "net subsidy" is, and the latter determines whether the subsidy has caused "material injury" to U.S. industry. If the ITA considers the effect of foreign government payments on foreign firms' competitive position in U.S. markets (because their marginal costs are lower), then the ITA will be considering the effect of the payment on U.S. markets. Generally, an entitlement approach has a tendency in some cases to combine three inquiries (determining that a payment is a subsidy, that the payment causes material injury to U.S. industry, and how much the net subsidy is) that Congress in 1979 assumed would be separate.

It appears that an entitlement approach is not exactly what Congress had in mind when it enacted the relevant provisions of the countervailing duty statute. Indeed, such an approach is probably inconsistent with the assumptions made by at least some members of Congress in 1979. None-

32. 19 U.S.C. § 1677(6) (1988).

33. Cass, *supra* note 26, at 644-46.

34. Thus, § 771(6)(A) (application fee) and (B) (loss because of deferred payment) are equally unnecessary offsets under a distortion approach, hence rendering those provisions unnecessary. The same might be true of § 771(6)(C) (export duties) in many cases. 19 U.S.C. § 1677(6) (1988).

35. Cass, *supra* note 26, at 648-49.

36. The best evidence is S. REP. NO. 249, 96th Cong., 1st Sess. 85 (1979), *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS 381, 471 ("The bill defines the term 'net subsidy' to place clear limits on offsets from a gross subsidy. The gross subsidy is the value of the subsidy provided, or made available, and used."); *see also* Cass, *supra* note 26, at 649 ("Statements from congressmen and other participants in hearings on the 1979 Act . . . are to the same effect as the reports.").

37. 19 U.S.C. § 1671(a) (1988).



theless, I believe that an entitlement approach (or something similar) can be adopted by the ITA. Indeed, competing approaches must be considered by the ITA because its own economic distortion approach is incoherent and contrary to the statute's primary purpose. Although most of the statute was enacted only eleven years ago, countervailing duty law provides a good case for dynamic interpretation of regulatory legislation to reflect more sophisticated economic theory. This article will next suggest the basis in current doctrine for so interpreting the statute, and then will explore the primary normative problem with this interpretation.

### DOCTRINAL BASES FOR INTERPRETING ECONOMIC REGULATORY LEGISLATION DYNAMICALLY

The debate over how to define "subsidy" raises an important general issue of statutory interpretation: Consistent with legislative supremacy and the proper role of the statutory interpreter, can an interpreter rethink a regulatory term (here, subsidies triggering countervailing duties) to reflect a more sophisticated economic theory than Congress originally had in mind? This is not an uncomplicated inquiry. Traditional rhetoric emphasizes that statutory interpretation is the implementation of "legislative intent,"<sup>38</sup> namely, the carrying out of original legislative expectations. This rhetoric suggests a static, historical inquiry. Yet in practice, statutory interpretation doctrine permits and indeed contemplates dynamic statutory interpretation, especially for economic regulatory legislation. This appears to present a paradox.

There are a number of ways to explain the paradox. On a practical level, a static approach to economic regulatory legislation simply does not work. Regulatory statutes themselves are often amended over the years, and each amendment or revision brings certain new assumptions, rules, and policies. Hence, there is often really no "original" static legislative intent that can be discovered, because the current version of the statute is a quilt-like result of decades of evolution and amendment. The countervailing duty statute has existed in some form for almost one hundred years now, and its definition of "subsidy" reflects the statute's own evolution. The statute first refers to "bounty or grant," the terms used in the original statute and carried forward until the 1979 revision. Thus, the administrative practice in the early part of this century remains relevant to interpreting the statute. The reference to export subsidies in the GATT

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38. I invoke the convention of legislative intent here because it is widely used in the literature on statutory interpretation, but I am sympathetic to criticisms of that convention. See Eskridge, *Legislative History Values* (to be published in Volume 66 of the *Chicago-Kent Law Review*).

Subsidies Code, added in the 1979 revision, reflects the U.S. commitment to an international regime for resolving unfair trade practices. The reference to domestic subsidies was added in 1922, and updated in 1979, and was probably Congress' perception of new forms of subsidies recognized by administrative practice. In 1984, Congress considered including a wide variety of foreign government programs within the definition of subsidy, but settled for just adding upstream subsidies. Given this history of amendments and revisions, each reflecting somewhat different assumptions and concerns, it is unrealistic to expect the statute to embody a static "intent."

Additionally, economic regulatory legislation is, almost by definition, an effort by Congress to deal with some important economic problem. As a practical matter, economic problems are protean: the nature of the problem changes rapidly, often as a result of strategic behavior responding to the original effort at regulation. Economic solutions are similarly protean: an initial approach based upon inaccurate economic assumptions will not help solve the regulatory problem (though it may build up some useful experiential data). To attack the problem, we need to build upon more reliable economic theory (which might not have been available earlier). For these and other reasons, Congress usually delegates responsibility for implementing economic regulatory legislation to courts and/or agencies—especially the latter, for they can respond more quickly than Congress can to changed circumstances and improved economic models. Thus, the countervailing duty statute has always been enforced by the Executive, with only general guidelines from Congress. When Congress has spoken, it has prodded the bureaucracy toward more dynamic enforcement of the statutory policy.

A final practical consideration is that the U.S. government's policy directions are constantly shifting, and oftentimes changes in one policy area will or ought to have ramifications in other areas. In such instances, it makes little sense to maintain outmoded expressions of legislative expectations, for they are overtaken by more recent expectations. One of the most exciting developments in countervailing duty policy in this generation has been the GATT Subsidies Code. Although GATT agreements are usually purely executive agreements, the negotiations culminating in the Subsidies Code were authorized by Congress. The 1979 revisions of the countervailing duty statute were motivated in large part by Congress' desire to implement the GATT Subsidies Code, as the United States had promised the other GATT signatories it would do. The discussion of adding further items to the definition of "subsidy" in 1984 was informed by the Subsidies Code. The more radical expansion of the definition favored by the House was rejected because it was arguably inconsistent with the Code.

The foregoing practical considerations make it inevitable that interpretation of economic regulatory legislation will be and should be dynamic. A more formal and conceptual means of expressing this insight is to consider the meaning of "legislative intent"<sup>39</sup> in the context of economic regulatory legislation. The term usually signifies the legislature's "specific intent," namely, its precise expectations for those it has charged with interpreting the statute. Sometimes, the legislature's specific intent will dictate specified answers to anticipated interpretive questions, and the statute will be drafted with the requisite specificity. But for economic regulatory legislation, it is difficult if not impossible to determine precisely the legislative consensus about specific issues. Often, the legislature's only discoverable specific intent for issues of detail and application is the referral (*i.e.*, the "delegation") of those issues to other decisionmakers.<sup>40</sup> When the legislature either explicitly or implicitly delegates specific lawmaking authority to courts and/or agencies, the legislature specifically "intends" that those decisionmakers develop the statute over time, subject to the constraints and directives built into the statute. Such a specific intent is inherently dynamic.

The legislature also has a "general intent," or purpose, when it enacts a statute. The purpose of economic regulatory statutes is to solve or ameliorate some economic problem. This does not, and cannot, occur overnight. The legislature knows that these problems will take time to solve. As time passes and conditions change, often in response to the statute, the nature of the problem changes. To fulfill the original purpose of the statute, the implementing agency or courts may need to adopt new strategies of regulation; otherwise, if they continue using the strategies originally assumed by the legislation, they may be defeating its general intent. Thus, the passage of time encourages productive thinking about the best overall strategy of regulation, as new theories are proposed and perhaps tested. For an agency to ignore creative new approaches is to slight the general legislative intent of a statute. The process by which a statutory scheme is updated to reflect new versions of the problem or new thinking about the problem is, therefore, an intrinsically dynamic process.

Finally, interpretation of regulatory legislation should be dynamic in order to be faithful to the legislature's overall cultural assumptions when it enacts statutes—its "meta-intent." When the legislature enacts a statute, it acts against a background of established conventions which the legislature is presumed to accept as background assumptions for future inter-

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39. See note 38 *supra*.

40. Some political reasons for this behavior are explored in Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275, 288 (1988).

preters. Critical and longstanding assumptions underlying economic regulatory legislation are that subsequent interpreters (1) will apply and interpret the statutory scheme in a way that is internally logical and not arbitrary (internal coherence), (2) will be fairly consistent in their application over time and will not make jarring new interpretations without a good reason (vertical coherence), and (3) will integrate the statute into new policy developments over time (horizontal coherence). The last assumption is highly dynamic, for it requires interpreters to coordinate new statutes and treaties with old ones, often having the effect of bending the latter.

In short, a whole cluster of conventions about what the legislature “intends” when it enacts a statute—especially a regulatory statute delegating most interpretation to an agency—suggests the legitimacy of dynamic statutory interpretation, even under traditional political assumptions such as legislative supremacy. The remainder of this part will explore the doctrinal contours of the conceptual structure just outlined, and suggest its application to justify the ITA’s adoption of an entitlement approach and possible problems for the agency if it ignores that approach altogether.

### *Specific Legislative Intent: Delegation*

When Congress enacts economic regulatory legislation, Congress sometimes sets forth detailed directives for courts and/or agencies to follow. This is the exception rather than the rule, however. Usually, Congress sets forth some general directives, with the specific expectation that courts and/or agencies will develop those directives over time in concrete situations. Subject to the lenient test of the nondelegation doctrine, Congress can delegate a great deal of interstitial lawmaking to courts and/or agencies. Most of the major regulatory statutes involve some delegation of this sort, and these delegations have usually been the occasion for dynamic statutory interpretation.

The classic example of implicit delegation of dynamic lawmaking power to federal courts is the Sherman Act. That statute prohibits contracts and conspiracies “in restraint of trade,” a term the statute does not define. The Supreme Court has effectively taken the general term as a delegation to the court system to develop the details of antitrust law, including the celebrated distinction, completely unanticipated by the statute, between practices that are per se unlawful and those subject to rule of reason. In making these distinctions, the Court has shifted directions several times, overruling prior interpretations, often because the Court came to accept more sophisticated economic theories. One such shift saw the Court abandon its per se rule against vertical restraints (*e.g.*, a distributor

requires all its retailers to follow specified rules).<sup>41</sup> The Court's main reason for overruling earlier precedent was the impracticability of the precedent in light of sound economic theory. In subsequent cases, the Court has further developed such theory and has recently reaffirmed the dynamic nature of its delegated lawmaking in a vertical restraint case. "The changing content of the term 'restraint of trade' was well recognized at the time the Sherman Act was enacted. . . . The Sherman Act adopted the term 'restraint of trade' along with its dynamic potential. It invokes the common law itself, and not merely the static content that the common law had assigned to the term in 1890."<sup>42</sup>

Most delegated lawmaking power has been assigned to agencies, not courts, and it is Congress' specific intent that these agencies deal with the issues of detail over time. Indeed, the leading case on countervailing duties, *Zenith Radio Corp. v. United States*,<sup>43</sup> deferred to the agency definition of bounty or grant. "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration."<sup>44</sup> The Court sustained the agency interpretation because it was "far from unreasonable."<sup>45</sup> A question suggested by *Zenith* is how much leeway the agency has to change its mind, for the Court in that case emphasized that the agency's view was adopted less than a year after enactment of the original statute in 1897 and was uniformly maintained for 80 years.<sup>46</sup>

Although the Court will sometimes accord less deference to an agency interpretation that has changed over time, the Court is still very deferential when the agency's new position is the result of reasoned deliberation. The leading case today for deference to agency interpretation is *Chevron U.S.A., Inc. v. Natural Resources Defense Council*.<sup>47</sup> In 1977, Congress required states not meeting national air quality goals to require permits for any "new or modified major stationary sources" of air pollution. Between 1977 and 1981, the Environmental Protection Agency (EPA) ex-

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41. See *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58, 59 (1977), *overruling* *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967).

42. *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 731-32 (1988).

43. *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978).

44. *Id.* at 450 (quoting the leading case, *Udall v. Tallman*, 380 U.S. 1, 16 (1965)).

45. *Id.* at 451. Note that *Zenith* deferred to the Department of Treasury, which administered the statute before 1980. Presumably similar deference would be accorded the Department of Commerce (ITA), which administers the statute now.

46. *Id.* at 450; *see id.* (administrative practice has "peculiar weight when it involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion.").

47. 467 U.S. 837 (1984).

perimented with various rules to implement the legislative directive. Firms argued for a "bubble concept," defining "stationary source" as a whole plant. The bubble concept would allow a firm to avoid the permit requirement when it increased emissions in one part of the plant, so long as it reduced emissions correspondingly elsewhere in the plant. The EPA's rules and proposed rules between 1977 and 1981 were reluctant to adopt the bubble concept and required plants in the targeted states to obtain permits for any emissions increase anywhere within a plant.<sup>48</sup> In 1981, the EPA changed its position and adopted the bubble concept, in order to encourage firms to modernize their plants. The Court of Appeals in *Chevron* overturned the agency decision because it found the decision inconsistent with legislative assumptions, but the Supreme Court unanimously reversed, albeit with only six Justices participating.

The Court's opinion in *Chevron* made three important points. First, it found that traditional indicia of legislative intent—the statutory text and legislative history—failed to provide a clear answer to the question of whether the bubble concept is a permissible definition of "major stationary source." This insight, that traditional sources of statutory interpretation can support a variety of views, is significant and suggests that substantial discretion should be granted to the interpreter. Second, the opinion held that the discretion to choose among the various "reasonable" interpretations rests mainly with the agency to which Congress delegated implementation of the statute. "When a challenge to an agency construction of a statutory provision . . . really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."<sup>49</sup> Third, *Chevron* rejected the argument that the agency's change of position dilutes the deference owed to it. "An initial agency interpretation is not instantly carved in stone. On the contrary, the agency, to engage in informal rulemaking, must consider varying interpretations and the wisdom of its policy on a continuing basis."<sup>50</sup>

Although commentators consider *Chevron* to be a major new development, these three points, central to its holding, are nothing new. Throughout the post-New Deal era, the Court has said that "[t]o sustain the [agency's] application of [a] statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would

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48. *Id.* at 855-59. Following two court of appeals decisions in 1980, the EPA firmly rejected the bubble concept for states needing to improve their air quality under the 1977 amendments, while permitting the bubble concept for states needing only to maintain their air quality.

49. *Id.* at 866.

50. *Id.* at 863-64.

have reached had the question arisen in the first instance in judicial proceedings.”<sup>51</sup> The Court has been equally emphatic that an agency can change its position in response to new policies, even if that position changes several times. “The use by an administrative agency of the evolutionary approach is particularly fitting. . . . ‘Cumulative experience’ begets understanding and insight by which judgments . . . are validated or qualified or invalidated.”<sup>52</sup>

There have been a few potentially important developments since *Chevron*. In determining whether an agency interpretation is reasonable, the Court now often looks just at the statutory language and structure, not the legislative history. The leading case is *K Mart Corp. v. Cartier, Inc.*,<sup>53</sup> in which six Justices accepted this formulation (albeit in a highly generalized way).<sup>54</sup> Section 526 of the Tariff Act of 1930 flatly prohibits importing “into the United States any merchandise of foreign manufacture if such merchandise . . . bears a trademark owned by a citizen of . . . the United States.”<sup>55</sup> The Court upheld one Customs Service regulation exempting merchandise from the prohibition in cases where the domestic owner is a subsidiary of a foreign parent that exports the marked merchandise, because there is ambiguity about who “owns” the mark. The domestic subsidiary technically “owns” it, but ultimately the foreign parent really “owns” it.<sup>56</sup> The Court invalidated another Customs Service

51. *Unemployment Compensation Comm’n v. Aragon*, 329 U.S. 143, 153 (1946).

52. *NLRB v. Weingarten, Inc.*, 420 U.S. 251, 265-66 (1975) (quoting *NLRB v. Seven-Up Co.*, 344 U.S. 344, 349 (1953)); see also *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 508 (1978) (stating that “[t]he authority of the Board to modify its construction of the Act in light of its cumulative experience is, of course, clear”).

53. 486 U.S. 281 (1988).

54. Justice Kennedy wrote the opinion for the Court which stated in Part II(A):

In determining whether a challenged regulation is valid, a reviewing court must first determine if the regulation is consistent with the language of the statute. . . . In ascertaining the plain meaning of the statute, the court must look to the particular statutory language at issue, as well as the language and design of the statute as a whole. . . . If the agency regulation is not in conflict with the plain language of the statute, a reviewing court must give deference to the agency’s interpretation of the statute.

*Id.* at 291-92. Although the Court fragmented on the merits, five Justices joined Justice Kennedy’s general statement of approach in Part II(A), and the Court has subsequently followed this approach in *Sullivan v. Everhart*, 110 S. Ct. 960, 964 (1990) (five Justices in majority quoting and following *K Mart*; four Justices in dissent relying only on statutory text); see also *Sullivan v. Zebley*, 110 S. Ct. 885 (1990); *Mead Corp. v. Tilley*, 109 S. Ct. 2156 (1989).

55. 19 U.S.C. § 1526(a) (1988).

56. *K Mart*, 486 U.S. at 292-93. In addition, Justice Kennedy used the same analysis to permit the agency to exempt situations where a U.S. parent owns the mark and wants its foreign subsidiaries or divisions to export the marked merchandise to the United States.

regulation exempting merchandise in cases where the domestic owner authorizes a foreign company to use its trademark abroad, because there is no discernible ambiguity as to the statutory coverage; the domestic company clearly “owns” the mark found on “‘merchandise of foreign manufacture.’”<sup>57</sup> In both instances, and in its statement of general approach, the Court pointedly *ignored* arguably relevant legislative history.

Additionally, the Court has been especially deferential to dynamic interpretation by executive agencies when the statutory scheme implicates international economic relations. In *Japan Whaling Association v. American Cetacean Society*,<sup>58</sup> the Court held that the Department of Commerce did not violate the Pelly and Packwood Amendments when it failed to certify the terms of Japan’s whaling practices to an international remedial body. Anticipating *K Mart*, the Court held that “the statutory language itself contains no direction to the Secretary automatically and regardless of the circumstances to certify a nation that fails to conform to the [internationally agreed] whaling Schedule.”<sup>59</sup> While that is true, the Pelly Amendment did direct certification if “nationals of a foreign country, directly or indirectly, are conducting fishing operations in a manner or under circumstances which diminish the effectiveness of an international fishery conservation program . . . .”<sup>60</sup> The Court responded that it was not clear that Japan’s practices, which regularly exceeded the international limits, “diminish[ed] the effectiveness” of those limits.<sup>61</sup> The Court’s argument that the statutory language vested considerable discretion *not* to certify regular (*i.e.*, annual) significant breaches of the limits is remarkably deferential to the Executive, for it reads the statute very generously and contrary to specific understandings in the legislative history.<sup>62</sup> *Japan Whaling* is an unusually deferential variation of *Chevron*, because the Court was bending the statute, perhaps beyond its breaking point, to give the Executive the opportunity to negotiate and work out international agreements with Japan and other countries.

Under *Chevron*, as elaborated in *K Mart* and *Japan Whaling*, the ITA has the discretion to adopt an entitlement approach, for “the statute is

57. *Id.* at 293-94.

58. 478 U.S. 221 (1986).

59. *Id.* at 233.

60. 22 U.S.C. § 1978(a)(1) (1988). The Packwood Amendment followed the same certification process but required that it be expedited and removed the Executive’s discretion not to impose sanctions. See 16 U.S.C. § 1821(e)(2) (1988).

61. *Japan Whaling*, 478 U.S. at 232-33.

62. *Id.* at 247 (Marshall, J., dissenting) (legislative colloquy with the Executive, where all agreed that the Executive has no “‘discretion to politely say to the Japanese you are violating our rules, but we will withhold certifying if you will change’”).



silent or ambiguous with respect to the specific issue” and, therefore, “the question for the court is whether the agency’s answer is based upon a permissible construction of the statute.”<sup>63</sup> Like the Sherman Act, the countervailing duty statute adopts general terms (subsidy, bounty, grant) that are sufficiently elastic, and sufficiently undefined, to constitute an implicit delegation of dynamic lawmaking authority to the ITA and the courts. Unlike the Sherman Act, the statute contemplates that the primary interpreter will be the ITA, and not the courts.<sup>64</sup> Congress’ specific intent was that the ITA exercise considerable discretion in developing the definition of subsidy. As in *Chevron*, there are several reasonable interpretations of the countervailing duty statutory language. The ITA has the initial decisionmaking responsibility. It is not bound by its prior practice and may adopt an entitlement approach. Under *K Mart*, the ITA would be precluded from adopting such a theory only if it is inconsistent with the statutory text and structure, which under *Japan Whaling* may be liberally construed to give the Executive flexibility to adopt useful international economic policies.

Although the entitlement approach is not immediately suggested by the statutory definition of subsidy, it is no more inconsistent with the statute than the regulations upheld in *Chevron* and *K Mart* were (and is not at odds with the statute, as is the Executive action in *Japan Whaling*). The entitlement approach is perfectly consistent with the general definition of subsidy in section 771(5) and is not inconsistent with the specific examples listed in section 771(5)(A). For example, the statutory subsidy described in section 771(5)(A)(ii)(I), “provision of capital, loans, or loan guarantees on terms inconsistent with commercial considerations,” might reasonably be read to embrace such payments which artificially lower the foreign firm’s marginal costs.<sup>65</sup> While that is a narrow reading of “inconsistent with commercial considerations,” it is no more inconsistent with the statutory term than was the Customs Service regulation narrowing the broad exclusion of foreign merchandise carrying a U.S. trademark. Thus, while an entitlement approach would result in a more narrow reading of some of the statutory examples than the ITA’s proposed distortion approach, it would not negate any of the illustrations.

Dean Cass agrees that there is really nothing in the statutory text which precludes the agency from adopting an entitlement approach, but

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63. *Chevron*, 467 U.S. at 843; see *Sullivan v. Everhart*, 110 S.Ct. 960, 964 (1990); *K Mart* 486 U.S. at 291-92.

64. See *Zenith Radio Corp. v. United States*, 437 U.S. 443 (1978) (deferring to agency interpretation of countervailing duty law).

65. 19 U.S.C. § 1677(5)(A)(ii)(I) (1988).

worries that it is inconsistent with the net subsidy provision's underlying assumptions. This is a legitimate concern for preserving the statutory structure, but it is ameliorated by considering the marginal role of that provision. Section 771(6) is something of a statutory afterthought, for it has never been well-integrated into the statute itself. It was apparently included in the 1979 revision for the limited purpose of narrowing the agency's inquiry *after it had found a subsidy*.<sup>66</sup> Logically, therefore, section 771(6)'s treatment of what can be "netted out" of a subsidy says nothing about what constitutes a subsidy under section 771(5). Indeed, Congress itself ignored section 771(6) when it added upstream subsidies in 1984.<sup>67</sup> To be sure, Cass suggests that section 771(6) assumes that subsidy will be defined by benefits received and not by improvement of competitive position, citing legislative history to that effect. However, the legislative history he cites is ambiguous on this point.<sup>68</sup> In any event, *K Mart* directs our attention away from legislative history and requires evaluation of an agency's interpretation based on the statutory language and structure alone.<sup>69</sup>

On the one hand, the ITA has the discretion to adopt the entitlement approach proposed by Diamond. On the other hand, the ITA also has the discretion to adopt another "reasonable" approach to its statutory duties, perhaps including its own economic distortion approach. If the ITA adopts the economic distortion approach, *Chevron* and *Zenith* suggest that the courts will be likely to uphold the ITA's policy choice, notwithstand-

66. See I. H. KAYE, P. PLAIA & M. HERTZBERG, *INTERNATIONAL TRADE PRACTICE* § 18.14 (1981).

67. The definition of "upstream subsidy" starts with "domestic subsidies" set out in § 771(5)(B), and then specifies the circumstances when they should be included as subsidies under § 771(5). 19 U.S.C. § 1677-1 (1988).

68. As Cass notes, S. REP. NO. 249, *supra* note 36, at 85, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS at 471, does say that a "gross subsidy is the value of the subsidy provided, or made available, and used." But note that the report uses the § 771(5) term "subsidy" and thus tells us nothing about what that means. Moreover, an example in the next paragraph suggests that competitive benefit might be relevant to determining subsidy payments. The report there identifies a "special problem in determining the gross subsidy . . . in the case of nonrecurring subsidy grants or loans" and suggests that any such subsidy be allocated "based on the commercial and competitive benefit to the recipient as a result of the subsidy. . . ." *Id.* at 85-86, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS at 471-72. The next paragraph then suggests that, after the agency has finished its gross subsidy calculations, only the three payments specified in § 771(6) may be netted out. *Id.* at 86, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS at 472.

69. *K Mart* simply refused to look at legislative history. *Chevron* ignored or slighted most of the legislative history raising questions about the agency's broad definition of "stationary source." *Japan Whaling* ignored the legislative history of the provision on point which targeted the very issue before the Court.

ing any objection that an entitlement approach reflects more sophisticated economic theory or a better policy choice. Hence, what Diamond needs are arguments to persuade the ITA that it ought to—or even is required to—adopt the entitlement approach instead of the one suggested in its proposed rulemaking.

### *General Legislative Intent: Purpose*

Even when Congress has few discernible specific intentions about particular interpretive issues arising out of the statutes it enacts, Congress often has ascertainable general intentions—purposes, goals, and objectives of the statute. In the era of the modern regulatory state, the Supreme Court has routinely relied on legislative purpose as a basis for interpreting statutes.<sup>70</sup> Likewise, agencies have used statutory purpose as the starting point for their statutory interpretations.

Interpreting statutes to fulfill their overall purposes is an important way in which statutes evolve and change in response to new economic realities and theories. A case illustrating the dynamic nature of purpose analysis is *Watt v. Western Nuclear, Inc.*<sup>71</sup> The statute at issue in *Western Nuclear*, the Stock-Raising Homestead Act of 1916 (SRHA), provided federal land to homesteaders to use for grazing and raising forage crops, but reserved to the United States the rights to “all the coal and minerals” in the homestead land. The issue in the case was whether gravel is a “mineral” under the Act. The Court admitted that the statutory term is ambiguous but confidently argued that it now includes gravel, based upon the statutory purposes to give homesteaders the right to farm the land and to leave other, nonfarming, uses of the land to development by the government.<sup>72</sup> “In resolving the ambiguity in the language of the SRHA, we decline to construe that language so as to produce a result at odds with the purposes underlying the statute,” the Court held.<sup>73</sup> As the dissenting opinion made quite clear, the Court’s interpretation would probably have been unthinkable to the Congress that enacted the statute in 1916. During that year, the Department of Interior had interpreted federal mineral laws to exclude sand, gravel and other inorganic substances of little value, in light of the economic theory prevailing in 1916.<sup>74</sup>

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70. See, e.g., *United States v. Fausto*, 484 U.S. 439, 443-44 (1988); *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 284-86 (1987); *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 285 (1956); *SEC v. Joiner Leasing Corp.*, 320 U.S. 344, 350-51 (1943).

71. 462 U.S. 36 (1983).

72. *Id.* at 52-56.

73. *Id.* at 56.

74. *Id.* at 62-67 (Powell, J., dissenting).

The Department changed its views in 1929, however, to reflect the value that these substances might have. The Court was persuaded that the Department's revised position better fit the purposes of the statute than would an interpretation based upon the more specific original legislative expectations.

There are many cases like *Western Nuclear*, where the Court has interpreted economic regulatory legislation dynamically by reference to statutory purpose.<sup>75</sup> However, this practice is somewhat more controversial in the Court today than it was ten years ago. In *K Mart*, for example, the Court invalidated the Customs Service rule excepting the authorized use by foreign companies of domestically owned trademarks, notwithstanding the agency's argument that this exception, like the ones sustained by the Court, was supported by the statutory purpose.<sup>76</sup> Four Members of the Court majority sarcastically criticized statutory purpose as a general warrant to update statutory schemes over time.<sup>77</sup> *K Mart* reflects the Court's greater reluctance these days to massage clear statutory language by reference to either legislative history or purpose.<sup>78</sup> On the other hand, nothing in *K Mart* prevents an agency from being guided by statutory purpose in choosing among several textually plausible interpretations of a statute. At the same time, *Chevron* encourages agencies to develop regulatory statutes over time to subserve overall statutory goals and objectives.

If the entitlement approach is more consistent with the purposes of the countervailing duty statute than a distortion approach, the ITA ought to move to an entitlement approach, as a matter of its own interpretation. Thus, a critical issue becomes: what is the purpose of the countervailing duty statute? In 1978, *Zenith* found the original purpose "relatively clear from the face of the statute and . . . confirmed by the congressional debates [in 1897]: [t]he countervailing duty was intended to offset the unfair competitive advantage that foreign producers would otherwise enjoy from export subsidies paid by their governments."<sup>79</sup>

75. See, e.g., *Anderson Bros. Ford v. Valencia*, 452 U.S. 205 (1981) (deferring to an agency definition of an undefined Truth in Lending Act term deemed consistent with legislative purpose, even though not completely consistent with statutory text); *Watt v. Alaska*, 451 U.S. 259 (1981).

76. See *K Mart*, 486 U.S. at 315-17 (Brennan, J., concurring in part and dissenting in part) (where statutory language technically covers a situation never anticipated by Congress, an agency can carve out a situation to implement the statute's overall purpose).

77. *Id.* at 325 (Scalia, J., concurring in part and dissenting in part) ("The principle of our democratic system is not that each legislature enacts a purpose, independent of the language in a statute, which the courts must then perpetuate, assuring that it is fully achieved but never overshoot by expanding or ignoring the statutory language as changing circumstances require.").

78. See generally Eskridge, *The New Textualism*, 37 UCLA L. REV. 621 (1990).

79. *Zenith*, 437 U.S. at 455-56.

This purpose imputed to the statute in 1978 is on the whole (but not unequivocally) borne out by subsequent revisions. The overall purposes of the Trade Amendments Act of 1979 were broader and included the removal of world-wide economic distortions,<sup>80</sup> but the purpose of the statute's revision of countervailing duty law was primarily to protect "U.S. producers" against "subsidized competition" by foreign governments seeking to provide "some competitive advantage in relation to products of another country."<sup>81</sup> The purpose of the 1984 amendment, which added upstream subsidies, was to "respond to the challenge of new unfair trade practices."<sup>82</sup> In particular, Congress phrased the definition of upstream subsidies, with explicit limitation to those subsidies affecting the foreign firm's marginal costs, to justify countervailing duties only when they affect "the competitiveness of that final product."<sup>83</sup>

The apparent primary purpose of the countervailing duty law announced by the Supreme Court in *Zenith*, at least substantially animating the 1979 revision, and strongly reiterated in the 1984 amendment, gives the ITA substantial justification to adopt an entitlement approach as its interpretation of the statute. This justification arises because the entitlement approach is much more closely tailored to meet the statute's purpose (offsetting the competitive advantage received by foreign firms from their governments) than other approaches that have been developed. In fact, the ITA's own proposed rulemaking may be vulnerable because it is inconsistent with the statute's overriding purpose. Not only does the ITA fail to

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80. See S. REP. NO. 249, *supra* note 36, at 31, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS at 417 (purposes were "(1) to approve and implement trade agreements negotiated under the Trade Act of 1974, (2) to foster the growth and maintenance of an open world trading system, (3) to expand opportunities for U.S. commerce in international trade, and (4) to improve the rule of international trade and to provide for the enforcement of such rules, and for other purposes").

81. *Id.* at 37, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS at 423.

82. H. REP. NO. 725, 98th Cong., 2d Sess. 5 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 5127, 5131.

83. *Id.* at 34, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5161.

In this regard two policy limits seemed sensible to the Committee. First, the requirement that the subsidy result in a lower price for the upstream product than the generally available price is intended to exclude situations where the upstream subsidy does not affect the price of the upstream product relative to unsubsidized competition. . . . The second policy limitation is the requirement that the upstream subsidy have a significant effect on the cost of manufacturing or producing the final merchandise. The purpose of this condition is to avoid needless investigation and verification of upstream subsidies which, although passed through to the final merchandise, are insignificant in affecting the competitiveness of that final product.

*Id.*

analyze the statute's purpose as a reference point for its interpretation, but its economic distortion approach<sup>84</sup> is arguably inconsistent with the statute's purpose. This approach focuses on hard-to-gauge factors that are only marginally related to the protection of U.S. firms against unfair competition in U.S. markets.

The legislative history of the 1984 amendment underscores this problem with the ITA's proposal. The House bill sought to expand the scope of foreign government activity that would be considered a countervailable subsidy—including foreign government rules facilitating the development of export industries, natural resource subsidies, and upstream component subsidies.<sup>85</sup> Dissenters in the House Report argued against including foreign government rules facilitating the development of export industries and natural resource subsidies because they did not address the central concern of countervailing duty law—preventing unfair competition.<sup>86</sup> However, they did not argue against the provision incorporating upstream subsidies, which was drafted carefully enough so as “to avoid needless investigation and verification of . . . subsidies which . . . are insignificant in affecting the competitiveness of that final product.”<sup>87</sup> The conference committee accepted the addition of upstream subsidies, but not the other additions favored by the House committee.<sup>88</sup> These debates not only reinforce the view in *Zenith* that the statutory purpose is to protect U.S. firms against unfair competition, but raise serious questions about the ITA's willingness to continue using an economic “theory” that was considered and rejected by Congress in 1984.

The potential incongruence between the purpose of the countervailing duty statute and the ITA's proposal could yield significant legal consequences, for an agency interpretation inconsistent with the statute's purpose may undermine the deference courts will otherwise accord that interpretation. In the past, the Court has used general legislative intent to overrule what might otherwise be a not-unreasonable agency reading of the statutory language.<sup>89</sup>

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84. See ITA Proposed Rulemaking, 54 Fed. Reg. 23,367 (1989) (proposed May 31, 1989) (stating that a subsidy is a “distortion of the market process for allocating an economy's resources.”).

85. H. REP. NO. 725, *supra* note 82, at 25-34, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5151-61.

86. *Id.* at 89-93, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5183-87 (dissenting views of Rep. Conable et al.).

87. *Id.* at 34, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5161.

88. H.R. CONF. REP. NO. 1156, 98th Cong., 2d Sess. 170-71 (1984), *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS 5220, 5287-88.

89. *E.g.*, *United Hous. Found., Inc. v. Forman*, 421 U.S. 837, 848-50 (1975) (rejecting an SEC definition of “security” because it was inconsistent with the statutory purpose).

In *FTC v. Fred Meyer, Inc.*,<sup>90</sup> for example, the Court rejected part of the agency's interpretation of the statute at issue because it was "untenable when viewed in light of the central purpose of [the statute] and the economic realities with which its framers were concerned."<sup>91</sup> The Court, "in the absence of an unmistakable directive" in the statutory text, refused to "construe the Act in a manner which runs counter to the broad goals which Congress intended it to effectuate."<sup>92</sup> If the same can be said of the proposed ITA rule, it is vulnerable in a critical way that Diamond's proposal is strong.

*Legislative Meta-Intent: Vertical Coherence, Horizontal Coherence,  
and Internal Coherence in Statutory Policy*

When interpreting statutes, courts and/or agencies are interested in both the specific expectations and the general purposes Congress had when it enacted those statutes. These are the most concrete and relevant "intentions" of Congress for statutory interpretation, and they often countenance dynamic interpretation of economic regulatory legislation. A third level of legislative intent is the background assumptions that have conventionally been imputed to Congress when it enacts such legislation. These assumptions, as well as others, constitute a legislative "meta-intent" that informs lawmaking generally in our polity.

Legislative meta-intent is usually expressed in terms of "rationality" and "purposiveness" in the legal literature, although one might prefer to express it in terms of "coherence." Coherence is the most common form of legal argumentation, and such arguments are encountered in at least three situations. A legal argument is considered to be strengthened if it can be demonstrated that (1) its conclusions are coherent with its premises and with one another (internal coherence); (2) the conclusions are coherent with other conclusions and current rules (horizontal coherence); and (3) the conclusions are coherent with positions traditionally followed on the same issue in the past (vertical coherence). Various legal doctrines reflect these coherence values. The entitlement approach, which enjoys the advantages of internal and horizontal coherence, is legally more legitimate than the current ITA position, which may be at best only vertically coherent. The ITA's ultimate rule for defining subsidy may fail the basic tests of coherence if the ITA does not confront this problem.

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90. 390 U.S. 341 (1968).

91. *Id.* at 349 (footnote omitted).

92. *Id.*

## Internal Coherence

When Congress enacts statutes, it has a floating meta-intent that interpretations of those statutes be internally coherent. The minimum requirement of internal coherence is that the interpreter clearly set forth the reasons for the interpreter's position, so that the position can be rationally tested.<sup>93</sup> Internal coherence then requires that none of the interpreter's premises be inconsistent with the record before the interpreter, that the interpreter's conclusions flow rationally from the premises and the evidence, and that obvious alternatives are not overlooked. These requirements apply to agency interpretations otherwise entitled to deference. Unless Congress exempts an agency from judicial review, an agency position can be set aside if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."<sup>94</sup>

The informal rulemaking initiated by the ITA in 1989 would be subject to the arbitrary and capricious standard of review. The courts have given teeth to that standard by adopting the minimum requirement of a statement of reasons, as well as a plausible effort by the agency to write an internally coherent justification for its policy choices. The leading case on this issue is *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Co.*,<sup>95</sup> in which the Court invalidated the Department of Transportation's informal rulemaking that eased its requirements for passive restraints (e.g., airbags) in automobiles. Although the agency had deliberated at length about the issue and met the minimum standard by providing a statement of reasons, the Court found its statement insufficient under two of the three requirements of internal coherence. The Court found that the agency's rule failed to consider alternative policy strategies. The Court further found that the agency failed to offer a "rational connection" between the facts it found and the policy choices it made.

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93. The best statement of the minimum requirement is set forth in *Atchison, Topeka & Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 807 (1973) (Marshall, J., plurality opinion) (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), and *United States v. Chicago, Milwaukee, St. Paul & Pacific R.R. Co.*, 294 U.S. 499, 511 (1935)):

[A] simple examination of the order being reviewed is frequently insufficient to reveal the policies that the [agency] is pursuing. Thus, this Court has relied on the "simple but fundamental rule of administrative law". . . that the agency must set forth clearly the grounds on which it acted. For "[w]e must know what a decision means before the duty becomes ours to say whether it is right or wrong."

94. 5 U.S.C. § 706(2)(A) (1988).

95. 463 U.S. 29 (1983).



Under *State Farm*, the ITA, in its final rulemaking, will have to provide a plausible justification for whatever position it takes. If the ITA abandons its proposed distortion approach for an entitlement approach, and candidly examines statutory policy arguments, it should survive an appeals court challenge. On the other hand, if the ITA retains its proposed approach and with equal candor sets forth the policy reasons why it thinks that an entitlement approach will not work or will not be consistent with statutory policy, it will probably be equally successful. The only disastrous strategy for the ITA would be to follow the incoherent style of its proposed approach, which seems to start from an implausible premise (the statute's purpose is to penalize foreign payments causing economic distortion anywhere), does not tie its conclusions rigorously to the evidence, and fails to consider obvious alternative strategies.

### Horizontal Coherence

When Congress enacts statutes, it also has a floating meta-intent that those statutes will not unnecessarily clash with other important public policies, whether they are current policies or subsequently adopted ones. A wide variety of rules of statutory interpretation implement this rule of horizontal coherence, including the rule that a statute should be interpreted to avoid constitutional problems.<sup>96</sup> A related rule that has direct bearing upon the countervailing duty law is that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains."<sup>97</sup> This rule applies equally to treaties and executive agreements,<sup>98</sup> and probably best explains the Court's highly flexible statutory interpretation in *Japan Whaling*.<sup>99</sup>

Thus, when it makes its final rule defining "subsidy," the ITA should be sensitive to current Congressional policy, which includes U.S. international obligations under the GATT Subsidies Code, the implementation of which was an important goal of the Trade Agreements Act of 1979. The ITA's economic distortion approach is inconsistent with the goals and specific terms of the GATT Subsidies Code, which focuses on unfair competi-

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96. See Eskridge, *Public Values*, *supra* note 1.

97. *Murray v. Schooner Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804) (*quoted in* *Lauritzen v. Larsen*, 345 U.S. 571, 578 (1953)); see *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW* § 114 (1986).

98. See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987); *Toll v. Moreno*, 458 U.S. 1, 17 (1982); *Dames & Moore v. Regan*, 453 U.S. 654 (1981).

99. The President had negotiated an executive agreement with Japan which allowed it to violate the whaling limits longer than initially anticipated, in return for its long-term cooperation.

itive advantage.<sup>100</sup> Specifically, the Code permits countervailing duties only in response to subsidies whose effects on exports to a GATT signatory “materially injure” producers in that export market. Although the Code authorizes signatories to levy countervailing duties under their domestic laws<sup>101</sup> (a concession to the United States), it did so only upon the understanding that any such duties would be limited to those required to offset “material injury” within the countervailing country. The entitlement approach’s focus on the competitive effect of a subsidy in U.S. markets is completely consistent with the Subsidies Code. Alternatively, the ITA’s distortion approach seems to cling to a position the rest of the world was assured the United States had abandoned in 1979.

Moreover, the ITA’s distortion approach is inconsistent with the GATT Subsidies Code’s approval of domestic subsidies. In the Tokyo Round of negotiations leading to the Subsidies Code, the United States suggested the prohibition of many domestic subsidies, but the other signatories rejected that prohibition. The GATT’s statement of general principles in the final Code reflects the GATT’s rejection of the U.S. position. The first general principle is that subsidies “are used by governments to promote important objectives of social and economic policy,” though they “may cause adverse effects to the interests of other signatories.”<sup>102</sup> The rules suggested by the Code seek balance between the domestic policies behind subsidies and the potential harms to other countries. This balance is struck differently for export subsidies than it is for domestic subsidies. Export subsidies on non-primary products are completely forbidden,<sup>103</sup> and those on primary products are forbidden when they result “in the signatory granting such subsidy having more than an equitable share of world export trade in such product.”<sup>104</sup>

Domestic subsidies, on the other hand, are recognized as “important instruments for the promotion of social and economic policy objectives,”<sup>105</sup> and hence are not forbidden. Signatories are urged, however, to be cautious about using domestic subsidies which “may cause or threaten to cause injury to a domestic industry of another signatory or serious prejudice to the interests of another signatory or may nullify or impair benefits accruing to another signatory under the [GATT], in particular

100. See Diamond, *Search for Principles*, *supra* note 3, at 527-29; see also Cass, *supra* note 26.

101. GATT Subsidies Code, *supra* note 7, art. 4, 31 U.S.T. at 519, T.I.A.S. No. 9619, at 2, 1186 U.N.T.S. at 206.

102. *Id.* art. 8(1), 31 U.S.T. at 530, T.I.A.S. No. 9619, at 13, 1186 U.N.T.S. at 220; see *id.* art. 11(1), 31 U.S.T. at 532, T.I.A.S. No. 9619, at 15, 1186 U.N.T.S. at 214.

103. *Id.* art. 9, 31 U.S.T. at 531, T.I.A.S. No. 9619, at 14, 1186 U.N.T.S. at 222.

104. *Id.* art. 10(1), 31 U.S.T. at 532, T.I.A.S. No. 9619, at 15, 1186 U.N.T.S. at 222.

105. *Id.* art. 11(1), 31 U.S.T. at 532, T.I.A.S. No. 9619, at 15, 1186 U.N.T.S. at 224.

where such subsidies would adversely affect the conditions of normal competition."<sup>106</sup> I agree with Dean Cass' assessment that "the imposition of duties in excess of amounts necessary to offset a subsidy's effects in the export market"—namely, the ITA's distortion approach—"appears to violate the sense of the agreement embodied in the Code: such a duty would seem to be directed at the elimination of domestic subsidies, a duty imposition not sanctioned by the GATT agreement, rather than at the GATT-approved goal of eliminating effects in the market covered by the duty."<sup>107</sup> An overriding purpose of Congress in 1979 was to implement the U.S.'s international GATT commitment, and therefore any ambiguities in the countervailing duty statute should be interpreted to be consistent with the Subsidies Code.<sup>108</sup> Horizontal coherence arguments cut strongly against the ITA's approach.

### Vertical Coherence

Arguments based upon internal and horizontal coherence present significant problems with the ITA's proposed distortion approach. Vertical coherence suggests that a position is strengthened if it is coherent with positions that have traditionally been followed in the past when addressing the same issues. Vertical coherence arguments, however, would not be sufficient to render the ITA's approach intellectually respectable. In fact, the ITA's approach is only partially consistent with the history of the countervailing duty statute.

On the one hand, there is much in the history of the statute's evolution that supports the ITA's broad approach to countervailable subsidies. The early countervailing duty statutes covered only export subsidies, but the Tariff Act of 1922 extended that coverage to domestic subsidies,<sup>109</sup> a decision carried forth in the Tariff Act of 1930. For the most part, the evolution of the statute's definition of subsidy has been in response to new devices foreign governments have invented to provide advantages to their firms. Legislative activity has been aimed at expanding the definition of "subsidy," prodding agency willingness to find new types of countervailable subsidies, rather than holding the agency back. Thus, the 1979 revision of the statute added the four broad specific examples of countervailable domestic subsidies, and the 1984 amendment added upstream subsidies, both times with some Congressional impatience that the agency was moving too slowly in countervailing new forms of foreign government

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106. *Id.* art. 11(2), 31 U.S.T. at 532, T.I.A.S. No. 9619, at 15, 1186 U.N.T.S. at 224.

107. Cass, *supra* note 26, at 634.

108. See cases cited *supra* note 98.

109. Tariff Act of 1922, § 303, Pub. L. No. 77-318, 42 Stat. 858, 935.

assistance. The ITA's proposed approach would construe the list of domestic subsidies rather broadly, consistent with the persistent legislative expansion of subsidies that are countervailable, and Congress' specific expectation in 1979 that "[t]he administrative authority may *expand* upon the list of specified subsidies consistent with the basic definition."<sup>110</sup>

On the other hand, the ITA's distortion approach does not make the *best* sense out of the history of the statute<sup>111</sup> and, if anything, is a step backwards. The Congressional expansion of subsidies to be countervailed can be given the following alternative explanation:<sup>112</sup> Early countervailing duty law targeted export subsidies, which inevitably lower marginal costs for exports and affect the U.S. market. Congress added domestic subsidies as a target for essentially the same reasons, emphasized in *Zenith*—to protect U.S. manufacturers against unfair competition in the U.S. market. Congress assumed domestic subsidies would have similar marginal cost effects as export subsidies. That is not always true, and so the administering agency, the Treasury Department prior to 1980, applied the statute cautiously. Even the ITA, in the early 1980s, at least sometimes recognized that the statute's purpose was limited to offsetting unfair competitive advantages in the U.S. market.<sup>113</sup>

Here the legislative history of the 1984 amendments becomes particularly significant. The House bill sought a significant expansion of countervailing duty law in order to reach export targeting, natural resource subsidies, and upstream subsidies.<sup>114</sup> Dissenters from the House report criticized the targeting provisions as derogating from GATT obligations, but they did not criticize the addition of upstream subsidies.<sup>115</sup> The apparent reason the dissenters considered those subsidies properly countervailable under GATT was that, as the House report emphasized, the definition of countervailable upstream subsidies required an effect on the "cost" of the final product and bestowed a "competitive benefit" on

110. S. REP. NO. 249, *supra* note 36, at 85, *reprinted in* 1979 U.S. CODE CONG. & ADMIN. NEWS at 471 (emphasis added).

111. R. DWORKIN, *LAW'S EMPIRE*, *supra* note 1, at 228-38 (suggesting that law is like a "chain novel," in which each interpreter adds a chapter to the novel, and the goal of the interpreter is to make the "best sense" of the chapters that have come before).

112. Developed from Cass, *supra* note 26, at 644-46. Recall that Cass believes the entitlement approach is inconsistent with the statute. *Id.* at 647-49.

113. See Horlick, *Subsidies and Suspension Agreements in Countervailing Duty Cases*, in *THE COMMERCE DEPARTMENT SPEAKS ON DUMPING AND COUNTERVAILING DUTIES* 31 (1982) (Gary Horlick is a former Deputy Assistant Secretary of Commerce) ("Countervailing duties are designed specifically to offset those distortions as they impact on our internal markets.").

114. H. REP. NO. 725, *supra* note 82, at 25-34, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5151-60.

115. *Id.* at 89-93, *reprinted in* 1984 U.S. CODE CONG. & ADMIN. NEWS at 5183-87.

the exporting firm.<sup>116</sup> The conference committee dropped all the House additions except for the upstream subsidy provision.

Thus, only five years after Congress itself *rejected* a distortion approach in favor of an entitlement approach when it adopted only the upstream subsidy provision, the ITA proposed a distortion approach. For the same reasons Congress acted in 1984—the statutory purpose and U.S. GATT obligations—the ITA should act in 1991 to the same effect: Reject the distortion approach as a way of defining “subsidy” in the evolving countervailing duty statute.

#### NORMATIVE OBJECTIONS TO DYNAMIC INTERPRETATIONS OF SUBSIDY

Three points ought to be clear from the foregoing discussion.<sup>117</sup> First, the ITA’s proposed distortion approach to defining subsidy is a poor approach because it is internally illogical, will yield bad policy consequences, and is inconsistent with the overall statutory purpose and with U.S. GATT obligations. Second, an entitlement approach is a better approach in that it is more logical and internally coherent, will yield better policy consequences, and is a great deal more consistent with the statutory purpose and U.S. GATT obligations. Third, the bare text of the countervailing duty statute is not clear and, indeed, purposely leaves a lot of room for the agency to make policy.

Once these three propositions are accepted, it becomes apparent that the ITA should abandon its distortion approach and at least for now adopt an approach like the entitlement approach, which under current statutory interpretation doctrine is permissible under the statute. Presently, however, both Cass (formerly ITC Vice Chair) and the ITA refuse to go this far. Their refusal raises a central normative problem for dynamic statutory interpretation, and my answer to them raises a significant normative problem for current doctrine.

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116. *Id.* at 34, reprinted in 1984 U.S. CODE CONG. & ADMIN. NEWS at 5161:

[T]wo policy limits seemed sensible to the Committee. First, the requirement that the subsidy result in a lower price. [New § 771-1(a)-(3)] . . . is intended to exclude situations where the upstream subsidy does not affect the price of the upstream product relative to unsubsidized competition. . . . The purpose of [the second limitation, § 771-1(a)(2)] is to avoid needless investigation and verification of upstream subsidies which, although passed through to the final merchandise, are insignificant in affecting the competitiveness of that final product.

117. I take Cass, *supra* note 26, to agree with the three propositions in text, though he disagrees with my ultimate position. I also note that at the Olin Conference on Countervailing Duty Law, at which this article was presented as a comment on the Diamond paper, there was general agreement during the academic panel about the propositions in text.

Cass' objection might be phrased in this way: The entitlement approach may be preferable to the distortion approach in every way but one—the entitlement approach is not encoded in the statute, while the distortion approach is.<sup>118</sup> At least some of the criticisms Diamond makes of the ITA's distortion approach might also be made of the 1979 revision of the countervailing duty statute itself. The statute is a muddy compromise among different visions of countervailing duty law and for that reason does not embody a coherent vision of subsidy. "Subsidy" is defined quite vaguely, but its definition is narrowed by specific examples. The definition of "net subsidy" seems to contemplate a very narrow range of offsets from foreign government grants, but there is no indication that the definition narrows that of "subsidy." The 1984 amendment, by adding upstream subsidies, considered the net subsidy provision irrelevant. The statute says it is implementing the GATT Subsidies Code, but limits the material injury issue to the ITC's determination and leaves it out of the ITA's initial role.

On the one hand, this analysis suggests that the statutory text does not stand in the way of the ITA's accepting the entitlement approach. On the other hand, the analysis suggests the ITA can "get by" with its distortion approach. Indeed, critical analysis of the ITA's approach is so strangely compelling that it may save the ITA's rules. What started out (for me) as a criticism of an agency that did not have a good economic theory for doing its job, has turned into a criticism of a statute that not only lacks a "good" economic theory, but that may have no economic theory at all. The countervailing duty law as it exists today is something of a Rube Goldberg machine, jerry-rigged over a long period of time in a series of ad hoc legislative decisions and compromises. As a result, it is cumbersome, incoherent, and strange. But it works well enough to avoid constitutional challenge.

In short, the countervailing duty statute is at least janus-faced, and probably schizophrenic. It shows one face to the world, in which the statute faithfully implements the *Zenith* policy of protecting only against unfair competitive advantage in U.S. markets, which fits with the GATT Subsidies Code and the economic theory of the entitlement approach. The statute shows another face inside the Beltway, in which it reveals a possible underlying assumption (and current application) that *any* foreign payment may be a subsidy. What should be done with such a statute?

Cass suggests that the agency treat the statute's schizophrenia as a bargained-for legislative compromise that must be enforced to the let-

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118. The discussion in this paragraph is the author's analysis of and response to Cass, *supra* note 26, at 630-52.

ter—which means implementing an approach to foreign subsidies that Diamond, Cass and I consider insane. The main problem with Cass' argument is that the compromise he posits is not written into the statutory text. It appears that the compromise was a secret deal, if it was a deal at all.<sup>119</sup>

This raises the issue of whether the agency or courts should enforce quasi-secret deals like this one. As a doctrinal matter, the Supreme Court's recent precedents do not require it. One point of *Chevron*, *K Mart*, and *Japan Whaling* is that if Congress wants to direct agency discretion in the way Cass suggests it has, Congress must do so on the face of the statute. In all three cases, the agency decision was contrary to more specific and compelling legislative history than that relied on by Cass. As a normative matter, agency or judicial enforcement of secret deals like this one hardly contributes to the public good or to the legitimacy of the federal government. If we require Congress to put such deals on the face of the statute, rather than under its skin, the deals would be subjected to greater scrutiny, and irrational deals such as this might be excised (as indeed happened with some of the 1984 amendments). In short, there is no reason, under conventional political assumptions, not to hold Congress to its public obligations (*i.e.*, fidelity to the GATT and preventing unfair competition in U.S. markets), and to reject questionable deals unless they are done openly and on the face of the statute.<sup>120</sup>

A related normative problem is more troubling, because the answer to it runs counter to current doctrine. All current theories of dynamic statutory interpretation recognize that the role of interpreter is a bounded one, because the interpreter must make the best of the text itself. Thus, the ITA does not have the discretion to say it will no longer find any subsidies, on the ground that countervailing duties do not really protect U.S. consumers.<sup>121</sup> Such a move by the ITA would not be a sensible "interpretation" of the statute, primarily because it would be a radical break with the text, structure, history, and purpose of the statute. Such an interpretation

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119. While Cass' suggestion that this anomaly was a compromise is quite plausible, it is only a hypothesis with no compelling evidence to support it. For an intelligent and plausible defense of this hypothesis, see, *e.g.*, *id.* at 659-61.

120. This is the central lesson of H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* (tent. ed. 1958), and of Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986).

121. An eminently respectable position, given the economic literature. *E.g.*, Barceló, *Subsidies and Countervailing Duties—Analysis and a Proposal*, 9 LAW & POL'Y INT'L BUS. 779 (1977); Sykes, *Countervailing Duty Law: An Economic Perspective*, 89 COLUM. L. REV. 199 (1989).

would also be rejected for conventional legal process reasons. For instance, it would reflect a major policy shift that is best left for Congress to make.

It is possible that this latter argument can be invoked by the ITA to reject the entitlement approach. Adopting an entitlement approach would rationalize the statutory scheme in a way that would change policy. The result would yield fewer findings of subsidies under section 771(5), the net subsidy provision (section 771(6)) would become more marginal than it is now, and the division of responsibilities between the ITA and the ITC would be altered. Should not such an important rationalization of the statute be left to our popularly elected Congress, rather than the agency? The answer to this institutional quandary is complex.

In terms of conventional doctrine and practice, the policy suggested for the ITA to implement is no more significant a shift than the policy shifts the Executive sought to accomplish in *Chevron* and *State Farm*. Both of those cases arose out of agency implementation of the Reagan Administration's deregulationist perspective, and they involved agency initiatives contrary to Congressional assumptions and expectations in the 1970s. Both cases involved policy shifts at least as important as the one advocated by Diamond. In *Chevron*, the Supreme Court unanimously upheld the agency's significant shift in direction, and in *State Farm*, the Court made it apparent that a better-explained shift would have been acceptable.<sup>122</sup> More significant still was the Executive policy initiative in *Japan Whaling*. The Court's extraordinarily lenient scrutiny of executive implementation of legislative directives in *Japan Whaling* is not unusual in cases where foreign economic and political relations are concerned, because of the broad discretion needed by the Executive to conduct a unified foreign policy. The entitlement approach's greater sensitivity to the balance struck in the GATT Subsidies Code now becomes not just an excellent policy reason for the ITA to consider this approach, but would be a compelling foreign relations context in which the Executive could defend the policy ramifications of that approach.

Normatively, the Court, in cases such as *Chevron* and *Japan Whaling*, encourages dynamic statutory interpretation by agencies as the best way to achieve balance and energy in our modern regulatory state. Most law today is made by agencies and with good reason: They can move swiftly, they can develop technical expertise, and they are responsive to democratic

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122. In *State Farm*, four Justices dissented from the Court's criticism of the agency for not considering airbag alternatives but agreed with the Court's criticism of the agency for not providing a better explanation. Justice White wrote the opinion for the Court, but he is unusually deferential to agency action and probably would also have sustained a better-explained policy shift.



pressures,<sup>123</sup> but they also enjoy some luxury of reflective decisionmaking. Agencies should be encouraged to take policy initiatives. Courts stand as a counterbalance to agency decisions that are legally unjustified, and Congress and the President stand as a counterbalance to agency decisions that are politically unjustified.

One reading of *Chevron* is that so long as the agency's policy shift reflects a reasonable view of the statute's text, the agency should be able to effect that policy shift if it has coherent justifications. *Japan Whaling* suggests that where a statutory policy has foreign economic and political ramifications, our political system not only tolerates, but invites the agency to take policy initiatives not contemplated by Congress. If Congress does not agree with the policy shift accomplished by the agency (in either situation), Congress can amend the statute to overturn or modify the agency's rules. Stated another way, it is justifiable to place the "burden of inertia" on Congress when the agency makes a reasonable policy shift in economic regulatory legislation it is charged with enforcing. This normative view is supported not just by *Chevron* and *Japan Whaling*, but also by a realistic theory of politics.

Consider Congress' incentives to enact statutes affecting international trade practices.<sup>124</sup> There are significant pressures on Congress to enact inefficient distributive legislation. Unions and industry associations, among the best-organized groups in U.S. politics, tend to favor protectionist legislation, and some of our nation's weakest industries are among the most active and powerful lobbies. When labor groups and management groups, who are usually on opposite sides of issues, are allied, they are a powerful combination. In such cases, resistance to demands for protectionist legislation is less powerful. U.S. consumers stand to pay higher prices because of such legislation, but they are not as powerfully organized and are in no way monolithic in their preferences, because they are open to jingoistic rhetoric. Foreign governments and firms themselves are better represented in the political process than they once were, and the Executive exercises a moderating influence. But the political reality is that interests seeking protection are consistently better represented on Capitol Hill than are their opponents.

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123. Agencies within the executive department, of course, are under the domain of the President, our primary nationally elected official. So-called "independent" agencies are governed by officials who are usually appointed by the President (but not easily removable by the President) and approved by Congress. Through its oversight and budget powers, Congress can exercise substantial political control over both types of agencies.

124. The discussion in this paragraph is taken from Eskridge, *supra* note 40; Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987); Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123 (1989).

United States' trade laws reflect this insight. The Tariff Act of 1930 was itself a well-documented, rent-seeking feeding frenzy by U.S. companies desiring protection against foreign competition.<sup>125</sup> The dominance of protectionist interest groups has varied widely since then, but they remain powerful forces. The importance of these groups explains why most of the Congressional interest in countervailing duties since 1930 has prodded the Executive to seek out new forms of foreign subsidization. Usually, the most extreme protectionist measures have been blocked in Congress, but the persistence is troubling. Some of the new "subsidies" proposed by the House Ways and Means Committee in 1984 would have fundamentally violated U.S. GATT commitments, for example. That these proposals made it to conference committee, where they died, is sobering.

From this political analysis, it seems probable that Congress will not readily take the initiative to rationalize the countervailing duty statute. Any proposal, such as Diamond's, that restricts the definition of subsidy in any range of cases, even if not across the board, is going to encounter significant and well-organized opposition from at least some industry and labor groups. Well-organized opposition to a measure is usually fatal, unless that measure has the backing of one of the political parties and of important leaders, especially the President. It is doubtful that countervailing duties will be such a salient national issue as to stimulate such activity in the foreseeable future, and there is little hope for meaningful reform on the part of Congress.

An agency implementing the law may be more likely than Congress to take the initiative to rationalize countervailing duty law. The ITA, after all, has some self-interest in adopting an economically coherent, probably more easily administrable, approach. In addition, as part of the Executive branch, the ITA is potentially more sensitive than Congress to the spirit, as well as the letter, of U.S. international commitments. Unhappily though, some of the same distributive pressures described above may well prevent the ITA from taking the initiative to rationalize countervailing duty policy—pressure from industry and labor groups, as well as from members of Congress themselves. Indeed, the Department of Commerce (of which ITA is a part) has a reputation as a "captured" agency, which may explain why Congress in 1979 insisted that enforcement of counter-

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125. See E. SCHATTSCHNEIDER, *POLITICS, PRESSURES AND THE TARIFF: A STUDY OF FREE PRIVATE ENTERPRISE IN PRESSURE POLITICS, AS SHOWN IN THE 1929-1930 REVISION OF THE TARIFF* (1935) (a classic study of rent-seeking and the seminal book for the modern study of interest-group politics).

vailing duty law be transferred from the relatively "uncaptured" Treasury Department to the relatively "captured" Department of Commerce.<sup>126</sup>

In short, there is every reason to believe that the ITA will be almost as reluctant to adopt an entitlement approach as Congress—and just as reluctant to do so if members or committees of Congress apply any kind of pressure on the agency. On the one hand, this makes political sense. The compromise Cass finds is real, albeit quasi-secret and submerged beneath the text of the statute, but embedded in one of those triangles of legislative committees, relevant interest groups, and administrative agencies that makes much of the public policy in the U.S. The path of least resistance for the agency is to maintain the political equilibrium, because American companies and unions are comfortable with a liberal view of subsidies. The companies and unions, along with their Congressional allies in rust belt states, will not bother the agency so long as it cooperates. Although foreign governments will complain, their objections do not hurt the agency. *Chevron* seems to allow the agency to choose the path of least resistance.

Yet this political sense is economic nonsense. If it persists in its politically easy economic distortion approach, the ITA is settling for a third- or fourth-best approach to implementing the countervailing duty statute. Such a commitment to the mediocre but politically expedient course of action reflects one problem in the enforcement of economic regulatory statutes over time: Even when such statutes tackle a genuine economic problem, the solution sometimes becomes stacked in favor of established rent-seeking groups over time. Congress delegates broad discretion to the agency, which becomes captured by the rent-seeking groups, and whose decisions are protected from judicial review by *Chevron*. Such a multiplication of rent-seeking regulatory opportunities costs the U.S. as a society dearly.<sup>127</sup>

This is a normative problem with *Chevron*, which may insulate from review those agency decisions that press an open-textured regulatory statute in rent-seeking directions. The ITA's economic distortion approach seems to be a classic move along these lines. It is possible to challenge the proposed rule, as internally incoherent, contrary to the statute's stated

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126. Implementing his agreement with Congress as part of the 1979 revision of the countervailing duty law, the President issued Exec. Order No. 12,188, 45 Fed. Reg. 989 (1980), which designated the Secretary of Commerce as the administering authority identified in 19 U.S.C. § 1671 (1988).

127. See M. OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* (1982), critically analyzed in *THE POLITICAL ECONOMY OF GROWTH* (D. Mueller ed. 1983).

purposes, and contrary to the GATT Subsidies Code, but in all likelihood *Chevron* will insulate the agency from meaningful review. This removes an important check on administrative agencies, which is unjustified by traditional theories of administrative law.<sup>128</sup>

### CONCLUSION

Dynamic interpretation of economic regulatory statutes is inevitable because such statutes typically delegate substantial policy discretion to agencies charged with implementing them over time. This delegation is necessary because economic problems are notoriously protean and must be met by an evolutionary and practical approach by the agency, and because the changing legal and policy terrain affects prior policies and rules. The problem of countervailing duty law demonstrates, however, that dynamic interpretation can be distorting just as easily as it can be progressive. In my view, the ITA's distortion approach is a dynamic interpretation of the statute, since it goes well beyond the 1979 statutory text and expectations. But it is a poor exercise in dynamic statutory interpretation, for traditional legal process reasons (internal incoherence, contrary to statutory purpose, and inconsistent with U.S. GATT commitments). The distortion approach is a poor interpretation also for substantive reasons: It encourages the grant of countervailing duties that are unnecessary and economically inefficient, harmful to neglected consumer interests, and arrogant in the face of a world consensus favoring the use of domestic subsidies in appropriate instances.

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128. See, e.g., Farina, *Statutory Interpretation and the Balance of Power in the Administrative State*, 89 COLUM. L. REV. 452 (1989).