International Legal Control of Domestic Administrative Action

Joel P Trachtman
International law increasingly is designed to constrain the regulatory activities of countries where these activities have external effects on other countries. While countries retain the right to regulate, it is a qualified right, with a number of restrictions under international trade, investment, finance, human rights, and other areas of international law. The restrictions are often nuanced: while maintaining maximum policy autonomy, countries agree to international legal rules that establish increasingly complex preconditions for national regulatory action. In some cases, preconditions are formulated so as to establish procedural, as distinguished from substantive, predicates for national action. These varying types of preconditions are often designed to be met through determinations and procedures of domestic administrative agencies, and so they form a particular variety of global administrative law: they are means by which international law harnesses and guides national administrative decision-making in order to take into account the concerns of foreign countries. This article examines how these methods are used in several important examples of international legal control of domestic administrative processes, and develops a set of hypotheses regarding the circumstances under which these respective mechanisms would be used by countries.

Abstract

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1. Introduction: New Structures for International Law in Control of National Regulation

This article addresses an important, but insufficiently studied, area of global administrative law. With a handful of exceptions, global administrative law studies has focused on the ways in which administrative law concerns are applicable to actions of international organizations, and to international legal legislation, adjudication, and administration, or to national participation in international legal legislation, adjudication, and administration. Global administrative law has focused on the international, not on the effects of the international on the domestic. This article reverses that concern, focusing on how administrative law mechanisms can be used in international law to regulate the domestic administrative actions of countries, in order to address international policy externalities. The mechanisms I highlight require the regulating country to take account of the interests of foreign persons. So, this article’s concern relates to the role of international administrative law in providing a kind of “virtual representation” for foreign persons within domestic administrative processes.

The purpose of this article is to develop a framework for analysis of a relatively novel means of international legal restriction of national measures. As international law has increasingly reached into domestic regulatory processes, it has become necessary to explicitly balance different types of concerns. A novel and emerging way in which international law does so is by constraining not, or not just, the substance of national action, but the procedure for national action.

a. Requirements Regarding Substance: State Contingency

The main function of international law is to regulate the behavior of countries. The traditional way in which international law restrains national action is through direct substantive prohibitions: for example, with exaggerated simplicity, you may not abridge the human rights of your citizens, you may not discriminate between goods coming from different countries, and you may not engage in aggressive war. As international law has touched upon more internal issues,

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3 This is consistent with Peter Gourevitch’s focus on the “second image reversed.” PETER GOUREVITCH, THE SECOND IMAGE REVERSED: THE INTERNATIONAL SOURCES OF DOMESTIC POLITICS (1978).
its restrictions have become more complex. The complexity may take the form of complex conditions for prohibition, or, increasingly, complex conditions for national action.

Law is always expressed as an “if-then” statement: if W, X, and Y, then Z. The most common form of this type of if-then statement is that, if factual conditions W, X, and Y are met, then the requisite elements of a particular offense are satisfied, and legal consequences Z will ensue. Or the law can be described conversely: if A, B, and C conditions are met, then action D is permitted. Instead of the legal consequence being a finding of violation in this formulation, the legal consequence is permission for action. If the conditions were not met, the action is not permitted and is illegal. Countries are given explicit prescriptions as to how to take specific actions.

Furthermore, in a number of contexts, the factual conditions are becoming more complex. These complex conditions may be understood in terms of state-contingent incomplete contracting (“state contingency”), in which legal rules do not specifically determine the legality of behavior in advance. Rather, complex facts must be determined in order to evaluate whether the behavior was legal. For example in the WTO area of safeguards, if, and only if, there is observed (A) a surge in imports, (B) serious injury to a domestic industry, and (C) causation of B by A, then a country may be permitted (D) to impose a safeguard action restricting imports from other countries. In this formulation, which is a simplification of relevant WTO law, the legality of D (the safeguard action) is dependent on the objective existence of A, B, and C. Thus, countries are prohibited from taking the actions if the specified conditions are not met. So, in the application and enforcement of international law, it is incumbent upon countries, and upon enforcers, to determine whether the specified conditions are met.

Thus, because the concerns of international law increasingly have to do with the internal regulatory activities of countries, and because countries wish to retain as much freedom to act as possible, international legal rules are increasingly set up as complex if-then statements about the existence of specified and nuanced conditions for national regulatory action. These international legal rules may be understood as state-contingent incomplete contracts.

State contingency is a special type of allocation of responsibility that sets its broad parameters ex ante, but whose application in practice is only determinable ex post, once the state of affairs is known: allocation of responsibility is dependent upon the state of the world pursuant to which action is taken. But state contingency often involves complex ex post judgments as to the state of the world when action was taken. Furthermore, state contingency can involve delegation to third party decision-makers of the task of determining whether the preconditions are satisfied.

b. Requirements Regarding Procedure: Procedure Contingency

In connection with state contingent rules, those responsible for enforcement, whether they are other countries in this generally horizontal system, or international tribunals or international organization secretariats, must determine for themselves whether the requisite conditions exist in
order to be able to determine whether the country’s action is lawful. However, there are several problems with this determination by other countries and international tribunals or political bodies. First, they may not have access to the information required to make this determination. Second, it may not be worthwhile for them to develop and apply the requisite economic, scientific, or other analytical capacity to make this determination. Third, concerns about preservation of national autonomy under globalization may make it difficult for countries to relinquish this decision-making authority.

These types of information problems, expertise problems, and sovereignty costs are distinctive characteristics of international law, where authority is divided up among countries, but where each country may have an interest in circumstances where the facts are more easily, and properly, determinable by other countries. The information and expertise problems are somewhat analogous to certain problems in administrative law, in which each branch of government may have an interest in facts that are more easily determinable by other branches. They are also analogous to the problem of assessing corporate decision-making in corporate law, in which a standard of due diligence may be applied in some circumstances to allow courts to evaluate the decision-making process, rather than the substantive correctness of the decision.

Under these circumstances of information problems, expertise problems, and sovereignty costs, countries formulating international law rules may structure them in terms of conditions that relate not to the substantive existence of specified facts, but to the decision-making procedures carried out by the national authority (“procedure contingency”) to determine the existence of those facts, without necessarily examining whether the country acting was actually correct in its determination. It may be easier and less intrusive to scrutinize procedures than to scrutinize substantive facts.

What distinguishes state contingency from procedure contingency? First, state contingency relates to the relevant objective facts, while procedure contingency relates to the acting country’s procedures. Second, procedure contingency allows other countries or international tribunals or international organization secretariats to evaluate the procedure that was followed by the acting country independently of the results of that procedure. It is dependent upon knowledge about the procedure, not about the objective facts. Third, procedure contingency evaluates the quality of the procedure followed, and may reject a deficient procedure, even if the outcome of the procedure was correct. The general vocation of international law is to cause countries to take into account the interests of other countries as they make policy; procedure contingency imposes a direct requirement to take certain concerns into account, while declining to determine separately whether the resulting determination was correct.

Furthermore, although countries will negotiate different forms of state contingency and procedure contingency with their own strategic position in mind, from a purely welfare standpoint, we would expect them to seek to maximize the sum of the benefits from cooperation, taking into account transaction costs including those occasioned by information problems and
expertise problems, and sovereignty costs. Procedure contingency may generally implicate a lower level of information problems, expertise problems, and sovereignty costs, although it may entail higher transaction costs, and there may be concerns regarding whether it can adequately address cooperation problems.

As will be illustrated in detail below, the international law-based preconditions for national action are increasingly procedural: they require countries to make certain findings in certain ways. Procedure contingency may replace state contingency, or may supplement state contingency.

Where procedure contingency replaces state contingency, these procedural conditions precedent might be said to delegate to countries the job of determining the existence of the predicate facts necessary as a condition for their action. Where procedure contingency supplements state contingency, in order for a country’s action to be permissible, the country must have followed the specified procedures and its resultant determination of the state of the world must in addition be determined to be objectively correct. In this case, presumably there is some intrinsic value ascribed to proper procedure. These choices necessarily involve different burdens of proof, standards of review, and allocation of workload compared to state contingency.

c. Relative Specificity of State Contingency and Procedure Contingency

Contracts may be structured to be more or less incomplete: to be more or less specific. Likewise, state contingent contracting, and procedure contingent contracting, can be more or less specific. If the contracting is more specific, then the “if” portions of the if-then statements contain specific, easily determinable components. For example, if each of the conditions for safeguards action listed above were clear and relatively easily determinable, there would be little work for a judge or other evaluator but to make those factual determinations. On the other hand, to the extent that the if-then statement contains less specific standards, less well-defined and perhaps more difficult to determine, the judge or other evaluator would have more latitude, and more responsibility, in determining a violation. Consider a requirement of “due process” or a requirement that in order for discrimination to be found there must be differential treatment of “like products.” Under what circumstances are more specific rules superior tools compared to more general standards, and vice-versa?

d. Global Administrative Law as a Constraint on National Action: Standards of Review

To what extent should international law emulate administrative law? Countries are increasingly in a position that is structurally similar to administrative units, insofar as their right to act under international law is conditional upon their satisfaction of certain preconditions. Of course, a country is different from an administrative agency in many salient respects. While an administrative agency is generally an agent of the national executive or government, a country cannot be understood as an agent of a global sovereign.
We might understand a country as exercising authority delegated from the international legal system, or conversely understand the country’s authority as a kind of limited retained authority, and seek to understand the structure of delegation or limitation. It matters little whether the glass of sovereignty is half full or half empty. Where the international law is formulated by a group of countries to address a common concern like global warming or inadequate bank capital, operating by restricting the acts of each individual country, we can view the individual country as an agent of the collective principal.

In the international legal context, state contingency results from a binding international legal agreement that the country will only act if specified conditions are satisfied. Where international law rules utilize procedure contingency, the type of international law supervision that can be applied to the country’s actions is functionally similar to certain types of judicial review in administrative law.

Thus, while it is clear that countries in the international legal system are not analogous to administrative agencies within a national system, some aspects of the situation of countries under international law are comparable. The following table describes the correspondence:

**Table 1**

<table>
<thead>
<tr>
<th></th>
<th>Country under International Law</th>
<th>Administrative Agency under Domestic Administrative Law</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Principal</strong></td>
<td>Collective principal consisting of countries establishing international legal rule or international organization</td>
<td>Collective principal of (a) superior executive, and/or (b) legislators establishing statutory rule</td>
</tr>
<tr>
<td><strong>Operative Text</strong></td>
<td>Treaty</td>
<td>Statute</td>
</tr>
<tr>
<td><strong>Supervision</strong></td>
<td>Possible adjudication—varies depending on treaty context. Possible legislative reversal or other political supervision, perhaps in the form of withdrawal, but legislative reversal is formally difficult under unanimity system.</td>
<td>Adjudication under administrative law system. Possible legislative reversal or other political supervision</td>
</tr>
<tr>
<td><strong>Assuming adjudication, standard of review</strong></td>
<td>Two main alternatives (a) non-deferential test of “compliance” with international legal rule; or (b) some type of deference</td>
<td>Two main alternatives: (a) non-deference, or (b) deference</td>
</tr>
<tr>
<td><strong>Normative Concern</strong></td>
<td>Policy externalities</td>
<td>Agency problems: shirking by administrative agency or</td>
</tr>
</tbody>
</table>
In U.S. administrative law, which I reference for convenience and because it is a highly advanced system of administrative law, courts may exercise review of various phases of agency action. Each phase has a functional analog in international law.

Compliance with Law. First, courts can review agency rulemaking in order to determine whether the agency correctly interpreted the directions of the legislature. In U.S. administrative law, the Chevron doctrine has been applied to provide significant deference to agency interpretations of their legislative directions. There are two rationales for this deference: agency expertise and greater democratic accountability of administrative agencies as opposed to courts. This has a functional analog in international law adjudication, although as noted in the last row of Table 1, the normative concern is somewhat different. According to a contractual vision of international law, the main normative concern in that context is to ensure that other countries obtain the benefit of their bargain: that the national measure is consistent with the international legal obligation. The benefit of the other country’s bargain generally involves some internalization of a policy externality that the subject country might impose on the other country. In administrative law, the concern involves shirking, and different political interests of the executive compared to the legislature. With respect to different political interests, we might say that this involves a different type of policy externality—one between different elements of a divided single government, rather than between different horizontally-related countries.

The traditional approach to treaty obligations is implicitly to allow each country to interpret its obligation for itself, subject to informal diplomatic discourse. In the WTO, in investment treaties, in the European Union, and in other specialized areas, dispute settlement tribunals are accorded mandatory jurisdiction to determine whether countries’ interpretations of their obligations are accurate. One of the main functions of the WTO Appellate Body has been to interpret the WTO treaty, in accordance with customary international law rules of interpretation. This type of review is best understood as a technique for ensuring that countries comply with

| Normative Reasons for Deference | Expertise; subsidiarity; legitimacy and democratic accountability | Expertise; executive prerogative (horizontal subsidiarity); legitimacy and democratic accountability |

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5 But see Croley & Jackson, *id.*, for a refined analysis of important distinctions, and a critique of application of the Chevron doctrine in WTO law.
their treaty obligations as objectively determined: it is a departure from the international law default rule of auto-interpretation.

The treaty context here is quite different from the administrative law context. In the U.S., the *Chevron* rule calls for substantial deference to agencies in interpreting their authorizing statutes. While this has important rationales in the domestic context, given the more contractual relationship between parties to international treaties, it would be strange to provide substantial deference to national treaty interpretations. To which country would we defer—the complainant or the respondent? Article 17.6(ii) of the WTO Anti-Dumping Agreement was designed to replicate the *Chevron* rule in connection with interpretation of that agreement by requiring WTO tribunals to accept national interpretations of international legal requirements under the Anti-Dumping Agreement, provided that they are based on one of multiple permissible interpretations of the international law. However, it has not been given effect in application.

More specifically, in the domestic context the relationship between agencies and a legislature is nuanced and has elements of verticality in which the agency is subordinate to the legislature. On the other hand, in the international setting, the core of the international legal relationship is still largely between countries in a more purely horizontal relationship.

**Procedural Review for Rule-Making.** Second, courts can review agency rulemaking in order to determine whether the agency followed the prescribed process in making its rule. Under the U.S. Administrative Procedure Act, the main standard of review asks whether the agency action was “arbitrary or capricious.” In U.S. administrative law, the review of agency rule-making examines the process followed by the agency, under the “hard look” doctrine. This type of procedural review can have substantive effects, but it is used in a different way than direct substantive review. As discussed in Part 2, procedural review—in order to establish and supervise procedure contingency as to both rule-making and adjudicative action—seems to be an increasing feature of international law. For example, the WTO establishes important procedural review mechanisms with respect to national rule-making in connection with the setting of regulatory standards under the Agreement on Technical Barriers to Trade (TBT Agreement) and under the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement).

**De Novo Review of Rule-Making.** Third, courts can engage in de novo review of rule-making. In U.S. administrative practice, courts rarely engage in extensive substantive review of agency rule-making. Indeed, the U.S. Supreme Court has instructed lower courts not to “substitute [their] judgment for that of the agency.” It would be strange in international law for an international tribunal to engage in general de novo review of national legislation. Rather, review would ordinarily be limited to determining compliance with specific international legal rules.

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However, where international legal review involves a balancing test, examining factors like the
domestic benefit of the national regulation, as well as whether the national regulation constituted
the option least violative of international law reasonably available (as in a number of WTO and
other contexts), the factors to be considered can approximate what a legislature might consider in
determining public policy. The difference may simply be that the international legal review
requires *additional* factors to be considered, such as effects on foreign persons. We will see in
Part 2, that, although WTO tribunals have spoken of considering a broad range of these factors,
they do not actually do so.

**Review of Facts.** Fourth, courts can engage in various types of review, including de novo
review, of fact-finding, generally in connection with an adjudicative action by an agency. In
U.S. domestic administrative law, we rarely have de novo review of the substance of agency
fact-finding decisions. The WTO Appellate Body, in the context of national regulation of food
safety measures, has said that the role of WTO panels is not to engage in de novo review of
national fact-finding. The WTO establishes important *procedural* review with respect to
national adjudication in connection with anti-dumping duties, countervailing duties against
subsidies, and safeguards actions.

While these administrative law analogs raise interesting issues and provide a measure of
analytical leverage, it is important to recall that the default standard of review for international
law, either in the context of adjudication or in the context of auto-interpretation, is to determine
“compliance” with the requirements of the law. However, it is important to say that compliance
should be measured in relation to the specific terms or requirements of the law: if the law
requires substantive predicates for action, then judicial review evaluates whether that substantive
predicate has been met, while if the law requires countries to follow a process, review evaluates
whether the process has been followed.

If the actual terms of the law require countries to follow a process, without an objective
substantive requirement, we might say that this is a type of deference: so long as the required
process is followed, the adjudicator shall defer to the determination made, even if the adjudicator
believes the decision to be objectively incorrect. Furthermore, this type of deference may apply
to two types of determination: first, deference may apply to interpretation of the law’s
requirements, and second, deference may apply to determination of the facts to which the law
applies.

This article identifies some circumstances within WTO law in which a tribunal has in effect
converted a substantive requirement into a more limited requirement for process. These are
circumstances in which the tribunal has judicially moderated the international legal obligation

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8 Appellate Body Report, European Communities—Measures Concerning Meat and Meat
Products (Hormones), WT/DS26/AB/R, WT/DS48/AB/R, adopted 13 February 1998 EC-
Hormones, para. 117.
applied to countries, perhaps under the guise of establishing a standard of review that differs from simple “compliance.”

There are also circumstances, within WTO law and in other areas of international law, where framers of relevant treaties have chosen a requirement of procedure contingency instead of or in addition to specifying a substantive requirement of state contingency. An important example of WTO treaty law that imposes a requirement for regulatory process is the TBT Agreement, which requires an open process for establishing technical regulations.

e. Structure of the Article

In Part 2, I review selected instances in international law doctrine of the use of state contingency, rules, standards, and procedure contingency. This review is intended to provide examples, rather than to be comprehensive or empirically persuasive. This article makes explicit the choices that authors of international legal rules make in formulating international legal rules in terms of state contingency, more specific rules or more general standards, and procedure contingency. Doctrinally, it describes a drift in international trade law towards procedure contingency, even in some cases where the relevant text seems to call for state contingency. In Part 3, I develop a set of hypotheses regarding the conditions under which countries would choose state contingency, rules, standards, and procedure contingency. As noted above, international legal rules are formulated to cause internalization of policy externalities. But they are also formulated to preserve maximum policy flexibility for the bound countries, consistent with appropriate internalization of costs otherwise imposed on other countries. In Part 4, I conclude and suggest some avenues for further research.

2. The Use in International Law of State Contingency, Rules, Standards, and Procedure Contingency

In this Part, I provide selected examples of the uses of state contingency, rules, standards, and procedure contingency. The examples addressed include (i) specific types of national trade remedies disciplined under WTO law, (ii) exceptions for national regulatory measures that are “necessary” for protection of human health under WTO law, (iii) requirements that certain types of national regulation be supported by a scientific basis under WTO law, (iv) factual determinations under the WTO Anti-Dumping Agreement, (v) fair and equitable treatment standards in bilateral investment treaties, (vi) the use of complementarity under the Rome Statute for the International Criminal Court, and (vii) proportionality relating to protection of civilians in the laws of armed conflict.

a. Trade Remedies at the WTO

The WTO law of trade remedies—restrictions on national anti-dumping, anti-subsidies, and safeguards measures—on its face provides an excellent example of state contingent contracting in international law. This area of WTO law specifies the preconditions for specific types of trade
remedy actions, and countries are only permitted to take these actions if the preconditions are met.

The formal WTO treaty law in these areas is characterized by a combination of state contingency and procedure contingency, but the jurisprudence has in important groups of cases applied only procedure contingency, and avoided application of state contingency. That is, WTO dispute settlement has declined to determine for itself whether certain conditions for the application of trade remedies are met; rather, WTO dispute settlement has behaved as though the formal law is only procedure contingent. It evaluates whether the national authorities followed the appropriate procedure to make the relevant determinations, not whether the relevant determinations were factually correct.

The clearest case of this move from state contingency to procedure contingency is in the area of determining whether a domestic industry in the country imposing a trade remedies measure under safeguards has suffered serious injury within the meaning of the treaty.

Article XIX of the General Agreement on Tariffs and Trade (GATT), a sub-agreement of the WTO Charter, operates as an exception from the other rules of GATT—those that limit tariffs and generally prohibit quotas. Article XIX sets specific substantive conditions for the right of countries to impose safeguard measures. Under Article XIX, safeguards measures are permitted only if, as a result of (1) unforeseen developments and of the (2) effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions, any product is being imported into the territory of that contracting party (3) in such increased quantities and under such conditions as to (4) cause or threaten serious injury to domestic producers in that territory of (5) like or directly competitive products . . . . (numbering added)

Thus, there are five major conditions that must be satisfied for a country to impose a safeguard measure protecting against imports. In 1995, the WTO Agreement on Safeguards (Safeguards Agreement) came into effect to “establish rules for the application of safeguards measures” provided for in Article XIX. Art. 2 of the Safeguards Agreement provides that a WTO member may apply a safeguard measure to a product only if that Member has determined, pursuant to the provisions set out below, that such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and

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9 While the “GATT 1994” is a sub-agreement of the WTO Charter, it replicates precisely the pre-existing GATT, which was first entered into in 1947.
10 Safeguards Agreement, Art. 1.
under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products.\[11\]

Thus, while Article XIX of GATT focuses on *substance*, the Safeguards Agreement focuses on *procedure*. The Safeguards Agreement asks whether the member country has made the relevant findings pursuant to a proper procedure, not whether the relevant findings are substantively correct.\[12\]

In its 1999 decision in Argentina—Safeguards Measures on Importation of Footwear (“Footwear Safeguards”),\[13\] the WTO Appellate Body made two important findings in this regard. First, the Appellate Body found that “the ordinary meaning of Articles 1 and 11.1(a) of the Agreement on Safeguards confirms that the intention of the negotiators was that the provisions of Article XIX of the GATT 1994 and of the Agreement on Safeguards would apply cumulatively, except to the extent of a conflict between specific provisions.”\[14\] Cumulative application means that both sets of requirements apply to any national action. Thus, the procedural requirements of the Safeguards Agreement apply alongside the substantive requirements of GATT: the treaty structure is to provide both procedure contingency and state contingency. However, the Appellate Body exercised judicial economy, and, once it found violations of Articles 2 and 4 of the Safeguards Agreement, did not proceed to evaluate Argentina’s compliance with Article XIX itself.\[15\]

Second, and consistent with the language of the Safeguards Agreement, the Appellate Body found that the role of WTO dispute settlement in connection with the Safeguards Agreement is not to determine whether the substantive conditions for safeguards measures are met. Rather, in order “to determine whether the safeguard investigation and the resulting safeguard measure applied by Argentina were consistent with Article 4 of the Agreement on Safeguards, the Panel was obliged, by the very terms of Article 4, to assess whether the Argentine authorities examined all the relevant facts and had provided a reasoned explanation of how the facts supported their determination.”\[16\] This is procedure review.

During the WTO period (since 1995), no WTO tribunal has engaged in *substantive* determination of the facts that are the predicate for permissibility of safeguards action: all review of factual

\[11\] Safeguards Agreement, Art. 2.
\[12\] Perhaps it could be argued that it is *implicit* in the Safeguards Agreement that if a member country finding is *wrong*, it does not qualify as a determination, but it is certainly not explicit, and the Safeguards Agreement has not been applied to require state contingency, as opposed to mere procedure contingency.
\[14\] *Id.*, para. 89 (citing General Interpretative Note to Annex 1A of the WTO Agreement). *See also* para. 97.
\[15\] *Id.*, para. 98.
\[16\] *Id.*, para. 121.
determinations has been procedural.\textsuperscript{17} WTO jurisprudence in this area has focused on the procedural basis for the \textit{national} determination of the relevant parameters, and on the extent to which the national authorities provided a “reasoned and adequate explanation” of their action. These are administrative law-type tests. In the U.S.—Steel Safeguards case, the Appellate Body approved the standard of review applied by the Panel, which the Panel described as follows:

\dots the role of this Panel in the present dispute is not to conduct a \textit{de novo} review of the USITC's [United States International Trade Commission] determination. Rather, the Panel must examine whether the United States respected the provisions of Article XIX of GATT 1994 and of the Agreement on Safeguards, including Article 3.1. As further developed below, the Panel must examine whether the United States demonstrated in its published report, through a \textit{reasoned and adequate explanation}, that unforeseen developments and the effects of tariff concessions resulted in increased imports causing or threatening to cause serious injury to the relevant domestic producers. In considering whether the United States demonstrated as a matter of fact that unforeseen developments resulted in increased imports causing serious injury, the Panel will also examine, in application of its standard of review, whether the competent authorities "considered all the relevant facts and had adequately explained how the facts supported the determinations that were made."\textsuperscript{18}

Note that the Panel referred to the provisions of Article XIX, so its statement may be understood as suggesting that the \textit{only} review to be applied is procedure review. In the U.S.—Cotton Yarn case (which did not actually involve claims under the Safeguards Agreement) the Appellate Body summed up the standard of review under the Safeguards Agreement as follows:

Our Reports in these disputes under the \textit{Agreement on Safeguards} spell out key elements of a panel's standard of review under Article 11 of the DSU [Dispute Settlement Understanding] in assessing whether the competent authorities complied with their obligations in making their determinations. This standard may be summarised as follows: panels must examine whether the competent authority has evaluated all relevant factors; they must assess whether the competent authority has examined all the pertinent facts and assess whether an adequate explanation has been provided as to how those facts support the determination; and they must also consider whether the competent authority's explanation addresses fully the nature and complexities of the data and responds to other plausible interpretations of the data. However, panels must not conduct a \textit{de novo} review of the evidence nor substitute their judgment for that of the competent authority.\textsuperscript{19}

\textsuperscript{17} Even during the GATT period, it is arguable that there has not been any substantive review.
\textsuperscript{19} Appellate Body Report, US – Cotton Yarn, para. 74 (italics in the original).
This statement, from the Appellate Body, also may be understood as suggesting that the only review to be applied is procedure review. To conclude on the determination of injury in connection with safeguards, the Appellate Body has not required panels to engage in their own substantive fact-finding with respect to the parameters that are objective preconditions for safeguards action under Article XIX of GATT. It should be noted that no national safeguards measure brought before the WTO dispute settlement system has been found valid, and there is a possible argument that the failure to consider substance is simply a matter of judicial economy. But based on the evidence so far, and the statements of the Appellate Body, perhaps it is fair to say provisionally that the Appellate Body has effectively moved to a regime of exclusively procedural review, ensuring that the national authorities engage in an appropriate procedure.

Nothing in GATT, or in the Safeguards Agreement, would provide a textual basis for this relatively deferential standard of review. The standard of review applied so far seems inconsistent with the clear language of Article XIX of GATT, which establishes substantive conditions for the imposition of safeguards measures.

A procedure-only contingency is susceptible to two types of error: to circumstances in which the procedure is flawed but the substantive outcome is correct (false negative), and circumstances in which the procedure is correct but the substantive outcome is flawed (false positive). However, since no national safeguard measure has actually survived procedure review, and since no panel has actually gone on to engage in substantive review, we actually do not know whether if a safeguard measure survived procedure review it would be subjected to substantive review.

The correct approach under Article 11 of the WTO Dispute Settlement Understanding (DSU) clearly must be de novo review of whether these conditions are objectively met—the panel must determine whether the conditions for safeguards action set out in Article XIX of GATT are met. Yet, this de novo review would require much greater empirical and analytical resources than have so far been mustered by WTO tribunals.

This circumstance illustrates the possibility that tribunals may exploit ambiguity to apply a deference-type standard of review even where none is specified, engaging in judicial activism to move from the default rule of determination of simple “compliance” to a lesser standard. It may seem odd that a tribunal would engage in judicial activism to loosen the constraints on countries, but judicial activism can depart from the terms of the law’s instructions in the direction of either strictness or laxity.

b. “Necessity” Analysis: Brazil-Tyres

The Brazil-Tyres case\(^{20}\) decided by the WTO Appellate Body in 2007 presents a similar challenge to the analytical resources available in WTO dispute settlement, and a similar shirking

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by the WTO dispute settlement tribunals of their responsibility to make substantive determinations of objective conditions of action in accordance with the WTO treaty.\(^\text{21}\)

The Brazil-Tyres case arises in the contentious terrain of overlap between trade policy and environmental policy. On its face, the dispute was about whether the importing country would be required to compensate the exporting country, but at the core of this dispute was the question of which country would bear the costs of disposal of used tires. The EU benefited from the export of retreaded tires, while Brazil was concerned about the environmental damage that would come from the disposal of these retreaded tires after they reached the end of their useful life. Retreaded tires have a shorter useful life than new tires, and therefore have greater adverse consumption externalities.

Free trade and national environmental protection measures are not always consistent. Yet the parties to the WTO decided, and committed in WTO law, that even where a national environmental protection measure would otherwise violate a free trade rule of the GATT, the national environmental measure would generally be permitted, subject to certain conditions. It is important to recognize that member countries of the WTO were serious both about allowing great flexibility for national environmental measures, and about establishing some conditions so that this flexibility is neither unlimited nor abused. It is also important to recognize that by establishing the WTO dispute settlement system, member countries decided that WTO panels, and the Appellate Body on appeal, would generally decide disputes about the scope of this flexibility.

In the Brazil—Tyres case, the Panel and the Appellate Body were called upon to decide the scope of Brazil’s retained flexibility under WTO law to maintain an import ban on certain retreaded tires. In their decisions, the Panel and Appellate Body explored the scope of their own responsibility to evaluate and weigh several factors in connection with these types of cases under the exceptional provision of GATT relating to human health: Article XX(b).

Indeed, Article XX(b) is a good example of the type of state contingency pursuant to which WTO member countries agreed on the allocation of responsibility for the trade detriments that may arise from health and certain types of environmental protection. The agreement may be summarized as follows: to the extent that the trade detriments are necessary to protect human, animal, or plant life or health, the importing state action is permitted, and the exporting country must bear the burden of reduced market access.\(^\text{22}\)

\(^{21}\) For a more detailed treatment, see Chad Bown & Joel Trachtman, Brazil—Measures Affecting Imports of Retreaded Tyres: A Balancing Act, 8 (Special Issue 1) WORLD TRADE REV. 85 (2009).

\(^{22}\) Interestingly, in the Appellate Body Report in the Asbestos case, the Appellate Body suggested that the country maintaining a trade barrier justified under Article XX(b) might be required to provide trade compensation to the exporting country under the doctrine of non-
An optimal test in this type of case, unconstrained by treaty text, from the standpoint of global welfare maximization, would simply use cost-benefit analysis to determine whether the national measure produces net benefits, or net cost-reductions, compared to alternative measures that might be considered (including inaction). Thus, a full cost-benefit analysis in this context would evaluate the following parameters on a global basis, considering the profiles of proposed alternatives, and select the measure that has the best cost-benefit profile:

- Value of the regulatory goal,
- Contribution of the measure to achieving the regulatory goal,
- Cost of the regulatory measure, and
- Cost to trading partners and domestic consumers via the mechanism of a restriction on trade.

Indeed, rational countries would write this test into their agreements, assuming that the transaction costs of carrying out this analysis do not exceed the benefits of doing so. In this type of case, interpreting the “necessity” test of GATT Article XX(b) (and Article XX(d)), the WTO Appellate Body has consistently spoken of a test that weighs and balances to some degree each of the four factors mentioned above, but it has never documented in an opinion its application of this type of test, or insisted that panels actually apply this type of balancing test.

Most importantly, in Brazil-Tyres, the Appellate Body has shown itself unwilling to evaluate for itself, or to require a panel to evaluate, in any but the grossest categories, any of these four factors. Yet, one might ask, if you consider these factors, but you do not evaluate them, in the sense of assessing their magnitude, and you do not compare them with one another—the costs with the benefits—how do you determine which domestic measures are acceptable and which are not? It seems that the only responsible answer is that without careful evaluation of these factors by the tribunal, its only strategy other than ignorance is deference to the importing member country. This is the situation in which the Appellate Body finds itself, and the result has been extreme deference to the importing country, but it is difficult to reconcile this degree of deference with the Appellate Body’s treaty mandate.

It appears that the Panel, and the Appellate Body, sought to be deferential to Brazil’s regulatory autonomy, especially in the environmental context. It is easy to see why this is an attractive violation nullification or impairment. Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, adopted 5 April 2001.

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course. But in order to rationalize deference, and a move in effect from state contingency to procedure contingency, the decisions have done much violence to text, to precedent, and to legal logic.

Should the Appellate Body require panels to seek greater analytical capacity, perhaps in the form of expert assistance, in order to perform a more extensive analysis of these factors in particular cases? Until the Appellate Body does so, we can say that the rule has effectively been transformed from one of state contingency to one of procedure contingency, pursuant to which the international legal discipline applies to check whether the member country seems, on the member country’s own analysis, to have selected the less trade restrictive alternative.

c. SPS Requirements of Scientific Basis: EU-Hormones

Both the TBT Agreement and the SPS Agreement contain requirements regarding the process for establishing product regulations. For example, key provisions of the SPS Agreement provide that countries must ensure that SPS measures are based on scientific principles (Art. 2.2), and that a reflection of this requirement is that governments must base any SPS measure on an assessment of the risks to human, animal or plant life or health, taking into account risk assessment techniques developed by relevant international organizations (Art. 5.1). The risk assessment must identify the diseases, pests, etc. a country wants to prevent in its territory, identify the potential biological and economic consequences associated with such diseases, and evaluate the likelihood of entry, establishment or spread of these diseases (Art. 5.3). In the assessment of risks, available scientific evidence must be considered, as well as relevant processes and production methods; inspection, sampling and testing methods, and the prevalence of specific diseases or pests and environmental conditions (Art. 5.2).

At the core of the European Union’s appeal in the 2008 Canada/United States—Continued Suspension case was the argument that the panel had substituted its own judgment for that of the relevant WTO member: the European Union. The Appellate Body clarified that “the review power of a panel is not to determine whether the risk assessment undertaken by a WTO Member is correct, but rather to determine whether that risk assessment is supported by coherent reasoning and respectable scientific evidence and is, in this sense, objectively justifiable.” That is, the test is not state contingency but procedure contingency. A panel must also determine whether the results of the risk assessment "sufficiently warrant" the SPS measure.

The Appellate Body found that in first looking at expert opinion, and then examining whether the European Union’s risk assessment agreed with this opinion, the panel gave too little deference to

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27 Appellate Body Report, para. 591.
the member’s retained autonomy to engage in its own risk assessments.\textsuperscript{28} Therefore, the
Appellate Body determined that "the Panel failed to conduct an objective assessment of the facts
of the case, as required by Article 11 of the Dispute Settlement Understanding, in determining
whether the European Communities' risk assessment satisfied the requirements of Article 5.1 and
Annex A of the SPS Agreement."\textsuperscript{29} Accordingly, the Appellate Body reversed the panel's
finding that the European Union failed to satisfy the requirements of Article 5.1 and Annex A,
paragraph 4, of the SPS Agreement.

In Brazil—Tyres, it was seen that a balancing test may be very demanding to apply in technical
terms, and that panels may avoid carrying out these tests as described.\textsuperscript{30} In fact, these tests may
require the panel to second-guess some of the public policy evaluations that governments often
carry out in order to determine their measures. This type of second-guessing is precisely the type
of judicial exercise that has also been rejected under the scientific basis provisions of the SPS
Agreement. Indeed, the Appellate Body decision in the Continued Suspension case may be
understood along parallel lines, as an interpretation of the SPS Agreement that limits the scope of
international judicial scrutiny of national use of science as a basis for public policy.

d. Article XVII of the ADA

The discussion above of the role of procedure contingency in connection with safeguards, Article
XX of GATT, and SPS measures involves portions of the WTO treaty that do not explicitly limit
judicial review. However, as shown above, WTO jurisprudence has sharply limited judicial
review, seeking to determine whether countries engaged in appropriate processes, rather than
determining the correctness of national determinations. In the particular, and limited, context of
the WTO Anti-Dumping Agreement, the members of the WTO provided specifically in Article
17.6 for deference to fact-finding by national authorities:

\begin{quote}
In [a WTO panel’s] assessment of the facts of [a complaint regarding improper
imposition of anti-dumping duties], the panel shall determine whether the authorities'
establishment of the facts was proper and whether their evaluation of those facts was
unbiased and objective. If the establishment of the facts was proper and the evaluation
was unbiased and objective, even though the panel might have reached a different
conclusion, the evaluation shall not be overturned . . . .
\end{quote}

This is an explicit-treaty-based expression of procedure contingency. Note that if the national
authority’s fact-finding was procedurally proper, it is deemed correct for purposes of the
complaint. Note also that since this limitation is not provided outside of the anti-dumping area,

\begin{flushright}
\textsuperscript{28} Appellate Body Report, paras. 598-602.\
\textsuperscript{29} Appellate Body Report, para. 616.\
\textsuperscript{30} Bown & Trachtman, supra note 21.
\end{flushright}
an expressio unius interpretive approach would argue that this type of deference should not be available in other areas of WTO law.31

e. Fair and Equitable Treatment Under International Investment Law: Metalclad v. Mexico

In another area of international economic law—international investment law—restrictions on national action contain elements of state contingency and procedure contingency. As to procedure contingency, the International Center for the Settlement of Investment Disputes arbitral decision in the case of Metalclad Corp. v. Mexico32 provides an important example.

North American Free Trade Agreement (“NAFTA”) Article 1105(1) provides as follows:

Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

In the Metalclad case, applying Article 1105(1), the tribunal found that:

Mexico failed to ensure a transparent and predictable framework for Metalclad’s business planning and investment. The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA.33

This is a clear example of international investment law constituting a kind of global administrative law,34 in this case providing for procedural review of environmental permitting in Mexico.

f. Complementarity in ICC

Complementarity is an emerging approach to the role of international law and institutions. It makes the use of international law and institutions contingent on failure by countries to take sufficient procedural steps. In this way, it can be understood as a type of procedure contingency: it does not require that national prosecutions convict guilty defendants—it merely requires that

32 Metalclad Corp. v. The United Mexican States, CASE No. ARB(AF)/97/1, August 30, 2000.
33 Id., para. 99
34 See Gus Van Harten & Martin Loughlin, Investment Treaty Arbitration as a Species of Global Administrative Law, supra note 2 (emphasizing other aspects of international investment law as global administrative law).
appropriate prosecutions take place. A leading example of complementarity can be seen in the Rome Statute for the International Criminal Court (ICC).

The jurisdiction of the ICC is intended to be complementary to national criminal jurisdiction. Therefore, under Article 17 of the Rome Statute, a case otherwise within the ICC’s jurisdiction will be inadmissible when it “is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution” and under other related circumstances. Conversely, the central legal obligations relating to the ICC become effective only where the relevant countries are unwilling or unable to carry out the investigation or prosecution. Note that this arrangement can be characterized in either of two ways: (i) as a limited delegation by countries to the ICC, or (ii) as a limited delegation by the ICC to countries. As a limited delegation to countries, it ensures that countries have a certain level of incentives to investigate or prosecute relevant crimes, or simply supplements their capabilities where they are unable to do so.

g. Proportionality in the Law of Armed Conflict

*Jus in Bello* proportionality requires that the damage to civilians caused by an act of war not be excessive in relation to the anticipated military advantage. Specifically, Article 51(4) of the Additional Protocol to the Geneva Convention of 1977 provides that “indiscriminate attacks are prohibited.” Article 51(5) provides that “among others, the following types of attacks are to be considered as indiscriminate (a) . . . and (b) an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”

Similarly, Article 8(2)(b)(iv) of the Rome Statute of the International Criminal Court provides that the following is a war crime, subject to the jurisdiction of the ICC: “intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.” This formulation provides some clarification that the intent and knowledge of the attacker, as well as the military advantage anticipated by the attacker, are critical to the analysis. Under this formulation, if the incidental loss is far greater than the achieved advantage, it is still possible for the attacker to be innocent, so long as his anticipation of loss is not excessive in relation to his anticipation of advantage. Of course, as many have pointed out, these elements are quite incommensurable.

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35 See The Prosecutor v Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali (ICC-01/09-02/11 OA) (finding that Kenya had not adequately shown that it satisfied the requirement to investigate or prosecute).
The attacker is required to engage in a procedure designed to determine whether its attack is proportionate.\footnote{Jean-Marie Henckaerts & Louise Oswald-Beck, Customary International Humanitarian Law Rules, ICRC (2005) (ICRC Rules), Rule 14; Moshe Cohen-Eliya, The Formal and Substantive Meanings of Proportionality in the Supreme Court’s Decision Regarding the Security Fence, 38 ISR. L. REV. 262, 288-289 (2005).} The law of armed conflict principle of precaution similarly requires attackers to engage in a procedure designed to protect civilians.\footnote{“Precaution requires that, before every attack, armed forces must do everything feasible to: (i) verify the target is legitimate, (ii) determine what the collateral damage would be and assess necessity and proportionality, and (iii) minimize the collateral loss of lives and/or property.” Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Philip Alston, 28 May 2010, at para. 58, \textit{citing} Additional Protocol I, art. 57; ICRC Rules 15-21.} These rules seem to constitute a type of procedure contingency.

3. Developing Hypotheses

When do countries use international legal rules that incorporate state contingency? When are more specific rules used in preference to less specific standards? Finally, when do countries use procedure contingency instead of state contingency? This Part develops some hypotheses as to the conditions under which countries choose these different types of legal rules. Some of these hypotheses may be difficult to test, involving difficult assessments of fact, and of course, in this article, I do not seek to prove them.

a. Countries use international legal rules in the regulatory context in order to induce other countries to take account of external effects of their regulation, where the transaction costs of doing so are not excessive in relation to the benefits.

When do countries create international legal rules that constrain the regulatory activities of other countries? According to the subsidiarity principle, countries should have no concern with the activities of other countries, unless those activities cause external effects. Broadly speaking, there should be no international law without international external effects, including the effects entailed by public goods, economies of scale and regulatory competition. These external effects may be physical, market-based (“pecuniary”), moral, or aesthetic. They may be beneficial or harmful. As globalization and industrialization grows, these external effects become greater.

Thus, for example, the financial regulation (or deficiencies therein) in one country may be associated with adverse or beneficial effects (negative or positive externalities) in other countries. Externalities may be addressed through rules of jurisdiction that accord the affected country control over the injurious behavior.

The externalization problem is accentuated by the diversity, or asymmetry, of countries’ positions. Some countries may be regulatory “havens” that provide lax regulation because the adverse effects of the lax regulation will largely be felt externally, while the positive effects in terms of tax revenues and employment can be enjoyed by the regulatory haven.
Furthermore, one country’s strict regulation might provide positive externalities to other countries. Because this is a positive externality, the first country may require some incentive—in terms of some type of narrow or diffuse reciprocity—as compensation. International cooperation can set the terms of such reciprocity.

Thus, there will be circumstances in which international cooperation is useful in order to cause countries to internalize externalities: to establish congruence between decision-making authority and the effects of the exercise of authority. In an increasingly interdependent world, we would expect increasing instances in which the national exercise of authority has consequences for people outside the national political community. The Pigovian function of international law is to bring the international effects of national decisions to bear on national authorities, where, as Coase pointed out, it is worthwhile in transaction cost terms to do so.

b. Countries use international legal rules that provide detailed state or procedure contingency where it is difficult ex ante to specify which circumstances will give rise to inefficient externalities.

How can countries best contract over externalities? Henrik Horn notes that a complete contract that specifies permissible policies in all possible states of the world is simply infeasible: the costs of writing and enforcing any such agreement are prohibitive even assuming heroically that governments are able to specify ex ante all the regulatory needs, and needs for exceptions, that may arise in the future. Many of the international legal rules described in Part 2 above can be understood as components of state contingent contracts, delegating to the dispute settlement process, where available, the task of determining the state. The degree to which state contingencies result in beneficial internalization of externalities (i.e., in contract completeness) needs to be examined.

Horn develops a model for evaluation in the context of the national treatment anti-discrimination rules of the WTO. There, given tariff commitments, a marginally binding national treatment provision will increase government welfare, but moving beyond this and further tightening national treatment may reduce welfare. The problem caused by tariff bindings combined with a hypothesized strict national treatment rule (one that is unable to use regulatory categories to distinguish between products) is that insofar as imported products cause externalities, governments no longer can use the tariff to offset these externalities.

Instead they must use domestic instruments, which, because of an assumed strict national treatment rule, must apply equally to local and imported goods. As a result, an importing country that is being forced to abide by an equal or non-discriminatory taxation requirement will set a uniform tax that is, from an international efficiency point of view, too high with regard to the domestic product (which is assumed not to produce a negative externality), and too low with regard to the imported product (which is assumed to produce a negative externality). As a

consequence, provided the externality problem is sufficiently severe, the imposition of national treatment may be internationally inefficient.\footnote{Costinot develops a model showing that national treatment results in standards that are excessively restrictive, due to failure to take account of the interests of foreign producers exporting to the regulating market. On the other hand, under a regime of mutual recognition in which each country undertakes to accept as satisfactory the regulation of the home country of the exported good, standards will be too low due to a race to the bottom effect in which the regulating government fails to account for foreign externalities. See Arnaud Costinot, A Comparative Institutional Analysis of Agreements on Product Standards, 75 J. INT’L ECON. 197 (2008).}

But the WTO national treatment rule is much more nuanced than the hypothesized strict rule. Horn explains that information about government preferences is at the core of the problem that a more nuanced national treatment rule is intended to solve. We want to allow governments to utilize a tax or regulation that results in a first-best solution, but cannot be sure whether they are abusing this discretion by exaggerating their regulatory preferences.

If we were to assume that such information [regarding government preferences in order to determine the first-best solution] is verifiable, in the context of the present model there would exist [a simple solution]: a provision simply requesting the parties to "set internal taxes to their first-best levels." This would implement the first-best outcome even if tariff negotiators were myopic, as long as the tariffs were set sufficiently low, since this would leave room to set total taxes at the first-best level, once the state of nature is realized. Presumably, the reason why we do not see such a provision lies in the difficulty to prove whether a set of taxes that benefits domestic interests, and harms foreign interests, is chosen to exploit neighbors, or because the importing government's preferences are such as to make the chosen taxes efficient from a global point of view. That is, it requires the adjudicator to effectively determine the intent behind the de facto discriminatory taxes, something the Appellate Body in the WTO has repeatedly (but not always very convincingly) claimed to be irrelevant to its decisions.\footnote{Horn, \textit{supra} note 39, at 402.}

The question that Horn focuses on is whether domestic regulators are engaging in first-best regulation, or instead are motivated by protectionism. The necessity requirement of Article XX(b) of GATT may be said to respond to precisely this question: how do we determine the intent of internal regulation that has adverse effects on imports—how do we get closer to a requirement to set internal regulation at its first-best level?\footnote{While there is no WTO law requirement that domestic regulators set internal regulation at first-best levels, the necessity requirement and the scientific basis requirement, discussed in Part 2 above, achieve a closer approximation of this test than mere national treatment. In order to get closer to a first-best level, it might be useful to suppress regulation that has greater adverse}
The nature of the externality arising from imports is left unclear in the Horn analysis, which is very general. In the case of health or environmental measures, tariffs would often be very poor substitutes for regulation—uniformly applied tariffs that do not distinguish between products that cause an externality and those that do not cannot address the local consumption externality or information problem that is created by or associated with the characteristics of the product or its by-products. Under the more nuanced national treatment principle of Article III of GATT, if the imported products cause negative externality problems because they are different from domestic products, the imported products may well not be “like” the domestic products, and so Article III would not require “no less favorable” treatment. However, the Appellate Body has articulated a test for “likeness” that focuses on competition in the market, and so may fail to take account of consumption externalities or information problems.

The scientific basis requirement at issue in Continued Suspension can be interpreted as a means for determining the intent of an SPS measure, just as the less trade restrictive alternative analysis of the Article XX(b) necessity standard, applied in Brazil—Tyres can be understood as a means for determining the intent of health measures under the GATT. But all of these standards seem motivated by a concern to prevent countries from adopting measures intended adversely to affect the competitive position of imported products.

Although the scientific basis test and necessity test can be regarded as proxies by which to measure intent, the Appellate Body reports in Continued Suspension and Brazil—Tyres make clear they are weak tests, making a marginal contribution toward completing the WTO contract. In the case of SPS measures, governments are free to apply whatever level of protection they deem appropriate, a minority scientific view is enough to justify a measure, and panels have no business assessing what is “good science,” evaluating whether the risk assessment undertaken by a government is “correct,” or giving more weight to the majority view in the scientific community. In the case of measures covered by Article XX(b), panels do not evaluate except superficially whether the importing country has chosen the less trade restrictive alternative, or whether alternative measures actually could achieve the selected level of protection.

It is easy to see a standard, combined with mandatory dispute settlement, as a means by which to complete incomplete contracts, ex ante, in a way that can under particular circumstances minimize costs of contracting. Horn, Maggi and Staiger examine the GATT, finding that it includes an interesting combination of “rigidity, in the sense that contractual obligations are largely insensitive to changes in economic (and political) conditions, and discretion, in the sense that governments have substantial leeway in the setting of many policies.\(^{43}\)

Under significant uncertainty as to the future state of affairs, countries would wish to establish complex state-contingent contracts. For example, ex ante, the magnitudes of (i) the benefits of environmental protection, and (ii) the benefits of unimpeded free trade in particular products that may violate environmental rules, are uncertain. However, contracting is costly, limiting the ability to specify state-contingencies. On the other hand, by specifying general “standards,” and delegating to dispute settlement bodies the responsibility to apply these standards, countries are able to include complex state-contingency in their contracts, with significantly less variable contracting costs.

c. Countries establish more specific “rules” where the types of conduct to be proscribed (c1) are more readily anticipated in advance, and (c2) occur with greater frequency.

Countries write treaties ex ante to govern actions ex post. In order to do so, they must describe which actions will have which consequences. They can do so with lesser or greater specificity. All international agreements, like all contracts, are incomplete. Countries may specify how they are to be completed either by stating with specificity the conditions of application of the rule, or by delegating to future decision-making the determination of whether those conditions are satisfied.

In the rules versus standards literature, a law is a “rule” \textit{to the extent that} it is specified in advance of the conduct to which it is applied.\footnote{For an introduction to the rules versus standards discussion in law and economics, see Louis Kaplow, \textit{General Characteristics of Rules}, in \textit{ENCYCLOPEDIA OF LAW AND ECONOMICS} (B. Bouckaert & G. De Geest, eds. 1998); Louis Kaplow, \textit{Rules Versus Standards: An Economic Analysis}, 42 DUKE L.J. 557 (1992). \textit{See also}, Cass R. Sunstein, \textit{Problems with Rules}, 83 CAL. L. REV. 955 (1995).} Thus, a law against littering is a rule to the extent that “littering” is well-defined. Must there be an intent not to pick up the discarded item; are organic or readily bio-degradable substances covered; is littering on private property covered; is the distribution of leaflets by air covered? Any lawyer knows that there are always questions to ask, so that every law is incompletely specified in advance, and therefore incompletely a rule.

A standard, on the other hand, is a law that is farther toward the more general end of the spectrum, in relative terms. It establishes general guidance to both the person governed and the person charged with applying the law, but does not specify in detail in advance the conduct required or proscribed. Incompleteness of specification may not simply be a result of conservation of resources. It may be a more explicitly political decision to either agree to disagree for the moment, to avoid the political price that may arise from immediate hard decisions, or to cloak the hard decisions in the false inevitability of judicial interpretation. It is important also to recognize that the incompleteness of specification may represent a failure to decide how the policy expressed relates to other policies. This is critical in the trade area, where often the incompleteness of a trade rule relates to its failure to address, or incorporate, non-trade policies.
Rules are more expensive to develop than standards, ex ante, because rules entail greater specification costs, including drafting costs and negotiation costs. In order to reach agreement on specification—in order to legislate specifically—there may be greater political costs. On the other hand, standards often involve greater ex post costs. These ex post costs include the costs of ex post decision-making after the circumstances calling for a decision arise, but also include the agency costs associated with delegation to a judicial, administrative, or other ex post decision-maker. The ex post decision-maker may shirk its duties or may be subject to conflicts of interest. A principal may be hampered in supervising its agent by asymmetrical availability of information. A country owed an obligation under international law will often be in a position vis-à-vis the country owing an obligation that is analogous to that of a principal seeking to supervise its agent. The principal may control its agent with greater specification—with more rules, but may also utilize required procedures, transparency, and requirements for logical reasoning in order to control its agent. In this sense, procedure contingency may supplement state contingency utilizing standards.

Rules are generally thought to provide greater predictability. There are two moments at which to consider predictability. First, is the ability of persons subject to the law to be able to plan and conform their conduct ex ante, sometimes known as “primary predictability.” The second moment in which predictability is important is ex post, after the relevant conduct has taken place. Where the parties can predict the outcome of dispute resolution—where they can predict the tribunal’s determination of their respective rights and duties—they will spend less money on litigation. This type of predictability is “secondary predictability.” Both types of predictability can reduce costs.

While rules appear to provide primary and secondary predictability, tribunals may construct exceptions in order to achieve goals they think worthy, and thereby reduce predictability. It may be difficult to constrain the ability of tribunals to do this. Furthermore, some degree of uncertainty—of unpredictability—may enhance the ability of the parties to bargain to a lower cost solution. Thus, simple predictability is not the only measure of a legal norm; rather, we must also be concerned with the ability of the legal norm to provide satisfactory outcomes.

As we consider the relative allocative efficiency of potential outcomes, we must recognize that there is a temporal distinction between rules and standards. Standards may be used earlier in the development of a field of law, before sufficient experience to form a basis for more complete specification is acquired. In many areas of law, courts develop a jurisprudence that forms the basis for codification—or even rejection—by legislatures. With this in mind, legislatures may set standards at an early point in time, and determine to establish rules at a later point in time. A common law system, or one that otherwise relies on precedent, may be understood as a hybrid standards-rules system, in which standards evolve into rules through experience-based precedent.

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47 See Kaplow, General Characteristics of Rules, supra note 44, at 10.
Kaplow points out that where instances of the relevant behavior are more frequent, economies of scale will indicate that rules become relatively more efficient. For circumstances that arise only infrequently, it is more difficult to justify promulgation of specific rules. In addition, rules provide compliance benefits: they are cheaper to obey, because the cost of determining the required behavior is lower. Rules are also cheaper to apply by a court: the court must only determine the facts and compare them to the rule.

It is not possible to consider the costs and benefits of rules and standards separately from the strategic considerations that would cause countries to select a rule as opposed to a standard. Where adjudication of an international legal rule is unlikely, which is the case for most international legal rules, specific rules may result in greater compliance, which might be understood as a benefit. This is the role of the concept of “precision” advanced in the “legalization” literature on international law.48

Johnston analyzes rules and standards from a strategic perspective, finding that, under a standard, bargaining may yield immediate efficient agreement, whereas under a rule, this condition may not obtain.49 Johnston considers a rule a “definite, ex ante entitlement” and a standard a “contingent, ex post entitlement.” Johnston notes the “standard supposition in the law and economics literature . . . that private bargaining between [two parties] over the allocation of [a] legal entitlement is most likely to be efficient if the entitlement is clearly defined and assigned ex ante according to a rule, rather than made contingent upon a judge’s ex post balancing of relative value and harm.”50 Johnston suggests this supposition may be incorrect:51 “When the parties bargain over the entitlement when there is private information about value and harm, bargaining may be more efficient under a blurry balancing test than under a certain rule.”52 This is because under a certain rule, the holder of the entitlement will have incentives to “hold out” and decline to provide information about the value to him of the entitlement. Under a standard, where presumably it cannot be known with certainty ex ante who owns the entitlement, the person not possessing the entitlement may credibly threaten to take it, providing incentives for the other person to bargain. Johnston points out that this result obtains only when the ex post balancing test is imperfect, because if the balancing were perfect, the threat would not be credible. This provides a counter-intuitive argument for inaccuracy of application of standards.53

d. Countries use process contingent contracting where it can sufficiently bind counter-parties while preserving a desirable level of local autonomy.

50 Id. (citations omitted).
52 Johnston, supra note 49, at 257.
53 Id. at 272.
Whenever externalities are internalized, the decision-maker is induced to take account of the external effects. Procedure contingency can serve to require the decision-maker directly to take account of the external effects, within the prescribed procedure, without necessarily bearing responsibility for the adverse effect. Just as a legislature may provide for judicial review in order to control the discretion of administrative agencies under their statutory authorization, countries party to a multilateral agreement may provide for dispute settlement in order to control the discretion of individual countries under the agreement. There is no doubt that procedural rules can have substantive effects.

As noted above, there are a number of different types of review that may be applied to national decisions. I will focus here on review by an international court of (i) national interpretation of treaty requirements, (ii) national regulation, and (iii) national agency determinations or adjudications.

Here, we can see in the field of contingent protectionism such as safeguards, in Brazil—Tyres, and in Continued Suspension, that WTO law can be understood as imposing procedure contingency as to national regulatory measures in particular fields. To some extent, as noted at the outset of this article, these procedure contingency requirements can be understood in terms of policy externalities as a kind of “virtual representation” of foreign persons in the policy process: the procedure contingency induces countries to make appropriate findings showing that they considered less protectionist alternatives, or that they had a scientific basis for their action.

Most scholars argue that the transparency of an agency, its duty to consult the stakeholders, weight their arguments and give the reasons for its decision, amount to a form of ‘soft accountability’ which is an acceptable substitute for classic electoral mechanisms where these do not fit the institution.54

In the U.S. administrative law context, process review examines the regularity of the process by which the regulation is produced. The U.S. Supreme Court has applied a “hard look” review to the agency process of establishing rules.55 Under these precedents, the reviewing court does not engage in de novo review, but instead determines whether the agency action is reasonable. In the U.S. administrative law context, a group that is currently in power in a legislature may anticipate that it will be out of power in the future, and seek to insulate its legislation from interference by a future government through administrative action.56

Another consideration regarding procedure contingency is that, to the extent that it requires work that would otherwise not be deemed necessary in the domestic context, it makes regulation more expensive.

In an analogous sense, a treaty partner able to negotiate a treaty today may seek to insulate the counterparty’s performance from interference by a future government of the counterparty. Treaty partners are increasingly aware of the need to analyze the extent to which their counterparties are likely over time to comply with their commitments. They can do so by requiring the counterparty to establish structural mechanisms through procedure contingency rules. While the counterparty may indeed violate both the procedure contingency and a related state contingency, violation of the procedure contingency will require it to maintain a constant violation, or to demean its own rule of law. That is, it will need to either decline to establish the required procedure, or refuse to follow the required procedure in a particular circumstance.

Foreign country counterparties might use procedure contingency to reduce the likelihood that the domestic government will renege on its commitments. As Terry Moe suggests, there are various structural means by which to constrain a future government to carry out a particular policy:

- write a detailed law that imposes rigid constraints on the administrative mandate and decision procedures;
- establish requirements for professional decision-making, since professionals resist political interference;
- oppose formal provisions that enhance political oversight and involvement; or
- favor judicial review of agency decision-making.

On the other hand, there are converse structural means to impede a future government in carrying out a particular policy:

- detailed provisions for political control of agency action, including legislative veto and monitoring;
- participatory agency decision-making procedures, including judicial review; or
- requirements for agency decision-making to be accompanied by detailed evidence and objective analytical statements, also facilitating judicial review.

Review under international law of national agency determinations or adjudications may be understood in a similar way: countries are permitted to act, as in to impose a safeguards measure, only upon the establishment of certain facts. But it is not necessary to achieve the counter-parties’ purpose to review the facts themselves. For example, as described in Part 2, the

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59 *Id.*, 275-76.
WTO Appellate Body in important contexts has found that the standard of review of national agency determinations is not de novo review—WTO panels are not required to check the facts that form the basis for the action, but are only required to check the procedure by which the national agency checked the facts that form the basis for the action.

Once countries understand the level of review required, they can set their procedures in such a way as to comply with the requirement. It is entirely possible that their procedure would superficially comply, while the substance of their determination is false. In order to set up its system this way, the country doing so would in effect have to sacrifice its own rule of law and the integrity of its legal system. If the national authorities apply the correct standard, and follow the correct procedure, they are otherwise unlikely to stray too far from the intent of the international legal rule.

e. Countries use process contingent contracting under conditions of information asymmetry that make state contingent contracting difficult.

Writing of burdens of proof (BoP), Eric Talley makes the following statement about the welfare stakes involved in determining the BoP:

This criticality of process in general—and the BoP in particular—may be especially salient in cases where the economic stakes are high, and where the informational environment is complex, opaque, and difficult to navigate. In such situations, it is plausible that no single entity—not the jury, not the judge, not attorneys, not the parties themselves—has full and complete command of all the “facts” pertinent to a legal dispute. It is here where the burden allocation may be the most influential in catalyzing information discovery, reducing verification costs, and ultimately contributing to overall welfare policy goals.⁶⁰

Of course the type of procedure contingency discussed in this article is not the same thing as a BoP. Rather, procedure contingency can best be analogized to a conditional presumption to the effect that if the procedure followed by the respondent country conforms to legal requirements, then there will be a presumption that the substantive act taken by the respondent country conforms to the relevant legal requirements. However, the core problem to which BoPs respond, and to which procedure contingency seems to respond as well, is the inability of the decision-maker—in our case the international tribunal—directly to observe the conditions of liability.

For example, in the Brazil—Tyres and Continued Suspension cases, the international tribunal is unable directly to observe the intent of the regulating country. In the WTO context, procedure contingency may be understood as establishing a presumption that, if requisite procedures are followed, then it is appropriate to presume that the intent is non-protectionist. Similarly in the

case of safeguards: if requisite procedures are followed, we presume that the intent is not falsely
to claim causation of injury by increased imports.

What is the rationale for making these presumptions? Under a decision-theoretic approach, as
described by Talley, “the fact-finder’s role is tantamount to a welfare-minded social planner,
using adduced evidence to learn and make decisions within an information-constrained
environment. The evidence produced in a case enables an uncertain fact-finder to “update” her
assessment of the case (possibly in a Bayesian manner) in light of that evidence.” 61 This is
consistent with the approach to national treatment taken by Horn in the WTO context: national
treatment is a proxy for the first-best nature of the national regulation.

Where the critical facts are not directly observable by the fact-finder, the fact-finder must
determine whether to rely on other facts that are statistically correlated with the critical facts.
The other facts are not perfectly statistically correlated with the critical facts, so the decision-
maker must assess their correlation, and weigh the costs of false negatives and false positives, as
as well as the costs of inquiry, in order to determine how to proceed.

In international law, it is difficult to assess how a decision-maker would weigh the costs of false
negatives and false positives. It might be that false positives (erroneous findings of violation) are
more costly, because of a weighting in favor of untrammeled sovereignty (in dubio mitius).
Alternatively, if the adjudicator has a view that the permitted action is normatively unattractive
(as might generally be the case with safeguards, anti-dumping duties, and countervailing duties),
it might determine that false negatives are not very costly, at least insofar as the adjudicator is
concerned about the public welfare.

However, in the special case in which the false negatives and false positives are weighted
equally, reliance on the presumption can be justified where it is more likely than not that the
other facts are indicative of the critical facts. More generally, a welfare-minded social planner
would optimize given the relative probabilities, and the relative costs of false negatives and false
positives.

As we consider these ideas regarding BoP, we might ask what inferences we can draw regarding
the likely effects of the move from state contingency toward procedure contingency documented
in Part 2? For one, provided that the procedures required by procedure contingency are not
unreasonable for countries to follow, we would expect procedure contingency to represent
greater latitude for national action than state contingency.

But this does not necessarily suggest greater efficiency, reduced litigation, or increased success
for respondents in litigation. Efficiency is rather ambivalent, and we would need to know a great
deal more about the utility of safeguards measures in order to assess efficiency. Indeed, as

61 Id., citing Eberhard Fees, Gerd Muehlheusser & Ansgar Wohlschlegel, Environmental
suggested above, less latitude for safeguards measures might be more consistent with efficiency in the welfare sense. Litigation might not be reduced, because the greater flexibility for national action could induce countries to hew less closely to legal requirements, giving other countries more reason to complain, and greater chances for success.62

In addition, the actual regulatory purpose may be quite difficult to observe. So, if the optimal bargain among countries in the trade and environment or trade and health context would involve prohibition of measures that are motivated by protectionism, it seems plausible that other facts might be selected for evaluation because they are good proxies for protectionist intent.63 The proxies that have been chosen have included (a) discrimination in the national treatment sense, (b) failure to choose the less trade restrictive alternative, and (c) failure to base the measure on a science-based risk assessment. In the area of safeguards, it seems costly to ask panels to develop the ability to engage in de novo review of factual determinations made by national authorities, so the proxy of procedural review—of procedure contingency—seems plausible.

Countries that take regulatory action often have engaged in public policy studies in order to determine their action. The examples of procedure contingency provided in this article involve circumstances where the regulating country has superior access to information, and has deployed superior expert analysis, compared to anything likely to be deployed by other countries that may complain about the regulating country’s action, and compared to anything likely to be readily available to international tribunals. It may be highly impractical, and can be very costly, to recreate these analyses. Even within the domestic legal system, we sometimes defer to the knowledge and expertise of those subject to the law, as in the legal doctrines of the business judgment rule in corporate law, or the due diligence defense in corporate law. These domestic doctrines can be understood in terms of procedure contingency.

The international law of cooperation frequently couches its obligations using concepts that make sense to experts, but that are not readily applied by laypersons. Obligations under the SPS agreement utilize and refer to biological knowledge, many obligations under other WTO law utilize and refer to economic knowledge, and the law of armed conflict concept of proportionality refers to military knowledge. In applying these types of provisions, a tribunal has little choice but to defer to experts—the question is whether to defer to national experts of the respondent country, or to hire independent experts.

It might be argued that it is better to have the litigants bring their own experts, and have the panel determine which experts present the better argument. However, panels generally lack the expertise to critique complex scientific or economic analyses. “A non-expert cannot

independently and directly check complex theoretical propositions that do not have simple observational consequences . . . . Whatever checking the non-expert can manage must rely on indirect devices like demeanor, credentials, and reputation.\footnote{64}

In any particular circumstance, it will require a complex calculus to determine whether to defer to national knowledge and expertise through exclusive procedure contingency, or to add state contingency and provide an independent expert review of complex facts. Part of the benefit of deference is to avoid chilling good faith national determinations—this is a kind of subsidiarity. Part of the detriment of deference is the risk of bias. But there are a number of other costs and benefits to be weighed in determining how to proceed.

4. Conclusion

This article describes the growth of state contingency and procedure contingency, and rules and standards, in international law, and develops some hypotheses regarding their use. It would be useful to develop greater theoretical and empirical understanding of the ways in which international legal structures are designed to use these devices to regulate national action. What are the advantages and disadvantages of each structure? With what parameters of specific international contexts does each structure match well? This article only begins to suggest the responses to these questions.

State contingency and procedure contingency are ways of providing for the completion of incomplete contracts in international law. They are ways of providing that regulating countries must take into account the concerns of other affected countries, either by refraining from action where the concerns articulated in state contingency are not met, or by following a procedure designed to take into account the concerns of other affected countries. As national regulation and globalization grow, we can expect to see increasing state contingency and procedure contingency.

Countries may articulate their state contingency or procedure contingency with greater or lesser precision—with rules or standards. Where adjudication takes place, standards implicitly allocate authority to the tribunal responsible for adjudication. Rules involve greater ex ante costs, but can provide economies of scale where the relevant issue will arise frequently. In the absence of adjudication, rules, being more precise and thereby making it easier for third countries to observe compliance or violation, may induce greater compliance than standards.

How can countries choose between state contingency and procedure contingency? Where the relevant conditions are easier for the regulated country to observe, and difficult for other countries or tribunals to observe, procedure contingency may be superior to state contingency.

\footnote{Scott Brewer, Scientific Expert Testimony and Intellectual Due Process, 107 Yale L.J 1535 (1998).}
Procedure contingency may be an appropriate substitute for state contingency where following the appropriate procedures is a close proxy for the existence of the desired conditions. Where the procedural requirements are not perfectly statistically correlated with the desired conditions, it is necessary to assess their correlation, and weigh the costs of false negatives and false positives, as well as the costs of inquiry, in order to determine whether to use them as proxies.

Procedure contingency can operate as a kind of virtual representation of outsiders to regulatory processes. Furthermore, procedure contingency can be used by other countries to embed a set of considerations within the administrative and legal processes of the obligee country, making compliance less susceptible to subsequent political shifts. In effect, domestic rule of law in the obligee country is made hostage to compliance.

The above considerations may suggest why countries would choose specific international legal mechanisms in order to cause other countries to internalize certain externalities in their regulatory decision-making. They may serve as a guide to countries seeking to formulate international legal mechanisms.

This article contributes to an increased focus of global administrative law studies on the way in which international legal structures regulate national administrative action. Most global administrative law studies have focused on the administrative law analysis of international legal structures. This article shows the rich potential for scholarship in the reverse area: administrative law analysis of international legal rules that restrict national action.

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