Amsterdam Center for International Law
University of Amsterdam

SHARES
RESEARCH PROJECT ON
SHARED RESPONSIBILITY IN INTERNATIONAL LAW

RESEARCH PAPER SERIES

SHARES Research Paper 55 (2014)

Ex Ante and *Ex Post* Allocation of International Legal Responsibility

Joel P. Trachtman
The Fletcher School of Law and Diplomacy

Cite as: SHARES Research Paper 55 (2014)
available at www.sharesproject.nl

Forthcoming in: André Nollkaemper & Dov Jacobs (eds.), *Distribution of Responsibilities in International Law* (Cambridge: CUP, 2015)

Ex Ante and *Ex Post* Allocation of International Legal Responsibility

Joel P. Trachtman[*]

1. Introduction: shared responsibility and national measures

In the end, or '*ex post*', all international legal responsibility is individual state responsibility. Shared responsibility must be allocated somehow, even if the rule is one of joint and several liability.[1] Also joint liability can result in certainty regarding allocation, so long as the rights of contribution are clear and the factual bases for contribution are known in advance.

However, the allocation of responsibility might not be known *ex ante*. First, the principle of allocation may be uncertain. Second, even if the principle of allocation is well known, its operation may be dependent on facts that are not known, probably because they will occur in the future. To the extent that these two reasons for uncertainty *ex ante* regarding allocation are resolved, and allocation to individual countries can be determined *ex ante* on the basis of the principles, then it might be better to speak of the individual responsibility of multiple countries. Under other circumstances, where the principles of allocation are unknown, or the facts that form the basis for allocation are unknown, or both, we may speak of shared responsibility *ex ante*.

With the rise of globalisation increasing the extent to which people from different parts of the globe interact with one another, there are increasing ways in which people from different parts of the globe confer benefits or detriments on one another. They may do so by the way that they husband a shared resource, or regulate a dangerous activity, or respond to a shared danger.

There is no logical difference between the iconic shared responsibility situation described by the editors in their framing chapter,[2] in which countries are seen factually to all have a contributory

[*] Professor of International Law, The Fletcher School of Law and Diplomacy. I am grateful to participants in the SHARES project, as well as to Jeffrey Dunoff, Simon Lester, Gabrielle Marceau, Petros Mavroidis, Greg Shaffer, and participants in the Georgetown Law Centre faculty workshop, for comments on an earlier draft, and to Juan David Velasco for excellent research assistance. Errors are mine.

[1] See for the concept of shared responsibility P.A. Nollkaemper and D. Jacobs, 'Introduction', this volume, at ___.

[2] P.A. Nollkaemper and D. Jacobs, 'Shared Responsibility in International Law: A Conceptual Framework' (2013) 34 MIJIL 359, at 366.

causal role in causing a single problem, and any other circumstance in which the actions of one country is seen to cause harm to another country. Indeed, as the authors point out:

> The criteria that may be used in apportioning responsibilities ex ante may not be dissimilar from those used to apportion responsibilities after harm is caused. Criteria such as of capacity, contribution, control and causation will be relevant both when states ex ante agree who is to carry what burden, and when courts make ex post facto determinations of responsibility.[3]

Consider the Coasean example of a laundry that is located near a coal-fired utility that produces smoke. Coase's insight is that the harm is a result of the *joint* action of the laundry and the utility.[4] Even though we tend to place these facts in a framework of one-way causation and unilateral responsibility, Coase showed that it is equally possible to understand these facts in terms of bilateral causation and responsibility.

Causation in this sense is reciprocal, and the core question from an efficiency standpoint is how to determine whether either the utility or the laundry should change its behaviour to increase efficiency. Coase argued that under zero transaction costs, the utility and the laundry would negotiate to the efficient solution. In this analytical sense, all responsibility should be analysed as shared responsibility. The question, under positive transaction costs and with concerns regarding distributive outcomes, is how it should be allocated among the parties.

This gives rise to the Coasean question: to what extent should principles of law be established to require acting states to internalise the beneficial or detrimental effects that they impose on one another. In an important sense, this could be determined on an *ad hoc* basis – before each action, states could negotiate over whether the action will be taken or not, and whether and to what extent compensation will be paid to the state that bears the detriment, or by the state that receives the benefit.

There are two problems with this *ad hoc* approach. First, it is dependent on any initial assignment of property rights that has been established in advance. If no assignment has been established, then the negotiation begins with a clean slate, and perhaps bilateral monopoly: a standoff in which neither party is willing to yield. But in the modern world, there are already legal rules that

[3] Ibid., at 394 (citation omitted).
[4] R.H. Coase, 'The Problem of Social Cost' (1960) 3 JLE 1.

might provide a default allocation of property rights. One example is the right of territorial sovereignty. Another might be the *sic utere tuo* principle of international environmental law.

Second, the appeal of the *ad hoc* approach is dependent on transaction costs. As Coase showed, long-term contracting, law, or even an international organisation might be justified if it allows for more efficient action without excessive transaction costs. In other words, even assuming that a better choice would be made if the choosing state internalised the costs of its action, the costs of identifying the problem, negotiating about it, contracting over it, and enforcing the contract must be included in the calculus of whether a mechanism of internalisation is worthwhile, and which instrument of internalisation is best.

As they decide how to address these problems of policy externalities, states may use very specific legal rules that allocate responsibility for action *ex ante*, or they may use more general principles that require analysis in order to determine the allocation of responsibility *ex post*. In designing these rules, states would wish to maximise the net benefits of internalisation of policy externalities, net of transaction costs. The net benefits of internalisation include the negative effect of reduced policy autonomy ('autonomy costs'). If the costs of reduced policy autonomy exceed the benefits of internalisation, no internalisation should take place.

The purpose of this chapter is to describe and provide a normative framework for analysis of several alternative 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. At the same time, the variety of restrictions on national regulatory measures has increased, and it is worthwhile to begin to compare these different types of restrictions in order to inform and critique international law-making.

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 states, and you may not engage in aggressive war. These norms can be articulated with more or less specificity. To the extent that they are articulated with less specificity, it might be said that the final allocation of responsibility must take place *ex post*, upon an evaluation of the particular circumstances of the state action or inaction. Whether curtailment of a human right is justified,

whether distinct treatment is indeed illegally discriminatory or instead has a legitimate basis, and whether a war is aggressive depends on a number of factors that may only be determined in context.

But there is another emergent way in which international law restrains state action: by requiring the state to engage in a specified procedure as a condition for certain actions. This chapter provides some examples of this type of procedural predicate for national action in international law, and provides a normative framework for determining when a procedural predicate would be desirable compared to a simple prohibition on action.

1.1 Requirements regarding substance: state contingency

Law is always expressed as an 'if-then' statement: if A, B, and C, then D. The most common form of this type of if-then statement is that, if factual conditions A, B, and C are met, then the requisite elements of a particular offense are satisfied, and legal consequences D will ensue. International law is often structured this way, but alternatively, and increasingly, international legal rules specify that countries may take certain actions if, and only if, specified conditions are met. Instead of the legal consequence being a finding of violation in this logical formulation, the legal consequence is a permission for action. If the conditions were not met, the action was not permitted and is illegal. Of course, this distinction is largely one of style, or of emphasis, but the distinction is nevertheless important. States are given explicit prescriptions as to how to take specific actions.

Furthermore, in a number of observable contexts, the factual conditions are becoming more complex, requiring greater information and expertise for their determination. 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 behaviour in advance. The idea of 'state contingency' is that the application of the rule is dependent on the future state – on the facts as they arise. For example, 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 state may be permitted (D) to impose a safeguard action restricting imports from other states. In this

formulation, which is a simplification of relevant World Trade Organization (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.

Because the concerns of international law increasingly have to do with the external effects of the regulatory activities of countries, international legal rules are increasingly set up as complex if-then statements about the existence of specified conditions for national regulatory action. The international legal rules are state-contingent incomplete contracts. In order to take the regulatory action, these conditions must exist. The country itself, as the regulated person, is implicitly required to ensure that the conditions exist. Conversely, the action is forbidden if the conditions are not met.

In addition, those responsible for enforcement, whether they are other countries in this generally horizontal system, or international tribunals or political bodies, must determine for themselves whether these conditions exist in order to be able to determine whether the state'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 ('information problems'). Second, they may not have the requisite economic, scientific, or other analytical capacity to make this determination ('expertise problems'). Third, concerns about preservation of national autonomy under globalisation may make it difficult for countries to relinquish this decision-making authority ('autonomy problems'). Under these circumstances, 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 examining whether the country acting was actually correct in its determination.

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 maximise the sum of the benefits from cooperation and the costs of information problems, expertise problems, and autonomy problems. Procedure contingency may

generally implicate a lower level of information, expertise, and autonomy problems, although there may be concerns regarding whether it can adequately address cooperation problems.

State contingency is an important way in which countries allocate responsibility for the costs of action. For example, state contingency in international trade law determines whether the importing country can take trade restrictive action without compensating the exporting country.

State contingency is a special type of allocation of responsibility that sets its 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 of the task of determining whether the preconditions are satisfied to third party decision-makers.

1.2 Specific rules and general standards regarding substance

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 it is more specific, then the 'if' portions of the if-then statements contain specific, formally realisable 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, such as a requirement of 'due process' or a requirement that in order for discrimination to be found there must be differential treatment of 'like products', the judge or other evaluator would have more latitude, and more responsibility, in determining a violation. Under what circumstances are more specific rules superior tools compared to more general standards, and *vice-versa*?

1.3 Requirements regarding process: procedure contingency

Moreover, the preconditions for national action, as often found in administrative law, are increasingly procedural (procedure contingency) rather than substantive (state contingency): they require states to make certain findings in certain ways. Of course, procedure contingency is based on, and is related to, state contingency, but it is by no means the same thing. The preconditions are not substantive or factual regarding the objective state of the world, but relate to the procedure followed by the acting country to determine the state of the world.

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.

1.4 Interaction between state contingency, rules and standards, and procedure contingency

International law constrains national action. As countries formulate more international law, with greater constraints, they may do so through flat prohibitions, but of course 'flat' prohibitions contain requirements for judgment in determining whether the conduct at issue fits into the prohibited category, and increasingly legal rules are framed explicitly in state contingent terms. Countries may express state contingency using more specific rules or more general standards. Indeed, they may express procedure contingency also using more specific rules or more general standards. Laws may be expressed purely in terms of state contingency or purely in terms of procedure contingency, or countries may determine to establish rules that set both a state and a procedure contingency for the same action.

1.5 Structure of the chapter

In section 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 be exemplary, rather than comprehensive. This chapter makes explicit the choices that authors of international legal rules may make in formulating international legal rules in terms of state contingency, more specific rules or more general standards, and procedure contingency. Doctrinally, it observes a drift in international trade law towards procedure contingency, even in some cases where the relevant text seems to call for state contingency.

In section 3, I develop a normative framework for assessing these different approaches to discipline of national action. As noted above, international legal rules are formulated to cause internalisation of policy externalities. But they are also formulated to preserve maximum policy flexibility for the bound countries, consistent with appropriate internalisation. Indeed, in theory they are designed to maximise the sum of the welfare benefits and detriments of (a) internalisation of externalities, (b) transaction costs, and (c) autonomy costs.

In section 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 section, I provide selected examples of the uses of state contingency, rules, standards, and procedure contingency. The examples addressed include exceptions for national regulatory measures that are ‘necessary’ for protection of human health under WTO law (section 2.1), requirements that certain types of national regulation be supported by a scientific basis under WTO law (section 2.2), fair and equitable treatment standards in bilateral investment treaties (section 2.3), the use of complementarity under the Rome Statute for the International Criminal Court (section 2.4), and proportionality relating to protection of civilians in the laws of armed conflict (section 2.5). In section 3, I develop a normative framework for evaluating these structures.

2.1 'Necessity' analysis: Brazil-Tyres

Environmental protection presents many instances in which the actions of one state have an effect on the interests of another. It may be beneficial to a particular state to block imports of goods that create adverse consumption externalities. But it may be costly to the exporting state to find alternative markets for those goods. How are states to share responsibility for these types of goods? Under WTO law, members have agreed that under certain circumstances, the exporting country would bear the costs of any barriers, but that under other circumstances, the importing country would be required to compensate the exporting country.

A recent example of this type of problem was the dispute between Brazil and the European Union (EU) over Brazil's decision to block imports of retreaded automotive tires. On its face, the dispute was about whether the importing state would be required to compensate the exporting state, but at the core of this dispute was the question of which state 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. Retreated tires have a shorter useful life than new tires, and therefore have greater adverse consumption externalities.

The *Brazil-Tyres* case arises in this contentious terrain of overlap between trade policy and environmental policy. 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 General Agreement on Tariffs and Trade (GATT),[5] the national environmental measure would generally be permitted, subject to certain conditions. It is important to recognise that members 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 recognise that by establishing the WTO dispute settlement system, members decided that WTO panels, and the Appellate Body on appeal, would generally decide disputes about the scope of this flexibility.

[5] General Agreement on Tariffs and Trade, Geneva, 30 October 1947, in force 1 January 1948, 55 UNTS 187 (GATT).

The *Brazil-Tyres* case,[6] decided by the WTO Appellate Body in 2007, presents a challenge to the analytical resources available in WTO dispute settlement. In *Brazi-Tyres*, the WTO dispute settlement tribunals seem to have shirked their responsibility to make substantive determinations of objective conditions of action in accordance with the WTO treaty.[7]

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 these 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 divided responsibility for the trade detriments that may arise from health and certain types of environmental protection: to the extent that the trade detriments are necessary to protect human, animal, or plant life or health, the exporting country must bear the burden of reduced market access.[8]

As discussed in more detail in section 3, an optimal test in this type of case, unconstrained by treaty text, from the standpoint of global welfare maximisation, 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: first, alue of the regulatory goal; second, contribution of the measure to achieving the regulatory goal; third, cost of the regulatory measure; and fourth, cost to trading partners 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 carrying out the

[6] *Brazil – Measures Affecting Imports of Retreaded Tyres*, Appellate Body Report, 17 December 2007, WT/DS332/AB/R (*Brazil-Tyres*).

[7] For a more detailed treatment, see C.P. Bown and J.P. Trachtman, 'Brazil – Measures Affecting Imports of Retreaded Tyres: A Balancing Act' (2009) 8 (Special Issue 1) WTR 85.

[8] Interestingly, in the Appellate Body Report in the Asbestos case, the Appellate Body suggested that the state maintaining a trade barrier justified under Article XX(b) might be required to provide trade compensation to the exporting state under the doctrine of non-violation nullification or impairment. *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Appellate Body Report, 5 April 2001, WT/DS135/AB/R.

analysis.[9] In this type of case, interpreting the 'necessity' test of Article XX(b) (and Article XX(d)) GATT, the WTO Appellate Body has consistently spoken of a test that weighs and balances to some degree each of the four factors mentioned above,[10] 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 most gross 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 decision-maker, its only strategy other than ignorance is deference. This is the situation in which the Appellate Body found 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 course. But in order to rationalise 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. The Appellate Body seemed to move to procedure contingency by virtue of the fact that it deferred to Brazil's balancing of the relevant factors.

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 seems, on the member's own analysis, to have selected the less trade restrictive alternative.

[9] J.P. Trachtman, 'Trade and … Problems, Cost-Benefit Analysis and Subsidiarity' (1998) 9 EJIL 32.
[10] See e.g. *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, Appellate Body Report, 10 January 2001, WT/DS161/AB/R, WT/DS169/AB/R.

2.2 SPS requirements of scientific basis: EU-Hormones

When the WTO was established in 1995, additional requirements were imposed on the process of national product regulation, beyond those that applied under the GATT. These requirements give exporting countries greater opportunities to require importing countries to compensate them for barriers to trade. Responsibility is shared between importing and exporting countries based on a determination of whether the importing country complied with these requirements. Interestingly, in this area as well, WTO law seems to focus not on the substance of national regulation, but on the procedure for formulating national regulation.

Both the WTO Agreement on Technical Barriers to Trade[11] (TBT Agreement) and the WTO Agreement on Sanitary and Phytosanitary Measures[12] (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 (Article 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 organisations (Article 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 (Article 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 (Article 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.[13] 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

[11] Agreement on Technical Barriers to Trade, 15 April 1994, in force 1 January 1995, 1868 UNTS 120.
[12] Agreement on the Application of Sanitary and Phytosanitary Measures, 15 April 1994, in force 1 January 1995, 1867 UNTS 493.
[13] *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, WT/DS320/AB/R, European Communities' Appellant's Submission, para. 248 (*Continued Suspension*).

and respectable scientific evidence and is, in this sense, objectively justifiable'.[14] 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.[15] 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 the member's retained autonomy to engage in its own risk assessments.[16] 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'.[17]

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 the discussion of *Brazil-Tyres*, above, 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.[18] 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 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.

2.3 Fair and equitable treatment under international investment law: Metalclad v. Mexico

In another area of international economic law – international investment law – home countries and host countries share responsibility for harm to investments in the host country in a similar

[14] *United States – Continued Suspension of Obligations in the EC – Hormones Dispute*, Appellate Body Report, 14 November 2008, WT/DS320/AB/R, para. 590.
[15] Ibid., para. 591.
[16] Ibid., paras. 598-602.
[17] Ibid., para. 616.
[18] Bown and Trachtman, 'Brazil – Measures Affecting Imports of Retreaded Tyres: A Balancing Act', n. 7.

way: restrictions on national action giving rise to host country responsibility contain elements of state contingency and procedure contingency. As to procedure contingency, the International Center for the Settlement of Investment Disputes (ICSID) arbitral decision in the case of *Metalclad Corp.* v. *Mexico*[19] provides an important example.

North American Free Trade Agreement (NAFTA)[20] 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) of NAFTA, 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.[21]

This is a clear example of international investment law constituting a kind of global administrative law,[22] in this case providing for procedural review of environmental permitting in Mexico.

2.4 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

[19] *Metalclad Corporation* v. *The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000.
[20] North American Free Trade Agreement (NAFTA), Washington, 17 December 1992, in force 1 January 1994, 32 ILM 289 (1993).
[21] *Metalclad Corp.* v. *The United Mexican States*, n. 19, para. 99.
[22] See G. Van Harten and M. Loughlin, 'Investment Treaty Arbitration as a Species of Global Administrative Law' (2006) 17 EJIL 121 (emphasising 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).[23]

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.[24] Conversely, the powers of the ICC to act in relation to a case become effective only where the relevant states are unwilling or unable to carry out the investigation or prosecution. Note that this arrangement can be characterised in either of two ways: first, as a limited delegation by states to the ICC, or second, as a limited delegation by the ICC to states. As a limited delegation to states, it ensures that states have a certain measure of incentives to investigate or prosecute relevant crimes, or simply supplements their capabilities where they are unable to do so.

2.5 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.[25] Specifically, Article 51(4) of the Additional Protocol to the Geneva Convention of 1977[26] provides that 'indiscriminate attacks are prohibited'. Article 51(5) provides that '[a]mong 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

[23] Rome Statute of the International Criminal Court, Rome, 17 July 1998, in force 1 July 2002, 2187 UNTS 90.
[24] See *The Prosecutor* v. *Francis Kirimi Muthaura, Uhuru Muigai Kenyatta and Mohammed Hussein Ali*, Case No. ICC-01/09-02/11 OA, 30 August 2011, at 13, para. 35 (finding that Kenya had not adequately shown that it satisfied the requirement to investigate or prosecute).
[25] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977, in force 7 December 1979, 1125 UNTS 3, Article 51(5)(b).
[26] Ibid., Article 51(4).

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, these elements are quite incommensurable.

The attacker is required to engage in a procedure designed to determine whether its attack is proportionate.[27] The law of armed conflict principle of precaution similarly requires attackers to engage in a procedure designed to protect civilians.[28] These rules seem to constitute a type of procedure contingency. They require that a procedure be followed as a predicate for action, not that a specific set of substantive facts be true as a predicate.

3. Normative evaluation

In section 2, I described instances of state contingency in international law, noting that state contingency may be framed in more specific 'rules' and in less specific 'standards'. Rules involve greater *ex ante* specification, and standards provide for more *ex post* specification of responsibility. I also described instances of procedure contingency in international law. What is the utility of international legal rules that incorporate state contingency? When are more specific rules superior to less specific standards? Finally, why would countries use procedure contingency

[27] J.-M. Henckaerts and L. Oswald-Beck, 'Customary International Humanitarian Law Volume I: Rules', International Committee of the Red Cross (Cambridge University Press, 2005) (ICRC Rules), Rule 14; M. Cohen-Eliya, 'The Formal and Substantive Meanings of Proportionality in the Supreme Court's Decision Regarding the Security Fence' (2005) 38 Isr LRev 262 at 288–9.

[28] '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, para. 58, citing Additional Protocol I, Article 57; Ibid., ICRC Rules, Rules 15-21.

instead of state contingency? This section develops some frameworks for analysis of the utility of these different types of legal rules.

These issues do not seem relevant to the iconic areas of shared responsibility, such as the classic case of degradation of an environmental commons. However they are relevant to the construction of new rules by which to address these iconic areas of shared responsibility: the designers of these rules will need to choose between *ex ante* specification by virtue of rules, and *ex post* specification through application of standards, and between state contingency and procedure contingency.

3.1 International law and policy externalities: the value of taking into account the concerns of other states

According to the subsidiarity principle, states should have no concern with the activities of other states, 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-transmitted ('pecuniary'), moral, or aesthetic. They may be beneficial or harmful.

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

Thus, there will be circumstances in which international cooperation is useful in order to cause states to internalise 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. Thus, 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. This is the only way to address issues of shared responsibility.

3.2 Incomplete contracts and state contingency

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.[29] So, no international legal regime is ever completely specified in terms of rules.

The GATT provisions described in *Brazil-Tyres*, the SPS provisions addressed in *Continued Suspension*, and the rule of proportionality in the law of armed conflict, can be regarded as components of state contingent contracts, delegating to the dispute settlement process, where available, the task of determining the state. But these provisions refer to a state that is described by virtue of conditions such as less trade restrictive alternative, lack of scientific basis, proportionality, etc. The implication is that in these contexts, the degree to which state contingencies result in beneficial internalisation of externalities (i.e. in contract completeness) needs to be examined *ex post*.

Analysing the GATT national treatment rules in these terms, Horn develops a model in which for 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. A state-contingent rule is efficient.

The problem caused by tariff bindings combined with a hypothesised 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 national treatment, 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 domestic 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).

[29] H. Horn, 'National Treatment in the GATT' (2006) 96 AER 394.

As a consequence, provided the externality problem is sufficiently severe, the imposition of national treatment may be internationally inefficient.[30] But the GATT national treatment rule is much more nuanced than the hypothesised strict rule. Horn explains that information about government preferences is at the core of the problem that a more nuanced national treatment is intended to solve:

> 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 an even simpler solution than the market access rule: 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.[31]

The question raised by Horn 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 and the scientific basis requirement imposed by the SPS Agreement may be said to respond to precisely this question: how do we determine the intent behind *de facto* discrimination – how do we get closer to a requirement to set internal regulation at its first-best level? While there is no WTO law requirement that domestic regulators set internal regulations to their first-best levels, the necessity requirement and the scientific basis requirement achieve a closer approximation of this test than mere national treatment. Under this type of regime, a country will only be assigned responsibility if it fails to set these taxes or regulations at first-best levels.

The scientific basis requirement at issue in *Continued Suspension* is a means for determining the intent of an SPS measure, just as the less trade restrictive alternative analysis of the Article XX(b)

[30] 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 state undertakes to accept as satisfactory the regulation of the home state 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 A. Costinot, 'A Comparative Institutional Analysis of Agreements on Product Standards' (2008) 75 JIE 197.
[31] Horn, 'National Treatment in the GATT', n. 29, at 402.

necessity standard, applied in *Brazil-Tyres* is a means for determining the intent of health measures under the GATT. But all of these standards seem motivated by a concern to prevent states from adopting measures intended adversely to affect the competitive position of imported products.

Although the scientific basis test and necessity test can therefore 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. 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) GATT, panels do not evaluate except superficially whether the importing state has chosen the less trade restrictive alternative, or whether alternative measures actually could achieve the selected level of protection.

Insofar as specific SPS measures that are adopted by governments are targeted at market failures that have effects on national objectives, any international negative spillovers associated with the SPS measures that are adopted will reflect national preferences and attitudes towards risk, and the fact that such preferences and attitudes will differ across countries. The SPS Agreement makes a marginal additional contribution in further completing the WTO 'contract' compared to the potential outcome of litigation of such cases under GATT alone.

3.3 State contingency: rules and standards

States negotiate 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. States 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' *to the extent that* it is specified in advance of the conduct to which it is applied.[32] 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 recognise 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 specification costs, including drafting costs and negotiation costs, as well as the strategic costs involved in *ex ante* specification. In order to reach agreement on specification – in order to legislate specifically – there may be greater costs in public choice terms.[33] 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. The principal may be hampered by asymmetrical availability of information. The principal may control its agent with

[32] For an introduction to the rules versus standards discussion in law and economics, see L. Kaplow, 'General Characteristics of Rules', in B. Bouckaert and G. De Geest (eds.), *Encyclopedia of Law and Economics* (Cheltenham: Edward Elgar, 1998). L. Kaplow, 'Rules Versus Standards: An Economic Analysis' (1992) 42 DLJ 557. See also, C.R. Sunstein, 'Problems with Rules' (1995) 83 Cal LR 955.

[33] See G.K. Hadfield, 'Weighing the Value of Vagueness: An Economic Perspective on Precision in the Law' (1994) 82 Cal LR 541, at 550, citing L.R. Cohen and R.G. Noll, 'How to Vote, Whether to Vote: Strategies for Voting and Abstaining on Congressional Role Calls' (1991) 13 PB 97.

greater specification – with more rules, but may also utilise required procedures, transparency, and requirements for logical reasoning in order to control its agent. In this sense, procedure contingency may supplement state contingency utilising 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'.[34] 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. As we consider the relative allocative efficiency of potential outcomes, we must recognise 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.[35]

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 states 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

[34] For this use of the terms 'primary predictability' and 'secondary predictability', see W.F. Baxter, 'Choice of Law and the Federal System' (1963) 16 Stan LR 1, at 3.
[35] Kaplow, 'General Characteristics of Rules', n. 32, at 10.

benefit. This is the role of the concept of 'precision' advanced in the 'legalisation' literature on international law.[36]

Johnston analyses 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.[37] He considers a rule a 'definite, ex ante entitlement' and a standard a 'contingent, ex post entitlement'.[38] 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'.[39] He suggests this supposition may be incorrect:[40] '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.'[41] 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.[42]

It is easy to see a standard, combined with mandatory dispute settlement, as a way to complete incomplete contracts, *ex ante*, in a way that can under particular circumstances minimise 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

[36] K.W. Abbott, R.O. Keohane, A. Moravcsik, A.-M. Slaughter and D. Snidal, 'The Concept of Legalization' (2000) 54 IO 401
[37] J.S. Johnston, 'Bargaining under Rules versus Standards' (1995) 11 JLEO 256.
[38] Ibid., at 256.
[39] Ibid. (citations omitted).
[40] See also C.M. Rose, 'Crystals and Mud in Property Law' (1988) 40 Stan LR 577 J.P. Trachtman, 'Externalities and Extraterritoriality', in J.S. Bhandari and A.O. Sykes (eds.), *Economic Dimensions in International Law: Comparative and Empirical Perspectives* (Cambridge University Press, 1998), 642.
[41] Johnston, 'Bargaining under Rules versus Standards', n. 37, at 257.
[42] Ibid. at 272.

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, states would wish to establish complex state-contingent contracts. For example, the magnitudes of first, the benefits of environmental protection, and second, 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, states are able to include complex state-contingency in their contracts, with significantly less variable contracting costs.

3.4 Procedure contingency: judicial review

Whenever externalities are internalised, 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.

In a sense, the relationship among (a) states party to a multilateral agreement, (b) individual states that may be accused of violation, and (c) dispute settlement under the multilateral agreement, is analogous to the relationship among (aa) a legislature, (bb) administrative agencies, and (cc) courts charged with judicial review. Just as a legislature may provide for judicial review in order to control the discretion of administrative agencies under their statutory authorisation, states party to a multilateral agreement may provide for dispute settlement in order to control the discretion of individual states 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, first, national interpretation of

[43] H. Horn, G. Maggi and R.W. Staiger, 'Trade Agreements as Endogenously Incomplete Contracts' (2010) 100 AER 394, at 406.

treaty requirements, second, national regulation, and third, national agency determinations or adjudications.

Review of national interpretation of treaty requirements is not a traditional international law function, but is a core international law function. That is, the traditional approach to treaty obligations is implicitly to allow each state to interpret its obligation for itself, subject to informal diplomatic discourse. In the WTO, in investment treaties, in the European Union, and in other specialised areas, dispute settlement tribunals are accorded mandatory jurisdiction to determine whether states' 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 states comply with 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 United States, the *Chevron* rule calls for substantial deference to agencies in interpreting their authorising 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.[44] To which state would we defer – the complainant or the respondent? More specifically, in the horizontal federalism 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 states in a more purely horizontal relationship.

Review of national regulation becomes more interesting. Here, we can see 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 chapter, 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

[44] See S.P. Croley and J.H. Jackson, 'WTO Dispute Procedures, Standard of Review, and Deference to National Governments' (1996) 90 AJIL 193.

procedure contingency induces states 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.[45]

In the administrative law context, process review examines the regularity of the process by which the regulation is produced. The United States Supreme Court has applied a 'hard look' review to the agency process of establishing rules.[46] In the 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.[47]

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 analyse the extent to which their counterparties are likely over time to comply with their commitments.[48] 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: first,

---

[45] P. Magrette, 'The Politics of Regulation in the European Union', in D. Geradin, R. Muñoz and N. Petit (eds.), *Regulation Through Agencies in the EU: A New Paradigm of European Governance* (Cheltenham: Edward Elgar, 2005) at 12 (discussing regulatory agency accountability).

[46] *Citizens to Preserve Overton Park* v. *Volpe*, 401 US 402 (1971); *Motor Vehicle Manufacturers Association* v. *State Farm Mutual Automobile Insurance Company*, 463 US 29 (1983). Under these precedents, the reviewing court does not engage in *de novo* review, but instead determines whether the agency action is reasonable.

[47] See T.M. Moe, 'The Politics of Bureaucratic Structure', in J.E. Chubb and P.E. Peterson (eds.), *Can the Government Govern?* (Washington: Brookings, 1989), at 267, 274.

[48] See J.P. Trachtman, 'International Law and Domestic Political Coalitions: The Grand Theory of Compliance with International Law' (2010) 11 Chic JIL 127.

write a detailed law that imposes rigid constraints on the administrative mandate and decision procedures; second, establish requirements for professional decision-making, since professionals resist political interference; third, oppose formal provisions that enhance political oversight and involvement; or fourth, favour judicial review of agency decision-making.[49]

On the other hand, there are converse structural means to impede a future government in carrying out a particular policy: first, detailed provisions for political control of agency action, including legislative veto and monitoring; second, participatory agency decision-making procedures, including judicial review; or third, requirements for agency decision-making to be accompanied by detailed evidence and objective analytical statements, also facilitating judicial review.[50]

Review under international law of national agency determinations or adjudications may be understood in a similar way: states are permitted to act, as in to impose an SPS measure, only upon the establishment of certain facts. For example, the WTO Appellate Body in important contexts relating to contingent protectionism such as safeguards actions, 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 unlikely to stray too far from the intent of the international legal rule.

3.5 Procedure contingency: burdens of proof

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

[49] Moe, 'The Politics of Bureaucratic Structure', n. 47, at 274–5.
[50] Ibid., at 275–6.

> 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.[51]

Of course the type of procedure contingency discussed in this chapter is not the same thing as a BoP. Rather, procedure contingency, when it appears alone, can best be analogised to a conditional presumption to the effect that *if* the procedure followed by the respondent country conforms to legal requirements, then we will presume that the substantive act taken by the respondent country conforms to the relevant legal requirements. 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 state. 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.

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'.[52] This is consistent with the approach to national treatment taken by Horn in the WTO context.

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 decision-maker must assess their correlation, and weigh the costs of false negatives and false

[51] E.L. Talley, 'Law, Economics, and the Burden(s) of Proof', in J.H. Arlen (ed.), *Research Handbook on the Economics of Torts* (Cheltenham: Edward Elgar, 2013), 305, at 306.
[52] Ibid., citing E. Feess, G. Muehlheusser and A. Wohlschlegel, 'Environmental liability under uncertain causation' (2009) 28 EJLE 133.

positives, 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 favour of untrammeled sovereignty (*in dubio mitius*). Alternatively, if the adjudicator has a view that the permitted action is normatively unattractive, 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 optimise given the relative probabilities, and the relative costs of false negatives and false positives.

International legal rules, like domestic rules of criminal and civil responsibility, generally allocate the initial burden to the complainant to show a violation. And so, in the trade law areas described above, it is up to the complainant to show a violation of the relevant rule. Here, it might be said that, especially in the trade remedies area, the procedures that form the basis for procedure contingency will often be easier for the complainant to observe than the actual facts that are the basis for state contingency.

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 section 2? For one, provided that the procedures required by procedure contingency are not unreasonable for states 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. Litigation might not be reduced, because the greater flexibility for state action could induce states to hew less closely to legal requirements, giving other states more reason to complain, and greater chances for success.[53]

In addition, the actual regulatory purpose may be quite difficult to observe. So, if the optimal bargain – the optimal shared responsibility – among states in the trade and environment or trade

[53] See A.E. Bernardo, E.L. Talley and I. Welch, 'A Theory of Legal Presumptions' (2000) 16 JLEO 1.

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.[54] The proxies that have been chosen in this area have included (a) discrimination in the national treatment sense, (b) failure to choose the less trade restrictive alternative (necessity), and (c) failure to base the measure on a scientific risk assessment.

3.6 Procedure contingency: information and expertise asymmetry

Countries that take regulatory action often have engaged in serious public policy studies in order to determine their action. The examples of procedure contingency provided in this chapter involve circumstances where the regulating country can be expected to have superior access to information, and to have 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 double-check 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 securities 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 utilise and refer to biological knowledge, many obligations under other WTO law utilise 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.

In the WTO, panels are permitted to establish 'expert review groups' under Article 13.2 of the WTO Dispute Settlement Understanding. This facility has not been used yet, but it seems well-designed for use in cases where the panel must make complex scientific or economic

[54] See Trachtman, 'Trade and … Problems, Cost-Benefit Analysis and Subsidiarity', n. 9, at 40.

determinations. Panels have called upon individual experts in eight cases: *US/Canada-Hormones Continued Suspension*, *EC-Biotech*,[55] *Japan-Apples*,[56] *Australia-Salmon*,[57] *EC-Asbestos*[58] (initial panel and Article 21.5 panel), *Japan-Agricultural Products*,[59] *US-Shrimp*,[60] and *EC-Hormones*.[61] However, in none of these cases have panels consulted experts on economic issues. In a number of cases, panels have sought expert or other information from international organisations, such as the International Monetary Fund, the World Intellectual Property Organization, Codex Alimentarius, and the World Customs Organization.

Engaging expert review groups to work through the difficult issues would relieve panels of a burden that they generally cannot bear. Article 13 of the WTO Dispute Settlement Understanding has been found to provide panels with broad flexibility to utilise experts. So it is curious that economic experts have not been used.

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.'[62]

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

[55] *European Communities – Measures Affecting the Approval and Marketing of Biotech Products*, Panel Report, 29 September 2006, WT/DS291/R, WT/DS292/R, WT/DS293/R Add.1 to Add.9 and Corr.1 (*EC-Biotech*).
[56] *Japan – Measures Affecting the Importation of Apples*, Report of the Appellate Body, 26 November 2003, WT/DS245/AB/R (*Japan-Apples*).
[57] *Australia – Measures Affecting Importation of Salmon*, Report of the Appellate Body, 20 October 1998, WT/DS18/AB/R (*Australia-Salmon*).
[58] *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, Panel Report, 18 September 1000, WT/DS135/R and WT/DS135/R/Add.1, as modified by the Report of the Appellate Body, 21 March 2001, WT/DS135/AB/R (*EC-Asbestos*).
[59] *Japan – Measures Affecting Agricultural Products*, Report of the Appelate Body, 22 February 1999, WT/DS76/AB/R (*Japan-Agricultural Products*).
[60] *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, Report of the Appelate Body, 12 October 1998, WT/DS58/AB/R (*US-Shrimp*).
[61] *EC Measures Concerning Meat and Meat Products (Hormones)*, Report of the Appelate Body, 16 January 1998, WT/DS26/AB/R, WT/DS48/AB/R (*EC-Hormones*).
[62] S. Brewer, 'Scientific Expert Testimony and Intellectual Due Process' (1998) 107 YLJ 1535, at 1538.

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 chapter provides a normative framework for analysis of state contingency and procedure contingency in international law. It would be useful to develop greater theoretical and empirical understanding of the ways in which international legal structures are designed to use state contingency and procedure contingency, and rules and standards, to regulate national action, and to provide for shared responsibility. What are the advantages and disadvantages of each structure? With what parameters of specific international contexts does each structure match well? This chapter 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 states, 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 states. As national regulation and globalisation grow, we can expect to see increasing state contingency and procedure contingency.

Countries engaged in cooperation 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.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 internalise certain externalities in their regulatory decision-making. These considerations do not seem relevant to the iconic areas of shared responsibility, such as the classic case of degradation of an environmental commons. However they seem relevant to the construction of new rules by which to address these iconic areas of shared responsibility: the designers of these rules will need to choose between *ex ante* specification by virtue of rules, and *ex post* specification through application of standards, and between state contingency and procedure contingency. They may thus serve as a guide to countries seeking to formulate international legal mechanisms in order to establish shared responsibility.

This chapter 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 chapter shows the rich potential for scholarship in the reverse area: administrative law analysis of international legal rules that restrict national action.