

DOMESTIC BUREAUCRACIES AND THE INTERNATIONAL TRADE REGIME:
THE LAW AND ECONOMICS OF ADMINISTRATIVE LAW AND
ADMINISTRATIVELY-IMPOSED TRADE BARRIERS

By Michael D. Rosenbaum*

This paper explores the economics of administrative law for administratively-imposed barriers to trade. Theory and data from OECD countries suggest that administrative procedure's most significant impact on trade-relevant outcomes lies in changing the cost of access to information about administrative decisionmaking. Procedures lowering the cost of access shift power over policymaking from more organized to less organized private interests. Consumer interests in states with private rights to government-held information, public notice and comment, and similar mechanisms therefore have greater influence over trade policy, and these states have lower barriers to imports. Empirical evidence suggests that "adequate consideration" and other doctrines relying on administrative officials to change their positions in the face of additional evidence do not change policy outcomes. Producer interests in states with administrative law limited to these mechanisms therefore have greater power over trade policy, and these states have greater barriers to imports.

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"Wherever a continuing series of controversies exist between a powerful and concentrated interest on one side and a diversified mass of individuals, each of whose separate interests may be small, on the other side, the only means of obtaining equality before the law has been to place the controversy in an administrative tribunal."¹

Introduction

When it comes to trade policy, these are heady days for bureaucrats. The power of the administrative official is great and growing to determine which goods may cross borders unimpeded and which goods face obstacles.² In this great trade policy power, unelected administrative officials have the power to determine which industries will thrive and which will die.³ They determine which goods and services will be accessible

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¹ Franklin Delano Roosevelt, Veto Message of the Walter-Logan Bill, 86 CONG. REC. 13,943 (1940).

² Alan V. Deardorff and Robert M. Stern, *Measurement of Non-Tariff Barriers*, 179 OECD ECONOMICS DEPARTMENT WORKING PAPERS 3, 4 (1997).

³ See Alan V. Deardorff and Jon D. Haveman, *The Effects of U.S. Trade Laws on Poverty in America*, 30 J. HUM. RESOURCES 807, 809-813 (1995).

to consumers and which will not be.⁴ They determine what the quality of goods and services available to individuals and communities will be.⁵

This high tide of administrative power over barriers to trade is the result of several developing institutions in the world economic order. First, the General Agreement on Tariffs and Trade, its successor institution the World Trade Organization, and other international institutions have put tremendous downward pressure on tariffs.⁶ International institutions devoted to the development of a world economic order based upon the free flow of goods and services across borders have had their greatest impact on tariffs, and therefore have given non-tariff barriers a greater role in national protectionism.⁷ Because these non-tariff barriers, including anti-dumping and countervailing duty measures,⁸ discretionary licensing,⁹ customs procedures,¹⁰ and domestic standards and regulations,¹¹ are generally determined not by legislatures but by administrative institutions, officials in these institutions enjoy greater power over barriers to trade.

⁴ *Id.*

⁵ *Id.*

⁶ Deardorff and Stern, *supra* note 1, at 3; *see also* Sam Laird and Alexander Yeats, *Nontariff Barriers of Developed Countries, 1966-1986*, FIN. & DEV., March 1989, at 12.

⁷ *Id.*

⁸ William J. Davey and John H. Jackson, *Reform of the Administrative Procedures Used in U.S. Antidumping and Countervailing Duty Cases*, 6 ADMIN. L. J. 399, 400-403 (1992)

⁹ Deardorff and Stern, *supra* note 1, at 4.

¹⁰ *Id.*

¹¹ *Id.*

The second force driving the greater power of administrative officials over trade policy is the increasing significance of transnational regulatory networks as the dominant mechanism of the international order.¹² Efforts to expand the power of supranational institutions have faced harsh domestic criticism for the effect these institutions have on national autonomy, and as a result the power over foreign policy has shifted to regulators developing formal and informal relationships with counterparts abroad.¹³ From law enforcement to customs, from antitrust to securities, policy choices affecting barriers to trade are being coordinated by bureaucrats and their foreign counterparts.¹⁴ As a result, policy choices that had been made by international organizations or by more senior national officials closer to the political process are now the responsibility of insulated administrative officials.

The growing importance of non-tariff barriers and the development of formal and informal transgovernmental regulatory networks has therefore dramatically enhanced the power of administrative officials. This enhanced power, however, has highlighted the dilemma of the administrative state, namely, the problem of balancing the need for expertise in a post-industrial economy against the paradox of unelected bureaucratic officials in a democratic state. James Landis noted a consequence of earlier

¹² See Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept./Oct. 1997, at 183. See also Robert O. Keohane and Joseph S. Nye, *Transgovernmental Relations and International Organizations*, 39 WORLD POL. 27 (1974); ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, REGULATORY CO-OPERATION FOR AN INDEPENDENT WORLD (1994).

¹³ *Id.* Although the theories developed by Professor Slaughter and others focus on the role of administrative officials in areas of foreign policy less politicized than trade, the implications of this paper suggest that their theory of regulatory power extends even to areas of trade policy. As the discussion below will suggest, certain non-tariff administrative barriers in particular may be sufficiently concealed from more public and political scrutiny that administrative officials are able to retain substantial power and autonomy in their trade-relevant actions.

¹⁴ Slaughter, *supra* note 12, at 189-190.

administrative solutions in the United States over thirty years ago when he explained to President-Elect John F. Kennedy that administrative agencies "had developed a tendency toward 'industry orientation... frequently expressed in terms that the regulatees have become the regulators.'"¹⁵ Instead of making their decisions in the "public interest,"¹⁶ administrative agencies were doing the bidding of certain organized industry groups.¹⁷ These observations were developed into the well-documented problem of agency capture.¹⁸

In response to the agency capture problem, legislatures and courts devised new legal mechanisms designed to limit the problem. Legislatures revised both organic statutes authorizing agency action and generalized administrative procedure statutes such as the Administrative Procedures Act,¹⁹ requiring agency officials to evaluate alternative evidence and argument when coming to a conclusion. Modern statutory administrative law in the United States addresses the issue of agency capture using a range of different constraints on the actions of administrative officials, including, for example, required public access to government-controlled information, formal hearings, and publication of

¹⁵ JAMES LANDIS, REPORT ON REGULATORY AGENCIES TO THE PRESIDENT-ELECT 70 (G.P.O. 1960).

¹⁶ The problem of determining the public interest is outside the scope of this paper. For the purposes of this discussion the public interest will only be defined by what it is not, namely, solely the interests of those actors capturing administrative agencies. For a further discussion of the problem of the concept of the public interest in the development of administrative law, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: THE CRISIS OF LEGAL ORTHODOXY 213-268 (1992).

¹⁷ See *supra* note 15; see also Mark Green and Ralph Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, 82 YALE L. J. 871 (1973).

¹⁸ See, e.g., LANDIS, *supra* note 15, at 70; Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335 (1990); STEPHEN BREYER AND RICHARD B. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 26 (1992); R. FELLMETH, THE INTERSTATE COMMERCE OMISSION: THE PUBLIC INTEREST AND THE ICC (1970); JAMES TURNER, THE CHEMICAL FEAST (1970); THEODORE LOWI, THE END OF LIBERALISM (1969).

¹⁹ 5 U.S.C. §551 et seq.

proposed agency actions. Likewise, courts in the United States devised such doctrines as the "hard look" or "adequate consideration" doctrine,²⁰ under which federal courts claimed the right to overturn agency actions if, in the judgement of the court, the agency did not sufficiently consider alternative evidence and argument. These judicial and legislative solutions were designed to address the problem of agency capture by ensuring that administrative officials considered all facets of a particular problem.²¹ They were thus premised on the assumption that, when forced to consider these alternative considerations, administrative officials would make better and different judgments than in the absence of such doctrines.

This assumption about the response of agency officials to alternative information is not universally held either in the United States or elsewhere, however. While the constraints imposed by modern American administrative law are based on a confidence in the response of administrative officials to alternative evidence and argument, the Legal Realists in particular have challenged this assumption. Extending back to Jerome Frank, the Legal Realists have claimed that because decisionmakers are dominated by their own political agendas, administrative procedures forcing decisionmakers to hear alternative voices are substantively irrelevant.²² Administrative procedures with no impact on outcome can be worse than irrelevant because of the costs they impose both on the efficiency of administrative action and on considerations of privacy. Indeed, not all

²⁰ See, e.g., *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402 (1971).

²¹ R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF THE CLEAN AIR ACT* 1-23 (1983); Richard B. Stewart, *Reformation of American Administrative Law*, 88 HARV. L. REV. 1667, 1712 (1975).

²² See, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* (1930); Joseph Sax, *The (Unhappy) Truth about NEPA*, 26 OKLA. L. REV. 239 (1973).

countries share the United States' approach to administrative procedure and the assumptions underlying that approach.

The debate over the impact of administrative law on administrative outcomes, and over the assumptions underlying those arguments, has more recently enjoyed another contribution.²³ This third approach, based on the disciplines of law and economics and public choice, is suggested by Susan Rose-Ackerman in her famous law review article *The Progressive Law and Economics-And the New Administrative Law*.²⁴ This third argument is based on the assumption that administrative officials are self-interested, and it evaluates the costs and incentives imposed by administrative law with respect to the broader political process.²⁵ This argument therefore does not depend upon an assumption of benevolence on the part of administrative officials,²⁶ the assumption the Legal Realists found so troubling.²⁷ Rose-Ackerman and the public choice and law and economics she applies suggest that if administrative procedures lower the cost of access to information about administrative decisions, then interested parties will be more likely to be able to find out about an upcoming decision. The more time an interested party has to mobilize

²³ For a good discussion of the goal of administrative procedure generally to address the issue of multiple and conflicting interest groups in a democratic administrative state, see Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985).

²⁴ Susan Rose-Ackerman, *The Progressive Law and Economics-And the New Administrative Law*, 98 YALE L. J. 341 (1988). See also SUSAN ROSE-ACKERMAN, *CONTROLLING ENVIRONMENTAL POLICY: THE LIMITS OF PUBLIC LAW IN GERMANY AND THE US* (1995).

²⁵ *Id.*

²⁶ As discussed below, the assumption of self-interest is not entirely inconsistent with the assumption of administrative benevolence. Specifically, if incentives are created within the bureaucracy so as to make the financial, professional, or personal benefits of changing positions based on new evidence are greater than the costs of abandoning personal agendas, then self-interest is not inconsistent with the benevolent administrator position. However, these bureaucracy-specific assumptions still allow for a distinction which provides a means of analysis here.

²⁷ See *supra* text accompanying note 22.

financial and political resources against a particular decision, the more likely it will be able to force the administrative decisionmaker, through his or her more politically accountable superiors, to influence that decision. The impact on substantive policy comes from the greater benefit to less organized interest groups of lowering this cost of access to information.²⁸

I will suggest in this article that this third explanation is the most powerful theory of the impact of administrative law on trade policy. Administrative procedures that lower the cost of obtaining information about and notice of agency decisionmaking, and that therefore increase the amount of time between an interest group's learning of a potential decision and the final administrative decision, shift the balance of power between more and less organized groups.²⁹ By giving less organized interest groups a greater opportunity to mobilize political resources to influence bureaucrats through the politicians who oversee them, administrative procedures shift the balance of power between constituencies. While more organized groups may have the political resources -- connections, money, staff -- to learn of agency decisionmaking without procedural constraints, less organized groups will be able to benefit from the increased possibility of notice and opportunity to mobilize.

In the context of trade policy, this argument suggests a significant impact on trade policy outcomes. Producers are more organized as a group than consumers, and therefore

²⁸ For a sketch of this kind of analysis of administrative law, see Matthew D. McCubbins, Roger G. Noll, and Barry R. Weingast, *Structure and Process, Politics and Policy: Administrative Arrangements and the Political Control of Agencies*, 75 VA. L. REV. 431 (1989).

²⁹ Cf. Gene M. Grossman and Elhanan Helpman, *Protection for Sale*, 84 AM. ECON. REV. 833 (1994); Avinash Dixit et al., *Common Agency and Coordination: General Theory and Application to Government Policymaking*, 105 J. POL. ECON. 752 (1997).

are better mobilized to influence agencies with control over trade barriers.³⁰ Therefore, by lowering the cost of access to information about administrative decisions, and by thus shifting the balance of power among constituencies from more to less organized groups, administrative law gives consumers greater power in determining trade policy. Because, most simplistically, consumers of a given good are interested in lower trade barriers while producers are interested in greater protection, this shift of power will lower trade barriers.

This article will develop the argument that administrative law impacts outcomes through shifting political power in contrast to the other two arguments. I will first discuss the problem of agency capture and its solution in the form of modern administrative law. In this section I will describe the different constraints on administrative action applied to bureaucrats making trade policy decisions in different countries. I will then summarize the debate about the significance and impact of administrative procedures, and elaborate specifically the application of public choice and law and economics to administrative procedures in the area of trade policymaking. The article will then proceed to demonstrate the empirical support for the law and economics/public choice theory of administrative law, using data from the member countries of the Organization for Economic Co-operation and Development ("OECD") from 1988-1993. I will employ two models to test which of the three arguments is most significant: one based upon legal mechanisms creating a private right of access to government information, and a second

³⁰ This analysis of political organization by producers and consumers will be discussed in detail below. See *infra* text accompanying notes 140-144.

based upon formal hearings involving interested parties. Finally, I will discuss the results and their implications for trade policy.

The implications of these arguments are wide-ranging. First, by evaluating the assumptions behind administrative law, this analysis has important implications for the most effective structure of these important legal constraints on administrative action. Second, this discussion suggests a possible solution to the problem of non-tariff barriers for those seeking to develop international trade regimes based upon free trade.³¹ The paradigm for analyzing administrative law suggested in this paper thus provides a possible means of addressing the dual problems of constraining administrative action and developing a free trade regime.

II. The Problem: Procedural Law for the Imposition of Trade Barriers

Administrative law is the legal answer to the philosophical dilemma posed by giving substantial power to unelected bureaucratic officials in the modern administrative state. One of the early problems created by unaccountable administrative power has been called agency "capture."³² When administrative agencies have scarce resources, they are forced to rely on private interests for information. These private interests are frequently the very industries regulated by the agency seeking the information, and as a result agency actions are largely controlled by the private industry. Other commentators have suggested variants on this theme, including the proposition that agencies can be

³¹ A discussion of the merits of a international trade regime based on free trade is beyond the scope of this paper. Therefore, the paper makes no judgements or assertions as to the benefits or problems of a free trade regime.

³² *See supra* notes 15, 18.

controlled by organized interests at the expense of less organized interests.³³ The solution to this problem in the United States and elsewhere has been the development of legal doctrines designed to ensure that administrative officials consider all the evidence and all the arguments relevant to a particular problem. In the United States, statutory law and doctrines such as "hard look" implement this approach to administrative law. This approach, however, depends on very specific assumptions about the effect of legal constraints on administrative action, and no consensus exists on these assumptions. The dilemma of administrative law therefore remains to confront the difficult relationship between administrative officials and the private interests under their jurisdiction.

In the context of trade policy, the critiques of agency capture and of the solutions to that capture are still vigorously debated. In the United States, the International Trade Administration ("ITA") and the International Trade Commission ("ITC") have faced great criticism for choosing to raise inefficient barriers to trade at the behest of domestic producers.³⁴ As Ronald Cass, former member of the ITC and Dean of the Boston University Law School, told the *New York Times*: "Many people in Commerce [the United States Department of Commerce] now see themselves as advocates for domestic business."³⁵ The result is a trade policy determined by domestic producers whose interests lie in protection from foreign competition, as opposed to a political or economic determination of the interests of consumers as well as producers.

³³ See Stewart, *supra* note 21, at 341-342. For a summary of other variants on the agency capture theme, see BARRY M. MITNICK, *THE POLITICAL ECONOMY OF REGULATION* 79-167 (1980).

³⁴ See Davey and Jackson, *supra* note 8, at 433-438.

³⁵ Peter Passell, Tough U.S. Enforcement on Trade: Is It Fair?, *N.Y. TIMES*, July 20, 1993, at D1-D2.

Administrative law, as the legal tool for addressing the dilemma of administrative power, therefore is at the center of this debate. Indeed, John Jackson and others have suggested a solution for United States trade officials similar to the "hard look" and generalized procedural statute answers used in the 1970's and 1980's to address agency capture in other administrative agencies.³⁶ Likewise, some countries have developed formal hearing requirements on administrative actors with jurisdiction of trade policy, while others have created private rights of access to information about trade policy decisionmaking. Other states do not have any formal procedural requirements imposed on administrative actors generally, while others have carved out foreign policy as a realm properly insulated from popular pressures.

In the discussion that follows, I will describe briefly and generally the administrative procedures applied in each of the member states of the Organization for Economic Co-operation and Development ("OECD") to non-tariff, administratively imposed trade barriers. The OECD is an organization composed of the major industrialized democracies, and I limit the comparison that follows to the OECD member states in order to clarify the legal distinctions between countries. Because each state in this group has analogous political and economic structures, a comparison of the legal systems limited to these states helps emphasize the specific legal differences.³⁷

Before summarizing these administrative law mechanisms, however, I must mention briefly the widely-discussed distinction between rulemaking and adjudication. Rulemaking refers to agency policymaking, broadly applicable to all activities under the

³⁶ See Davey and Jackson, *supra* note 8.

³⁷ The discussion *infra* excludes references to ombudsmen, because they generally do not affect the cost of information and access by private parties before an administrative decision has been made.

jurisdiction of the agency making the rule. Adjudication, on the other hand, refers to the determination of a particular dispute under the agency's jurisdiction. In the United States and in many other countries, separate legal requirements attach to the different genres of agency action. However, the distinction between adjudication and rulemaking is subtle at best, particularly in a legal system in which prior adjudications carry precedential value as a kind of administrative common law. In the field of trade-relevant policymaking, moreover, the distinction is even more difficult to make. Indeed, the difficulty of making such a distinction permits administrative bodies to achieve policy goals using either mechanism, thus providing greater flexibility for the agencies in avoiding procedural requirements.³⁸ In the discussion that follows, I omit the distinction and instead provide the range of administrative requirements applied to trade-relevant administrative action. Instead of confusing the comparisons across legal systems, excluding a discussion of this traditionally important aspect of country-specific administrative law will rather highlight the distinctions in administrative procedures as they are in fact applied across states.

United States

The major administrative agencies handling trade policy questions in the United States are the ITA and the ITC. These agencies in particular determine all antidumping and countervailing duty questions, two of the primary non-tariff barriers to trade. However, the government-wide administrative procedure statute, the Administrative Procedure Act ("APA"),³⁹ does not apply to the two agencies.⁴⁰ Therefore, the Freedom

³⁸ BREYER AND STEWART, *supra* note 18, at 523-648.

³⁹ 5 U.S.C. §§551-559 (1988).

of Information Act ("FOIA"),⁴¹ the statute creating a private right of access to government documents and information, does not generally apply to these agencies.⁴² Furthermore, the ITA and the ITC are not subject to the same kinds of elaborate hearing requirements,⁴³ procedures for publication of and feedback on proposed administrative action ("notice and comment"),⁴⁴ and limitations on *ex parte* communications that are imposed by the APA on other agencies.⁴⁵ Although the failure of the APA to extend to the ITA and the ITC has been a subject of some scholarly criticism,⁴⁶ it remains inapplicable to these major trade agencies.

At the same time, however, the ITA and the ITC do have their own required procedures. An investigation into the possible imposition of antidumping or countervailing duty barriers is initiated by a petition on behalf of the U.S. domestic industry producing the good in question.⁴⁷ The investigation is conducted at different levels of the ITA depending upon the significance of the issue and the access the party or counsel has to ITA officials.⁴⁸ The ITA sends out questionnaires to interested parties, but

⁴⁰ *Id.* See also Davey and Jackson, *supra* note 8, at 433.

⁴¹ 5 U.S.C. §552 (1988).

⁴² Note, however, that the Government in the Sunshine Act, 5 U.S.C. §552b(b), has historically been interpreted to apply to the ITC and to prohibit its Presidentially appointed Commissioners from deliberating in private. James T. O'Reilly and Gracia M. Berg, *Stealth Caused by Sunshine: How Sunshine Act Interpretation Results in Less Information for the Public About the Decisionmaking Process of the International Trade Commission*, 36 HARV. INT. L. J. 425 (1995).

⁴³ 5 U.S.C. §553(c), §554, §556-557 (1996).

⁴⁴ 5 U.S.C. §553 (1996).

⁴⁵ 5 U.S.C. §551 et seq. (1996).

⁴⁶ Davey and Jackson, *supra* note 8, at 433.

⁴⁷ 19 U.S.C. §§1671a(b), 1673a(b).

the agency has no meaningful requirements for those who must receive the questionnaire. The ITA is required to keep a record of all these *ex parte* communications.⁴⁹

If investigations conducted by the ITA and the ITC result in a preliminary dumping or subsidy finding, a hearing is scheduled at which parties may present witnesses and arguments.⁵⁰ Parties, for the purposes of this non-APA hearing, are considered to be the domestic producers and the foreign producers seeking to import into the United States. Domestic consumers have no formal mechanism for participating in the process, nor do they have any formal mechanism for learning of the investigation and decisionmaking. Therefore, trade barriers imposed by the major trade agencies in the U.S. Government are subject to limited formal hearing requirements, but no significant private rights of access to information.

These limited procedural protections are enforced through a vigorous system of judicial review.⁵¹

European Community

The administrative bodies of the European Community ("EC") have even fewer procedural requirements imposed on the determination of non-tariff barriers. Although a weaker analogue to the U.S. Freedom of Information Act exists to create a private right of access to documents held by the Council of the European Union,⁵² no such private

⁴⁸ Davey and Jackson, *supra* note 8, at 412.

⁴⁹ 19 C.F.R. § 353.35 (1992); *see also id.*

⁵⁰ 19 U.S.C. §1677c(b) (1988); 19 C.F.R. §207.23(b) (1991).

⁵¹ Davey and Jackson, *supra* note 8, at 419-420.

⁵² 1993 O.J. (L 340) 41, as implemented by 1993 O.J. (L 340) 43.

right exists for most non-tariff trade barrier determinations.⁵³ Furthermore, administrative officials are given wide discretion without real judicial review by the European Court of Justice in the most significant non-tariff barrier areas.⁵⁴

The procedures for antidumping in particular are also much less substantial. The EC authorities conduct an investigation, but no formal hearing must be held.⁵⁵ Furthermore, although formal hearings are permitted in antidumping inquiries, they generally are not held.⁵⁶ The inquiries are instead conducted largely through *ex parte* contact between EC officials and private parties, and through the same kinds of discretionary questionnaires utilized by U.S. Government agencies.⁵⁷ Because of these more limited procedural constraints, prospects for discovery by non-parties such as consumers are even more limited in the EC system.

Japan

The history of Japanese administrative state has led to a different approach towards its legal constraints on bureaucracies. In Japan, a strong administrative bureaucracy was built by the Meiji oligarchy at the end of the nineteenth century to guide industrialization actively and restrain the development of a middle class.⁵⁸ The

⁵³ *Id.*

⁵⁴ Davey and Jackson, *supra* note 8, at 421-422.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ John K. M. Ohnesorge, *States, Industrial Policies, & Antidumping Enforcement in Japan, South Korea, and Taiwan*, 3 *BUFF. J. INT. L.* 289, 309 (1997). The modern form of this bureaucracy, in contrast particularly to its analogue in the United States, enjoys such public respect that the word for retirement

bureaucracy was so powerful, in fact, that when Prime Minister Moriho Hosokawa (1993-1994) was Governor of Kumamoto, he was unable to move a bus stop a few hundred yards from its existing location without the imprimatur of the administrative civil servants.⁵⁹

Until 1994, non-tariff barriers to trade were most often imposed informally, though the practice of *gyosei shido*, or administrative guidance. Through *gyosei shido*, the Japanese bureaucracy placed unwritten requirements on private interests, thus limiting the information it provided publicly and the time it needed to act. These unwritten rules were applied most often, in the area of administratively imposed trade barriers, by the Ministry of Finance, the Ministry of International Trade and Industry, and the ministries with jurisdiction over specific industries.⁶⁰ In these bureaucracies and elsewhere in the Japanese administrative state, formal procedures of adjudication, notice and comment, private rights to government information, and limitations on *ex parte* communications were nonexistent. Furthermore, no system of judicial review existed in any of the major areas of substantive action, including trade policy.

To address concerns about lack of accountability and participation by private actors in Japan's strong and autonomous bureaucracy, the Japanese Diet in 1993 enacted the Administrative Procedures Law ("APL"),⁶¹ a set of administrative procedural

from the bureaucracy into the private sector is roughly translated as "coming down from heaven." EDWIN O. REISCHAUER, *THE JAPANESE* 88-89 (1991).

⁵⁹ David Boling, *Administrative Procedures Law Makes Inroads on Bureaucracy But Leaves Web Largely Intact*, EAST ASIAN EXECUTIVE REPORTS, July 15, 1994, at 7.

⁶⁰ Ohnesorge, *supra* note 58, at 340.

⁶¹ Gyosei Tetsuzukiho [Administrative Procedure Law], Law No. 88 of 1993 (Japan).

measures resembling the APA in the United States.⁶² Although the legislation did not provide for a FOIA-type private right, nor did it require formal hearings in major rulemakings and adjudications, the APL did place notice-and-comment procedural requirements on the practice of *gyosei shido*. However, because the legislation did not come into effect until October 1, 1994,⁶³ its provisions are outside the scope of the analysis in this paper.⁶⁴

Canada

The Canadian system shares certain characteristics of the European Community and the U.S. systems, but in many ways employs more rigorous procedural constraints on administrative action on trade issues. Unlike both the U.S. and EC systems, a private right of access to government information on administratively-imposed trade barriers exists.⁶⁵ In particular, the Department of Foreign Affairs and International Trade is included in the scope of the Access to Information Act, the broad statute creating a private right to government information passed in 1982.⁶⁶ However, as elsewhere, other procedural protections such as notice and comment are not applied. Furthermore, judicial

⁶² *Supra* note 39.

⁶³ The law had been passed 12 months earlier by the parliament, but did not go into effect for one year.

⁶⁴ Once the data is available to evaluate the impact of the APL, however, the role of the legislation will be able to shed great light on the analysis in this article.

⁶⁵ Access to Information Act, R.S.C., ch. A-1 (1985) (Can.).

⁶⁶ *Id.* The Act is applied specifically to the Department of Foreign Affairs and Trade in Access to Information Act, R.S.C., ch. A-1, Sch. I (1985) (Can.). For a discussion of the law, see Jill Wallace, *The Canadian Access to Information Act of 1982*, in PUBLIC ACCESS TO GOVERNMENT-HELD INFORMATION 122 (Norman Marsh, ed., 1987).

review is more limited than in the United States, though more utilized than in the European Community.⁶⁷

Antidumping procedures again provide a good concrete example of the legal constraints on Canadian administrative action to impose non-tariff barriers to trade.⁶⁸ Like EC and U.S. antidumping procedures, administrative officials conduct inquiries to determine the legitimacy of dumping claims.⁶⁹ Revenue Canada determines the dumping issues, and the Canadian International Trade Tribunal determines the injury issues.⁷⁰ As in the United States, hearings are conducted as part of the dumping investigation, but in the Canadian system these hearings are more like those required by the U.S. APA. Opposing parties present witnesses and evidence, and witnesses are subject to cross-examination.⁷¹ As a result, although the scope of judicial review is more limited than in the U.S., Canadian administrative procedures for trade policy determinations in comparison to their U.S. counterparts consist of both more formal hearings and a private right to information.

Austria

The defining feature of the Austrian system of government for the purposes of administrative law is the influential institution of the Social Partnership. Through its

⁶⁷ Davey and Jackson, *supra* note 8.

⁶⁸ The procedures applied to administrative action on antidumping issues are established by the Special Import Measures Act, R.S.C., ch. S-15 (1985) (Can.), as amended by R.S.C., ch. 23 (1985) (1st Supp.) (Can.), R.S.C., ch. 1 (1985) (2nd Supp.) (Can.), R.S.C., ch. 47 (1985) (4th Supp.) (Can.), and R.S.C., ch. 65 (1988) (Can.).

⁶⁹ Davey and Jackson, *supra* note 8, at 424.

⁷⁰ *Id.*

primary institution of the Parity Commission, the Social Partnership provides a major mechanism for extragovernmental influence on administrative decisionmaking.⁷² The Social Partnership includes the Government and four major interest groups, including the major business and labor interests. Thus, through the Parity Commission and its three committees, the Sub-committees for Wages and Prices and the Advisory Committee for Economic and Social Questions, business and labor interests affect administrative decisionmaking informally and without formal legal constraints.⁷³

As a result, major trade-related issues are decided informally by administrative officials in consultation with those interests represented in the Social Partnership.⁷⁴ No private rights of access to information, formal hearings, or other significant guarantees of transparency are applied by Austrian law to trade-relevant administrative determinations.⁷⁵ For the period analyzed by this paper, antidumping and countervailing duty issues were not relevant as neither were ever applied; in fact, no investigations of either were initiated between 1984 and 1992.⁷⁶

Finland

⁷¹ *Id.*

⁷² GENERAL AGREEMENT ON TARIFFS AND TRADE, TRADE POLICY REVIEW: AUSTRIA 2-3 (1992).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* at 90.

Finland's primary mechanism of private involvement in trade policy determinations is informal consultation.⁷⁷ Although Finland does have certain statutorily mandated principles of publicity in Finnish administrative action, these mandates are of limited significance because of the broad, vague, and well-utilized legal authority of administrative bodies to create exceptions to the publicity rules.⁷⁸ The administrative bodies most relevant to trade barriers, the Ministry for Foreign Affairs, the Ministry of Trade and Industry, and the Ministry of Finance,⁷⁹ therefore have limited procedural constraints on revealing information to private parties. These administrative bodies thus determine antidumping, countervailing duty, licensing, customs, and other non-tariff barrier issues through informal consultation with private interests, including management, business, and labor.⁸⁰

Consistent with Finland's informal mechanism of private influence over government decisionmaking are its antidumping and countervailing duty procedures. The Ministry of Finance is legally required neither to have hearings nor to follow notice-and-comment procedures in its handling of these issues. Instead, the Ministry is given wide discretion over the course of the investigation, which may last up to one year.⁸¹

⁷⁷ GENERAL AGREEMENT ON TARIFFS AND TRADE, TRADE POLICY REVIEW: FINLAND 4, 47 (1992). For a more general history of Finnish public law, see NILS HERLITZ, ELEMENTS OF NORDIC PUBLIC LAW (1969).

⁷⁸ HERLITZ, *supra* note 77, at 199-200.

⁷⁹ GENERAL AGREEMENT ON TARIFFS AND TRADE, *supra* note 77, at 46.

⁸⁰ *Id.* at 47.

⁸¹ *Id.* at 114.

Furthermore, strict confidentiality provisions limit public disclosure of investigation progress or results.⁸²

The Finnish judicial system has only limited power of judicial review. While decisions of the Council of State are appealable to the Supreme Administrative Court, decisions by the President are not subject to appeal.⁸³

Sweden

The most prominent facet of procedural constraints on administrative action is the principle of free access to government information that has been a defining part of Swedish public administration since 1766.⁸⁴ In that year over two hundred years ago, the first Freedom of the Press Act was enacted to ensure private access to government information; the principle has subsequently been upheld through both constitutional and legislative mandate.⁸⁵ The private right to information is extended to administrative bodies controlling non-tariff barriers to trade, only limited by the standard that the information must not "disturb Swedish international relations or otherwise be injurious to Sweden."⁸⁶

⁸² *Id.*

⁸³ *Id.* at 45.

⁸⁴ Gustaf Petren, *Access to Government-Held Information in Sweden*, in PUBLIC ACCESS TO GOVERNMENT-HELD INFORMATION 35 (Norman Marsh, ed., 1987).

⁸⁵ *Id.* The constitutional provision in current Swedish law is the Instrument of Government of 1974, which contains a Bill of Rights referencing the Freedom of the Press Act of 1949. In addition to the Instrument of Government and the Freedom of the Press Act, the Swedish constitution also contains the Act of Succession which further guarantees the private right to access government documents.

⁸⁶ *Id.* at 45.

Sweden's extensive procedural protections extend moreover to specific decisionmaking processes by administrative agencies. The Administrative Procedure Act ("APA"), most recently updated in 1986, and the Administrative Courts Procedure Act ("ACPA") provide the framework for procedural constraints on administrative action.⁸⁷ These laws impose formal hearing requirements on administrative officials dealing with non-tariff barriers.⁸⁸ The laws are furthermore enforced by a system of judicial review in Sweden.⁸⁹

Norway

In terms of private access to administrative decisionmaking, the Norwegian system of administrative law has the most limited procedural constraints of the three Nordic states discussed here.⁹⁰ No statutory or constitutional right of private access to government held information exists in Norway.⁹¹ Indeed, some have argued that the entire Norwegian administrative structure is not conducive to the kinds of accountability-enhancing procedures demanded by other Nordic systems of administrative law.⁹²

Norway has not initiated a formal investigation into antidumping or countervailing duty problems in the 1990's.⁹³ In fact, the last measure in force was lifted

⁸⁷ For a more extensive discussion of these laws, see PETER L. STRAUSS ET AL., ADMINISTRATIVE LAW: THE PROBLEM OF JUSTICE, VOL. 1: ANGLO-AMERICAN AND NORDIC SYSTEMS 379 (1991).

⁸⁸ *Id.*

⁸⁹ *Id.* at 435.

⁹⁰ HERLITZ, *supra* note 77, at 199-200.

⁹¹ *Id.*

⁹² *Id.* at 191-192, 200.

in 1985.⁹⁴ The failure of Norwegian administrative authorities to utilize these kinds of formal procedures for imposing non-tariff barriers is consistent with Norway's relative lack of formal procedural constraints on administrative action.

Australia

The Australian government has a rigorous set of procedural constraints on administrative action. The Freedom of Information Act 1982⁹⁵ provides for a broad public right to government information. The right extends to all ministerial departments and most statutory authorities, excluding intelligence and security bodies.⁹⁶ Furthermore, the standard for exempting international relations materials from public discovery is high; mere possibility of damage to the relations between Australia and another country is insufficient to exclude a piece of information from discovery.⁹⁷

Australian administrative bodies are in many cases also required to hold formal hearings in making decisions. The Administrative Decisions (Judicial Review) Act 1977⁹⁸ requires that administrative procedures comply with "natural justice."⁹⁹ In common law, this requirement has the practical import of imposing the "hearing" rule,

⁹³ WORLD TRADE ORGANIZATION, TRADE POLICY REVIEW: NORWAY 52 (1996).

⁹⁴ *Id.*

⁹⁵ Freedom of Information Act, 1982 (Austl.).

⁹⁶ Lindsay J. Curtis, *Freedom of Information in Australia*, in PUBLIC ACCESS TO GOVERNMENT-HELD INFORMATION 180 (Norman Marsh, ed., 1987). See also ROMAN TOMASIC AND DON FLEMING, AUSTRALIAN ADMINISTRATIVE LAW 339 (1991).

⁹⁷ *Re Maher* (1985) 7 A.L.J. 731, 742. This seminal case interpreted the international relations exception to the Freedom of Information Act 1982, §33(1)(a)(iii).

⁹⁸ Administrative Decisions (Judicial Review) Act, 1977 (Austl.).

⁹⁹ Administrative Decisions (Judicial Review) Act, 1977, § 5(1)(a) (Austl.).

otherwise known as the principle of *audi alteram partem*.¹⁰⁰ The exact meaning of the hearing rule depends on the context, but it generally requires that interested parties be given an opportunity to be heard.¹⁰¹

In the context of antidumping and countervailing duty issues, the hearing rule manifests itself in an enhanced notice-and-comment-style procedure in which the investigation is first publicized. Interested parties are then given an opportunity to express their views to administrative officials through comments and in person.¹⁰² The elaborate and public investigation is conducted under the jurisdiction of the Minister for Industry, Technology, and Regional Development.¹⁰³ Different commentators disagree on the level of judicial review of administrative procedures, but the Administrative Appeals Tribunal hears several thousand cases a year.¹⁰⁴

New Zealand

Like Australia, New Zealand has a broadly defined private right to access government-held information. The Official Information Act 1982 ("OIA")¹⁰⁵ applies to

¹⁰⁰ TOMASIC AND FLEMING, *supra* note 96, at 187. For a more detailed discussion of the common law hearing rule, see E. I. SYKES, *GENERAL PRINCIPLES OF ADMINISTRATIVE LAW* 188-197 (1989); M. ARONSON AND N. FRANKLIN, *REVIEW OF ADMINISTRATIVE ACTION* 145-209 (1987); J. FLICK, *NATURAL JUSTICE* (1984).

¹⁰¹ TOMASIC AND FLEMING, *supra* note 96, at 189.

¹⁰² GENERAL AGREEMENT ON TARIFFS AND TRADE, *TRADE POLICY REVIEW: AUSTRALIA* 101 (1994). See also Davey and Jackson, *supra* note 8, at 426.

¹⁰³ *Id.*

¹⁰⁴ TOMASIC AND FLEMING, *supra* note 96, at 5. The Administrative Appeals Tribunal Act 1975, together with the Administrative Decisions (Judicial Review) Act 1977, gave judicial tribunals wide authority to review substantive decisions and procedural safeguards of administrative agencies. See *id.* at 1-264.

¹⁰⁵ Official Information Act, 1982 (N.Z.).

all government departments, Ministers of the Crown, and organizations.¹⁰⁶ The Legislative Department and the Parliamentary Counsel Office are, however, exempt from the act.¹⁰⁷ Exemptions for security and international relations are not applied to institutions, but instead are evaluated on a case-by-case basis.¹⁰⁸ Therefore, the administrative institutions most significant for administratively imposed trade barriers, namely, the Ministry of Foreign Affairs and Trade and the Ministry of Commerce, as well as the Ministry of Agriculture, the Ministry of Fisheries, the Ministry of Forestry, and the Ministry of Transport, are subject to the OIA.¹⁰⁹ Judicial review of the private right to information ensures its vitality.¹¹⁰

The defining procedural standard for administrative agencies in New Zealand is the principle of natural justice, firmly established in the common law until 1990 and subsequently recognized by statute in the New Zealand Bill of Rights Act.¹¹¹ The natural justice requirement, as in Australia, demands *audi alteram partem*, or an opportunity for interested parties to be heard.¹¹² The specific procedural requirements of the rule depend

¹⁰⁶ Michael Taggart, *Freedom of Information in New Zealand*, in PUBLIC ACCESS TO GOVERNMENT-HELD INFORMATION 211 (Norman Marsh, ed., 1987).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 216-223.

¹⁰⁹ WORLD TRADE ORGANIZATION, TRADE POLICY REPORT: NEW ZEALAND (1996)

¹¹⁰ Taggart, *supra* note 106, at 233.

¹¹¹ New Zealand Bill of Rights Act, 1990, §27(1) (N.Z.).

¹¹² For a more detailed discussion of the *audi alteram partem* rule in New Zealand, see IAN EAGLES ET AL., LAW IN BUSINESS AND GOVERNMENT IN NEW ZEALAND 145-149 (1996).

on the context, but they may include notice-and-comment either in writing or in person, formal hearings, and/or cross examination of witnesses.¹¹³

In the context of antidumping and countervailing duties, notice of the initiation of an investigation must be published in the *New Zealand Gazette*.¹¹⁴ The Ministry of Commerce, whose responsibility it is to conduct the investigation, must then give all interested parties an opportunity to present written evidence and opposing views.¹¹⁵ Representations in person are discouraged, however, and formal hearings are rare.¹¹⁶ Judicial review is limited to appeals to the High Court on grounds of procedural fairness.¹¹⁷

Mexico

Mexico's history of one-party rule has defined its legal approach towards constraint of its administrative state.¹¹⁸ Mexico does not have a private right to access to government information.¹¹⁹ Furthermore, it did not have a law imposing procedural constraints on administrative officials at a government-wide level until 1995, when the

¹¹³ *Id.* at 147.

¹¹⁴ Robert Fardell, *New Zealand*, in ANTIDUMPING UNDER THE WTO: A COMPARATIVE REVIEW 191 (Keith Steele, ed., 1996).

¹¹⁵ Dumping and Countervailing Duties Act, 1988, §10(6) (N.Z.).

¹¹⁶ Fardell, *supra* note 114, at 191-192.

¹¹⁷ *Id.* at 206.

¹¹⁸ Stephen Zamora, *NAFTA and the Harmonization of Domestic Legal Systems: The Side Effects of Free Trade*, 12 ARIZ. J. INT'L & COMP. L. 401, 411 (1995).

¹¹⁹ *Id.*

Administrative Procedure Law of Mexico was adopted.¹²⁰ Real questions remain about the impact of the law on procedures applied by Mexican administrative bodies,¹²¹ but these questions are outside the scope of this comparative analysis as they are not relevant in our period of study of 1988-1993.

Mexico's antidumping procedures are similarly undeveloped. The Ministry of Commerce and Industrial Development, together with the Foreign Trade Commission, make determinations either upon petition from a private party or *sui generis*.¹²² Neither formal hearings or notice and comment are required, and administrative officials have wide discretion in the use of questionnaires. The questionnaires are sent to exporters and importers with an official notification of commencement of the investigation, but no further publicity is required.¹²³ The limited antidumping procedures therefore are consistent with administrative law generally in Mexico, as limited by that country's history of single party government.

Turkey

The administrative law of Turkey is based on the French dual court system of administrative law, or *droit administratif*.¹²⁴ As a result, a separate court system of *idari*

¹²⁰ "Reglas de procedimiento del artículo 1904 y del Comité de Impugnación Extraordinaria del Tratado de Libre Comercio de América del Norte," 489 D.O. 13, 20 de junio de 1994.

¹²¹ Zamora, *supra* note 118, at 411.

¹²² Ley de Comercio Exterior, D.O., 27 de julio de 1993 (Foreign Trade Law); Reglamento de la Ley de Comercio Exterior, D.O., 30 de diciembre de 1993 (Regulations of the Foreign Trade Law).

¹²³ For a more detailed discussion of Mexican antidumping procedures, see Ernesto Duhne Backhaus, *Mexico*, in *ANTIDUMPING UNDER THE WTO: A COMPARATIVE REVIEW* 155-157 (Keith Steele, ed., 1996).

mahkemeler, or administrative courts, hears appeals from contested administrative actions. A procedural defect, or *usul hatasi*, can provide the grounds for review by the administrative courts.¹²⁵ No private right of access to government information exists.

The procedural constraints on antidumping and countervailing duty action, however, do provide a right for the government of the interested exporter to non-confidential information.¹²⁶ Furthermore, although no private right to government information exists, the Undersecretariat of Treasury and Foreign Trade must publish a notice in the *Official Gazette* upon initiating any investigation.¹²⁷ After the notice is published, questionnaires are sent to importers and importers of the good in question, and answers must be submitted within 30 days.¹²⁸ No hearing is required.¹²⁹

III. Conflicting Theories of Administrative Law

As the preceding discussion has made clear, each country has a different combination of legal mechanisms to constrain administrative procedure in the area of trade policy. Some require formal hearings, some create private rights to government information, and some require notice and comment procedures. Some allow courts to

¹²⁴ Sait Güran, *Administrative Law*, in INTRODUCTION TO TURKISH LAW 61 (T. Ansay, ed., 1987). For a general description of *droit administratif*, see H. B. JACOBINI, AN INTRODUCTION TO COMPARATIVE ADMINISTRATIVE LAW 99-124 (1991).

¹²⁵ JACOBINI, *supra* note 124, at 110. The French term for this basis for judicial review is *le vice de forme*.

¹²⁶ GENERAL AGREEMENT ON TARIFFS AND TRADE, TRADE POLICY REVIEW: TURKEY 63 (1994). The statutory scheme for antidumping and countervailing duty action is Legislation on Prevention of Unfair Competition in Importation, Law No. 3577, 1 October 1989, as well as Customs Law, Art. 21.

¹²⁷ *Id.*

¹²⁸ *Id.*

review administrative decisions to ensure they comply with the required procedures, and others do not. Each state has a different combination of procedures based on the prevailing assumptions in that country on the impact of administrative law. Different assumptions about the impact of administrative procedures lead to different conclusions about the appropriate administrative procedures to apply in a given situation.

In the context of a trade policy in which administrative outcomes are increasingly significant, the relevance of the administrative law debate is even greater. The legal constraints on administrative action in trade-relevant areas are based on the dominant theory of administrative law in a particular legal system. Therefore, as domestic opposition to powerful international institutions grows, and as the role of transnational networks of administrative officials increases, the dominant paradigm and resulting administrative law becomes more relevant to the ultimate barriers to trade.

Therefore, the discussion that follows will articulate the conventional debate over the impact of administrative procedures and will then develop a third argument based on the methodologies of law and economics and public choice. Each of the three arguments has distinct empirical implications, and the next section will examine those implications. By developing the three alternative theories and then comparing their conflicting claims empirically, we will be better able to understand the most effective system of procedural safeguards in administrative trade policy formulation.

Administrative Optimist Argument

Arguments about the appropriate proceduralization of the administrative process have traditionally depended upon assumptions about the nature of administrative

¹²⁹ *Id.*

officials. In the United States, positions on proceduralization have shifted dramatically with confidence in the inclinations of administrative agencies.¹³⁰ Of course, an element to this debate has been that the delay inherent in procedural constraints may limit the ability of administrative bodies to take affirmative action.¹³¹ However, in a policy area in which affirmative action is less frequent, the question becomes whether procedural constraints furthermore affect the substantive outcomes in those cases in which the agency does act.

The debate over the answer to this question has traditionally been between those who trusted administrative officials to change their minds in the face of new evidence and argument, and those who did not have such confidence in bureaucrats. One of the champions of administrative officials in the United States has been the prominent jurist Judge Henry Friendly. Judge Friendly argued that procedures ensuring administrative officials were deliberative in their decisionmaking would create better substantive results.¹³² Judge Friendly's first and most prominent development of this argument was in the context of the seminal U.S. Supreme Court case of *Securities and Exchange Commission v. Chenery Corp.*¹³³ *Chenery* required agencies to articulate the reasons behind their administrative actions; Friendly suggested that such a requirement would

¹³⁰ HORWITZ, *supra* note 16, at 240.

¹³¹ *Id.* at 240-246.

¹³² See Henry J. Friendly, *Chenery Revisited: Reflections on Reversal and Remand of Administrative Orders*, 1969 DUKE L. J. 199 (1969).

¹³³ 318 U.S. 80 (1943).

substantively improve the administrative decisionmaking process by demanding that agencies consider the different arguments against the action.¹³⁴

As discussed at the beginning of this article, much of modern U.S. administrative law has been built on Friendly's view.¹³⁵ The "hard look" or "adequate consideration" doctrine and statutory law both in general administrative law statutes and in the organic statutes that authorize agency action are premised on confidence that administrative officials will change their positions in light of new evidence. I will call this argument the administrative optimists' position.

The reasoning behind Friendly's thinking may have been simply that procedures requiring agencies to consider alternative evidence will expose officials to additional evidence. Officials, then, when faced with this additional evidence, will lead to a better outcome as the officials selflessly search for the best outcome. This assumption about administrative officials is therefore very specific. The assumption is that administrative officials, if forced to hear alternative arguments and information, will consider those arguments in good faith and potentially decide differently.

Friendly's reasoning need not have been so optimistic, however. Instead, Friendly may have believed that administrative officials are properly motivated by self-interest to pursue the best possible policy, or at least a different policy in light of new evidence. Perhaps the administrator's job security or advancement depends upon the consideration of alternative positions if those arguments suggest lower non-tariff barriers to trade. Perhaps earnings or private sector positions depend upon such consideration of

¹³⁴ Friendly, *supra* note 132, at 209-210.

¹³⁵ See Stewart, *supra* note 21.

arguments for lower barriers to trade. Or perhaps greater action by the administrator enhances the prestige and perception of power in her position, potentially justifying higher pay or other desirable rewards. The self-interest analysis would then require these incentives to outweigh any benefit enjoyed by the official by pursuing a personal agenda.

The administrative optimist position is therefore built on one of two assumptions. First, it may be founded on the assumption that administrative officials will make the best choices based on the evidence in front of them because they benevolently and selflessly seek the best policies. Alternatively, this position may be founded on the assumption that incentives for officials to pursue the best policy, or at least a different policy in light of new information, are more powerful than the cost to officials of not pursuing personal agendas.

The empirical implications of the theory are straightforward. If administrative officials may change their decisions when presented with alternative evidence and argumentation, then any procedure providing this opportunity will substantively change administrative outcomes. Formal hearings and opportunities for public comment will affect the outcomes of administrative decisionmaking for the better. Therefore, in the context of trade policy, administrative procedures will create more efficient and effective trade policies. Procedures will address problems of producer capture of trade policy-relevant administrative bodies by giving administrative officials an opportunity to hear alternative evidence and argument. If those who suggest that producers capture administrative agencies and that trade barriers are therefore inefficiently high are

correct,¹³⁶ then administrative procedures providing an opportunity for officials to consider alternative evidence and argument will reduce barriers to trade.

Realist Argument

The other side of this argument derives from the critiques made by the Legal Realists in the first half of the twentieth century. The Realists suggested that decisionmakers make decisions based not necessarily on the merits of the arguments presented but instead on their own political agendas.¹³⁷ The same critique applies to administrative officials.¹³⁸ According to this argument, administrative officials are driven by their own agendas. Therefore, procedures ensuring that administrative officials consider alternative information and argumentation will have no impact on substantive outcomes. Implicit in this position is the assumption that the benefits to the administrator of following a particular agenda are greater than the benefits, as discussed above, of changing that position in the face of new evidence. I will call this argument the realist position.

Like the administrative optimists' position, the realist position is not inconsistent with the argument that increased procedural constraints work in favor of the status quo by slowing the administrative process. The realist position is, however, in conflict with the

¹³⁶ See, e.g., Davey and Jackson, *supra* note 8, at 433.

¹³⁷ See, e.g., FRANK, *supra* note 22. More recent critiques have included Sidney A. Shapiro & Richard E. Levy, *Judicial Incentives and Indeterminacy in Substantive Review of Administrative Decisions*, 44 DUKE L. J. 1051, 1068-1072 (1995); Christopher F. Edley, Jr., *The Governance Crisis, Legal Theory, and Political Ideology*, 1991 DUKE L. J. 561, 587-588 (1991). For a discussion of this point of view in the context of the U.S. Supreme Court's decision in *Chevron*, see Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron doctrine in the U.S. Courts of Appeals*, 15 YALE J. ON REG. 1 (1998).

administrative optimists' assumptions about the dispositions of administrative officials. The argument assumes the opposite of the administrative optimists in suggesting that administrative officials will not be swayed in their agendas by hearing alternative information and argumentation. Alternatively, the realist position assumes that the benefits to an administrator of changing a position in the face of new evidence are less than the costs of abandoning a personal agenda.

The very specific assumptions about administrative behavior implicit in the realist and administrative optimist arguments lead to specific and conflicting empirical implications. The realist argument suggests that procedural constraints on administrative action will have no impact on the substantive outcome of those issues determined by the administrative body. Giving interested parties an opportunity to participate in the decisionmaking process through learning of the pending decision and through providing alternative evidence and argumentation will not affect the relevant officials. Formal hearings and notice-and-comment procedures, though giving private actors formal access, will not alter the substantive decisions of administrative officials. Procedure will therefore have no impact on trade policies.

*Law and Economics/Public Choice Theory of Administrative Procedure*¹³⁹

The disciplines of law and economics and public choice provide a third explanation of the relationship between procedure and outcome. In a democracy, power is ultimately derived from those elected through popular elections. Therefore, interest

¹³⁸ See Sax, *supra* note 22; Securities and Exchange Commission v. Chenery Corp., 318 U.S. 80 (1943) (Black, J., dissenting).

¹³⁹ For a formal model of the theory developed in this section, see Appendix A: A Simple Model.

groups can influence administrative decisionmaking through political mobilization and pressure. However, different interest groups have different amounts of political power, in the form of relationships with public officials, financial resources, and organizational strength. Therefore, if administrative procedures affect the ability of different interest groups to influence administrative decisionmaking, then they will affect the substantive outcomes of that decisionmaking.

Many administrative procedures shift the cost of information about administrative decisionmaking. Private rights to government information and required notice, for example, make information about pending administrative decisions more accessible to interest groups with more limited resources. Furthermore, limitations on *ex parte* communications between administrative officials and interested private parties reduce the value of political capital in the form of relationships with officials.

These shifting costs of information and access affect the ability of different political actors to mobilize support for a particular outcome. A less organized interest group may be able to mobilize support for a particular position, but it will need time. If administrative procedures increase the amount of time between the actor's discovery of the pending decision and the final administrative determination, the actor will be better able to mobilize the resources necessary to influence that decision.¹⁴⁰

The key to this argument is that constraints on administrative procedure affect different actors in different ways. Political actors with more connections among public officials, greater financial resources, and stronger organization benefit less from procedural constraints than those with fewer such benefits. While a well organized lobby

may learn of a pending administrative action through its political connections, a less organized interest group may not learn of the pending action without some kind of private right to information or publication requirement until the action has already been taken.

The impact on trade policy, therefore, derives from the well-documented difference in political resources between the producers and consumers of a particular good or service.¹⁴¹ Political economists explain that because they are fewer in number and individually control greater resources, the producers are better able to organize politically to affect policy.¹⁴² Each consumer individually has much less at stake and thus a much smaller incentive to act to influence government action, while the incentives to organize are much greater for each producer.¹⁴³ Furthermore, the much smaller number of producers reduces the cost of organization.¹⁴⁴ Producers are generally therefore much better able to coordinate and organize on their own behalf.

The interest of a producer of a good is generally to sell that good at as high a price as possible to as many consumers as possible at as low a cost as possible. The producer is therefore usually interested in protection from foreign competition. The consumer, on the other hand, is generally interested in purchasing a good at as low a price as possible and of as high quality as possible. The consumer is therefore interested in less protection

¹⁴⁰ The dramatic difference in cost to changing a decision already made and to influencing a decision in the process of being made is developed in McCubbins et al., *supra* note 28, at 440-445.

¹⁴¹ This difference was first articulated by Schattschneider in E. E. SCHATTSCHNEIDER, *POLITICS, PRESSURES AND THE TARIFF: A STUDY OF FREE PRIVATE ENTERPRISE IN PRESSURE POLITICS, AS SHOWN IN THE 1929-1930 REVISION OF THE TARIFF* (1935). *See also* MANCUR OLSON, JR., *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 141-148 (1965); JEFFREY M. BERRY, *LOBBYING FOR THE PEOPLE: THE POLITICAL BEHAVIOR OF PUBLIC INTEREST GROUPS* (1977).

¹⁴² *Id.*

¹⁴³ *Id.*

¹⁴⁴ *Id.*

and lower trade barriers to foreign goods and services. In the most general terms, the lower the barriers to trade, the greater the competition, the lower the cost, and the higher the quality.

The impact of administrative procedures on administrative determinations of trade barriers, according to the law and economics/public choice or "New Administrative Law" argument, is that procedures lowering the cost of information and access will reduce trade barriers. Notice-and-comment, private rights to information, and limitation on *ex parte* communications will all shift power away from producers and towards consumers in trade policymaking.

IV. The Methodology of the Study¹⁴⁵

The three arguments suggest three distinct empirical results. The administrative optimist position suggests that opportunities for interested parties to present evidence and arguments to administrative officials will affect outcomes. Therefore, if producers are more politically mobilized and connected than consumers, then opportunities for parties to present evidence and arguments will reduce trade barriers. The realist position suggests that giving interested parties such notice and an opportunity to be heard will have no such effect. Finally, the New Administrative Law position suggests that lowering the cost of obtaining government information for private actors will reduce trade barriers by shifting the balance of political power between consumers and producers.

¹⁴⁵ For background on the data used, *see* Appendix B: Statistics Background.

The study was conducted in two steps to differentiate between the three positions. In the first set of regressions, the existence of a private right to government-held information in trade-relevant administrative bodies was the independent variable. The regression was thus designed to distinguish between the administrative optimist and New Administrative Law positions on the one hand and the realist position on the other. Significance of the procedural mechanism would mean that administrative procedures do have an impact on outcome in those cases that are decided, thus supporting either the administrative optimist or the New Administrative Law position. Insignificance, on the other hand, would suggest that administrative procedures do not have a significant impact on outcome, thus supporting the realist position.

The second set of regressions was based on an independent variable of the existence of a formal hearing for interested parties, the exporter and the importer, in tariff barrier determinations. By limiting the independent variable to hearings in which the consumer is excluded, the regression would narrowly focus on the mechanism of procedural impact on substantive outcome. If the coefficients were significant, then the hearing of exporter and importer would affect substantive outcomes, thus supporting the administrative optimists' argument. If, on the other hand, the coefficients were not significant, then the empirical evidence would support either the realist or the New Administrative Law position. By comparing the results of the two sets of regressions, we might therefore come to some preliminary conclusions about which of the three arguments is most strongly supported by the evidence evaluated here.

This two-stage approach is applied twice so as to deal with the difficulty of measuring administratively-imposed barriers to trade. Barriers to trade are exceptionally

problematic to measure, and the complexity of measurement has been the subject of extensive study by economists.¹⁴⁶ Tariffs are relatively straightforward to measure and are frequently applied through legislative action, but administrative actions leading to barriers to trade are much more difficult to measure. The goal here is to measure administrative barriers to trade such as antidumping and countervailing duty actions, discretionary licensing, customs restrictions, quotas, and domestic regulations leading to barriers to trade. The most utilized measure of such non-tariff barriers ("NTB's") is the OECD measurement of the pervasiveness of member states' NTB's.¹⁴⁷ Therefore, the first pair of regression sets utilize this data set.¹⁴⁸

Unfortunately, however, this data is imperfect. The pervasiveness of non-tariff barriers does not measure the magnitude of the barriers, nor does it measure a range of other important indications of barriers to trade as imposed by administrative bodies.¹⁴⁹ Therefore, the results include a second pair of regression sets using a dependent variable of total trade divided by gross domestic product. This measure, more commonly used to measure the *de facto* openness of an economy, allows us to test the robustness of our

¹⁴⁶ See, e.g., Deardorff and Stern, *supra* note 1; ALAN V. DEARDORFF AND ROBERT M. STERN, THE MICHIGAN MODEL OF WORLD PRODUCTION AND TRADE: THEORY AND APPLICATIONS (1986); ALAN V. DEARDORFF AND ROBERT M. STERN, COMPUTATIONAL ANALYSIS OF GLOBAL TRADING ARRANGEMENTS (1990); SAM LAIRD AND ALEXANDER YEATS, QUANTITATIVE METHODS FOR TRADE-BARRIER ANALYSIS (1990).

¹⁴⁷ ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, INDICATORS OF TARIFF AND NON-TARIFF TRADE BARRIERS (1996)

¹⁴⁸ The primary problem with this data set is that it measures only the pervasiveness of NTB's and not their intensity. Unfortunately, we have no better data set available at this time. However, for the purposes of this study, pervasiveness should be largely adequate. Through this data set we will be determining whether, under certain procedural constraints, it will be more likely that an NTB will be imposed. An additional helpful question would be whether, given that an NTB is imposed, procedural constraints limit the intensity of that NTB. For the purposes of distinguishing between the three paradigms for the impact of administrative procedures, however, the second question, though interesting, is not necessary.

¹⁴⁹ See *supra* note 146.

results using the pervasiveness of non-tariff barriers.¹⁵⁰ Using this alternative dependent variable also allows us a broader measure of barriers to trade.

However, we must be similarly wary of the ratio of total trade to GDP as our dependent variable. The ratio is commonly used by economists to measure the *de facto* openness of an economy, not specifically administratively-imposed barriers to trade. Therefore, while the pervasiveness of non-tariff barriers may be underinclusive as a measure of the barriers we are evaluating, the ratio of total trade to GDP is an overinclusive measure. We use both in our regressions to test the robustness of these imperfect measures.

Private Right of Information Test

The first step is to determine the impact of procedures lowering the cost of information to the public. The most obvious legal mechanism to use for this test was therefore the existence of a private right of access to government-held information. The first model tested was therefore as follows:

$$\mathbf{NTB} (\mathbf{TT}/\mathbf{GDP}) = \alpha + \beta\mathbf{I} + \Gamma\mathbf{Z} + \varepsilon,$$

where **NTB** is the pervasiveness of non-tariff barriers, **TT/GDP** is the ratio of total trade to gross domestic product (the dependent variable in the second pair of regression sets), **I** is a dummy variable indicating the existence of a private right to access to government-held information, **Z** is a vector of controls of those macroeconomic, social, and temporal

¹⁵⁰ *Id.*

variables that may affect non-tariff barriers, α is the constant, β and Γ are coefficients, and ε is an error term.

The OECD data set for dependent variables provides a number of advantages beyond a reliable measure of the pervasiveness of non-tariff barriers. First, the data set provides data for all of the OECD member states: the United States, the European Union, Japan, Canada, Austria, Finland, Sweden, Norway, Australia, New Zealand, Mexico, and Turkey. These countries, the major industrialized democracies of the world, provide an excellent group of countries to compare because of their analogous economic and political structures. The data set also provides data at two distinct points in time: 1988/1989 and 1993. Therefore, the data set not only avoids single-year anomalies but also allows the regression to test for trends.

The existence of private rights to access to government-held information is addressed above in II: The Problem: Procedural Law for the Imposition of Trade Barriers. In this set of regressions I has a value of 1 if there is a regulatory, statutory, or constitutional private right to government-held information from trade-relevant administrative bodies. Otherwise, the variable has a value of 0.

Several control variables are relevant. First, the model controls for gross domestic product¹⁵¹ and total trade.¹⁵² Because the size of a country's economy and the volume of its trade are closely correlated with its ability to influence world prices through market power as both producer and consumer, these macroeconomic variables may have

¹⁵¹ Data source: ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD STATISTICAL COMPENDIUM (1995); ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD STATISTICAL COMPENDIUM (1991).

¹⁵² *Id.*

an impact on trade barriers. Therefore, GDP and total trade are included in the regression to address the counterargument that country size, volume of trade, market power, and associated protectionism are the cause of the model's results. Because total trade is particularly endogenous,¹⁵³ we cannot rely on the resulting coefficients to make any causal arguments, but we must include the variable as a control nonetheless.¹⁵⁴

The model also controls for the percentage of exports that are agricultural. This variable controls for the structure of an economy. Because barriers to trade may be higher in certain sectors of an economy than others, we must control for the structure of the economy in order to isolate the existence of specific legal mechanisms as a factor in barriers to trade. Furthermore, economies with a heavier emphasis of different kinds of skills, education, or production may be more likely for broader political and institutional reasons to have different barriers to trade. Therefore, we use the percentage of exports that are agricultural to control for these variables.

The model also controls for membership in the European Free Trade Association ("EFTA") and the Association of South East Asian Nations ("ASEAN"), as such international agreements might put additional pressures on barriers to trade. These institutions furthermore encompass certain economic and political similarities which are difficult to control for by other means. Therefore, including EFTA and ASEAN membership in the regressions addresses the counterargument that these international

¹⁵³ Endogeneity refers to the relationship between a control variable and the dependent variable. In this case, total trade impacts barriers to trade, but barriers to trade also have an impact on total trade. Therefore, while we must include total trade in the regressions to ensure proper results, the resulting coefficients on total trade will not tell us anything about the causality between total trade and barriers to trade.

¹⁵⁴ In order to ensure that the results are robust to this issue, each regression set includes models both with and without total trade as a control variable.

agreements, regional factors, and associated political and economic institutions might be driving the model's results.

The final control variable utilized in the regression is a temporal dummy. The OECD non-tariff barrier data is provided across all OECD member states for 1988/1989 and for 1993. The temporal dummy has a value of 1 when the observation is a 1993 observation, and 0 otherwise. Significance on the dummy therefore would suggest a change in the pervasiveness of non-tariff barriers between 1988/1989 and 1993. Inclusion of this variable therefore helps address the counterargument that any significance on the procedural variables is the result of the tendency of procedures to uphold the status quo.¹⁵⁵

Hearing Test

The next step was to test the impact of formal hearings on non-tariff barriers. The second model tested was therefore as follows:

$$\mathbf{NTB} (\mathbf{TT}/\mathbf{GDP}) = \alpha + \beta\mathbf{H} + \Gamma\mathbf{Z} + \varepsilon,$$

where **NTB** is the pervasiveness of non-tariff barriers, **TT/GDP** is the ratio of total trade to gross domestic product (the dependent variable in the second pair of regression sets), **H** is a dummy variable indicating the existence of required formal hearings involving exporters and importers, **Z** is a vector of controls of those macroeconomic, social, and temporal variables that may affect non-tariff barriers, α is the constant, β and Γ are

¹⁵⁵ See HORWITZ, *supra* note 16, at 240-246.

coefficients, and ϵ is an error term. In this set of regressions, \mathbf{H} has a value of 1 if a hearing is legally required either for antidumping/countervailing duty actions or in a government-wide administrative procedure act. The variable has a value of 0 otherwise. Again, the data comes from the discussion in II: The Problem: Procedural Law for the Imposition of Trade Barriers.

As discussed above, NTB is the pervasiveness of non-tariff barriers from the OECD data. Furthermore, as discussed above, the vector of control variables \mathbf{Z} includes gross domestic product, total trade, ASEAN and EFTA membership, and a temporal dummy. These control variables will address the possible counterarguments that country size, volume of trade, market power, and associated protectionism, or that international agreements, regional factors, and associated political and economic institutions, or that the tendency of procedures to uphold the status quo are driving the results.

V. Results¹⁵⁶

Private Right of Information Regressions

The results of the first set of regressions, testing the impact of private rights of access to government-held information on non-tariff barriers, show significance for the negative coefficient on that mechanism of administrative law at least at the 5% level. The coefficients range from -4.358 to -6.606. In other words, the existence of a private right to government-held information suggests a reduction in the pervasiveness of non-

¹⁵⁶ For results, *see* Appendix C: Regression Results. For those readers with less technical background in econometrics and statistics, Appendix D: Brief Definitions of Basic Econometrics and Statistics Concepts may be of use for reading this section.

tariff barriers of approximately 5 or 6 percentage points, a substantial effect given that the mean pervasiveness of non-tariff barriers is 6.37%.

In various combinations of controlling variables, the t-statistics on the negative coefficient on the existence of a private right to government information range from 2.446 to 3.430. The negative coefficient is therefore quite robust. Furthermore, in the regression with all variables included, the negative coefficient is significant at the 1% level with an adjusted R^2 of .655 and an F statistic of 7.240. The standardized coefficients on private rights to government information are also relatively high, ranging from -.425 to -.645. Therefore, the existence of a legal mechanism ensuring a private right to government-held information does suggest a lower frequency of non-tariff barriers.

As discussed above, the significance of coefficients on total trade does not tell us anything conclusive about the impact of total trade on non-tariff barriers to trade because of the endogeneity of total trade.

The coefficients on gross domestic product are all negative at a 1% significance level, except when total trade is removed from the regression. The result is unsurprising given the reduced need for exports in a larger domestic market. Thus, larger economies have less need for protection.

The temporal dummy and the EFTA dummy both are insignificant at the 5% level, and the ASEAN dummy straddles the 5% significance level. All three dummies have negative signs on their coefficients, the result we would expect. Given the role of these international agreements in fostering a free trade regime, we might interpret the insignificance of these coefficients as putting this particular dependent variable in question.

The results using a dependent variable of total trade over GDP reinforce these results, however. Using the alternative dependent variable, the coefficient on the existence of a private right to government information in a regression including all variables is positive and significant at either a 1% level. Indeed, all regressions again have coefficients on a private right to government information significant at a 1% or 5% level. The coefficients range from 2.339 to 4.700. In other words, a private right to government information is associated with a greater *de facto* openness in an economy.

In this second set of regressions, membership in ASEAN and EFTA are more significant. Indeed, the coefficients on these variables are consistently negative and significant at the 1% level in all instances except when the pervasiveness of non-tariff barriers is included as a control variable on the right hand side. In this regression, EFTA membership remains significant but the significance of ASEAN membership becomes more marginal. We of course would expect these results.

In the regressions using a dependent variable of the ratio of total trade to GDP, the pervasiveness of non-tariff barriers is included as a control variable. This regression is run simply in case non-tariff barriers are set in some way through some independent political process. Even with the inclusion of this variable on the right-hand side of the equation, the existence of a right to government information remains significantly positive at the 1% level.

The regressions on a dependent variable of total trade over GDP also have very high adjusted R^2 figures, ranging from 0.432 to 0.845. Thus, the model is a relatively good fit.

The discussion below will describe these results in greater depth, but for those less versed in statistics these results indicate that a private right to government-held information is associated with lower, or at least less pervasive, non-tariff barriers to trade. The magnitude of the effect is approximately 5 or 6 percentage points. Furthermore, these tests of the impact of private rights to government-held information, which take into account an assortment of different possible factors in administratively imposed barriers to trade, explain more than half of the variation in non-tariff barriers to trade across countries and years. Finally, the tests indicate that even when we take into account the possible effects of country size, volume of trade, structure of the economy, market power, and associated protectionism, as well as international agreements, regional factors, and associated political and economic institutions, and the possible effects of procedure on upholding the status quo, private rights to government-held information still seem to have a substantial relationship with the barriers to trade. These results stay the same when we measure administratively-imposed barriers to trade by measuring the *de facto* openness of the economy.

Hearing Regressions

In contrast to the first set of regressions, the coefficients on the existence of a formal hearing requirement are insignificant at the 5% level in all of the second set of regressions with a dependent variable of the pervasiveness of non-tariff barriers. In all five combinations of regressions, the coefficient on formal hearings is insignificant. These insignificant coefficients range from 1.250 to -2.101. Furthermore, the adjusted R^2

are lower than in the first set of regressions, ranging from 0 to .440. Unsurprisingly, the F statistics follow suit, ranging from only .332 to 4.501.

The same significance and sign on gross domestic product remain in the second set of regressions. Likewise, the coefficients on EFTA membership and on the temporal dummy remain insignificant. The one difference in this set of regressions with the control variables is that in the second set the ASEAN dummy is significant with a negative coefficient at the 5% level when we exclude the agricultural variable from the regression. Therefore, in a nearly identical set of regressions simply replacing a private right to government information with formal hearings, the significance on the existence of a legal mechanism of administrative procedure disappears.

When the dependent variable is changed to the ratio of total trade to GDP, the coefficients remain insignificant at the 5% level for most of the regressions. Therefore, the results are robust, generally speaking, to the dependent variable used to represent administratively-imposed barriers to trade. Three main differences stand out, however, in these results in contrast to the same regressions run with a dependent variable of the pervasiveness of non-tariff barriers. First, the coefficients, even when not significant at a 5% level, are consistently positive in this set of regressions. Second, the coefficients, while not significant at a 5% level, may potentially be marginally significant with t-statistics of approximately 1.8 for the regressions including all variables. Finally, when all of the controls are removed, the regression with the independent variable alone does show a significant association between the existence of formal hearings and the ratio of total trade to GDP. Likewise, in the regression excluding total trade as a variable, the coefficient on formal hearings is significant at the 5% level.

These distinctions muddy the waters of these results somewhat, although they do not change the ultimate results indicating the significance of the existence of a private right to government information in contrast to insignificance of the coefficient on the existence of formal hearings. Furthermore, while the pervasiveness of non-tariff barriers is an underinclusive measure of administratively-imposed barriers to trade, the *de facto* openness of an economy as measured by the ratio of total trade to GDP is an overinclusive measure. Therefore, given the results using the pervasiveness of non-tariff barriers, the more uncertain results of regressions using the ratio of total trade to GDP may be driven by elements of the openness of an economy other than administratively-imposed barriers to trade.

Again, the discussion of these results below will clarify these results, but for those less versed in statistics the basic finding is the regressions do not show a significant impact of hearing requirements on non-tariff barriers. Furthermore, the tests that measure whether hearing requirements have any impact on non-tariff barriers explain only a small proportion of the variation in non-tariff barriers across countries and years.

VI. Discussion

Results in the Context of the Three Theories of Administrative Law

The two sets of regressions are designed to evaluate the impact of administrative law on trade policy, and together the regressions suggest an answer. The first set of regressions indicates that a private right to government-held information suggests a substantially lower frequency of non-tariff barriers. In fact, the existence of such a legal right suggests a reduction in the pervasiveness of non-tariff barriers of 5 or 6 percentage

points, a very substantial impact when compared with the average pervasiveness of non-tariff barriers to trade of approximately 6.37%. In other words, when a regulatory, statutory, or a constitutional right to government-held information exists, non-tariff barriers to trade are much less pervasive. Likewise, when such a right to government-held information exists, barriers to trade more generally are lower as measured by the ratio of total trade to gross domestic product. Therefore, the legal realist argument that procedural constraints on administrative action does not affect outcomes is not an effective explanation of the relationship between administrative law and trade policy.

The two remaining arguments, the administrative optimist and the public choice/new administrative law arguments, both suggest that administrative law should have an impact on trade law outcomes. They suggest that procedural constraints accomplish this end through different means, however. The administrative optimists suggest that giving administrative officials an opportunity to consider alternative evidence and argument will change outcomes, while the public choice/new administrative law proponents suggest that the most important mechanism is through lowering the cost of access to information. Therefore, the second set of regressions, testing the impact of formal procedures involving importers and exporters, distinguishes between these two arguments.

The lack of significance on the formal hearing variable suggests the answer that formal hearings may not affect the pervasiveness of non-tariff barriers. In the five different regressions using the pervasiveness of non-tariff barriers as the dependent variable, none of the coefficients on formal hearings involving importers and exporters are significant. Furthermore, some of the insignificant coefficients are positive while

others are negative. In the set of regressions using the ratio of total trade to GDP as the dependent variable, the coefficients on formal hearings are all positive, but they remain substantially insignificant.¹⁵⁷ Therefore, the regressions suggest that procedural mechanisms ensuring that administrative decisionmakers are presented with alternative evidence and argument likely do not have an impact on policy outcomes. Because the formal hearings tested in these regressions are ones involving domestic exporters and foreign importers, the regressions suggest that the administrative optimists may not have the most persuasive argument.

Potential Alternative Explanations for the Regression Results

The regressions also contemplate a number of potential alternative explanations for the results. The size of a country or its economy and the amount of trade it conducts with the rest of the world may have substantial effects both on the need and on the political pressure to develop protectionist policies. Indeed, the results of the regressions indicate that larger countries have less pervasive non-tariff barriers. However, the regressions also demonstrate that a private right of access to government-held information has a distinct effect on non-tariff barriers, independent of the effects of country size or trade volume. Even when country size has an effect in a regression on barriers to trade, the existence of a legal mechanism to ensure private access to government-held information has an impact above and beyond these other effects. Indeed, the effect of this legal mechanism is approximately 5 or 6 percentage points.

¹⁵⁷ For a slightly more technical discussion of the potentially marginal significance of some of these coefficients, *see supra* text accompanying note 156.

Likewise, the tests contemplate the impact of international agreements, regional effects, and associated political and economic institutions. If international agreements or regional effects play a role in non-tariff barriers to trade, or if the political institutions and economic structures associated with regional placement and international agreements play a significant independent role in barriers, then the regressions would indicate that effect. In the regressions, the substantial impact of a private right to government-held information and the insignificant impact of a hearing requirement both remain clear when the regressions take into account these other possible effects.

Yet another possible alternative explanation of the results is that a temporal trend, perhaps caused by the power conveyed to the status quo and to those already controlling the political and financial resources, is driving the conclusions. However, the temporal dummy controls for this possibility at least over the five year period studied in this analysis. The insignificance of the coefficient on that dummy suggests that no such temporal trend is driving the results.

Another issue is the real meaning of the insignificance of the coefficients on the hearing variable in the second set of regressions. The evidence evaluated does not show any impact of hearings on the pervasiveness of non-tariff barriers, nor does it suggest a consistent if insignificant sign on the hearing coefficients. However, this lack of significance may be the result of limited data.

Given the limited data, however, the conclusions suggested by the regressions are relatively strong in the methodologically difficult world of comparative administrative law. A potential argument against any transnational legal study is the varying levels of legalism and proceduralism across states. In this study, however, because the regressions

are identical except for the type of procedural mechanism tested, variations between states of the level of legalism or proceduralism do not drive the results. Furthermore, a more structural correlation between a state's approach to free trade and its approach to the rule of law most likely does not drive these results because of the insignificance of hearing laws.¹⁵⁸ Likewise, variations in systemic views of the appropriate rigidity, formalism, and legalism in administrative law specifically do not drive the results for the same reason.

Implications of the Results

The two sets of regressions therefore suggest the preliminary conclusion that the public choice/new administrative law argument is the most persuasive of the three paradigms. Administrative procedures do have an impact on trade policy outcomes, and specifically on administratively imposed non-tariff barriers to trade, as the first set of regressions makes clear. The mechanism by which administrative procedures affect outcomes, however, is not by giving administrative decisionmakers an opportunity to consider alternative evidence and argument. Instead, outcomes are being influenced through a different mechanism, involving other pressures on administrative decisionmaking. The external pressures on an administrative decisionmaker come from the decisionmaker's more politically driven superiors.¹⁵⁹ Therefore, administrative procedures affect trade policy outcomes by shifting the kinds of political pressure brought

¹⁵⁸ Of course, this conclusion suggests that more legalistic states are more likely to have laws requiring formal hearings. The fairness of the assumption is left to the reader.

¹⁵⁹ See GRAHAM ALLISON, *ESSENCE OF DECISION: EXPLAINING THE CUBAN MISSILE CRISIS* (1971).

to bear on the decision. That impact is effected through lowering the costs of access to information, thus allowing less organized political groups to mobilize their resources.

The conclusions are, however, limited by our data sets. The OECD data set provides data on the pervasiveness of non-tariff barriers, weighted by domestic production. However, the data set does not provide information on the level or intensity of the barriers, and therefore does not suggest openness or inclination to free trade. By providing pervasiveness, however, the data set does give some measure of frequency of application of non-tariff barriers. Therefore, the regressions, while saying nothing about the relationship between administrative law and the openness of an economy, do help explain the impact of administrative law on the likelihood that non-tariff barriers will be imposed.

Likewise, our use of the ratio of total trade to gross domestic product similarly limits how much we can interpret from these results. As discussed above, the ratio measures the overall *de facto* openness of an economy, not specifically the barriers to trade raised through administrative processes. Therefore, while our use of this variable helps address some of the weaknesses of the pervasiveness of non-tariff barriers variable, the ratio of total trade to GDP alone does not isolate the phenomenon we are evaluating here. By using both variables, we are able to make more robust, though still limited, conclusions about the data.

VII. Conclusion

The international trade regime in the era of the WTO is in the hands of the domestic administrative official. The actions of that official are constrained by

administrative law, and this paper has sought to evaluate the relationship between the administrative official with control over trade barriers and the procedure imposed by the legal system on that official. Three distinct conceptions of the role of administrative procedure in outcomes have been presented here, and empirical evidence has provided preliminary support for one of the three conceptions as more powerful than the other two. That dominant conception has been one based on law and economics and public choice through its emphasis on the costs of access and information for private actors with interests in trade policy.

Commentators from James Landis to Antonin Scalia have noted the relationship between procedure and power, in particular the power of administrative agencies and of those with a vested interest in the status quo.¹⁶⁰ This paper has suggested that the relationship between procedure and power, in the trade policy context in particular, goes even further. Administrative procedure shifts the balance of political power between those with greater political and financial resources and those with less. The importance of such resources in influencing agency action emphasizes the role of administrative procedure in trade policy outcomes by limiting the importance of political power.

The study conducted here suggests several answers to the problem of administrative power in trade policy. Certain administrative procedures open administrative decisions to private actors and interest groups less organized or mobilized. Certain administrative procedures help balance the role of private interests in administrative control over trade barriers. Procedures do not accomplish this goal, however, by relying on the benevolence of administrative officials to be deliberative in their decisionmaking. Instead, administrative procedures mitigate the role of money and

organization in private influence over administrative trade-relevant decisionmaking. As a result, producers relinquish some of their control over administrative decisionmaking to individual consumers.

Administrative procedures provide a function that can also be of use to those seeking to develop an international trade regime based on free trade. International agreements signed by governments and administered by international organizations are less likely to be able to ensure low barriers to trade in the context of non-tariff barriers. These non-tariff barriers, determined by mid-level administrative officials, are more controlled by the world of domestic interest groups than by the world of international diplomacy. Therefore, if the world of international diplomacy can implement procedures that will affect the world of domestic interest groups, it can better accomplish its free trade goals.

The analysis of administrative procedures here, of course, leaves many questions unanswered. Just as substantive policies are a function of politics, so too are administrative procedures.¹⁶¹ The analysis here suggests that certain administrative procedures shift the balance of political power from more to less organized interest groups, but procedures are determined by a political process controlled by the same interest groups. The argument thus becomes circular: law influences politics, but politics make law. Nevertheless, the fundamental conclusions of the analysis here remain the same in that certain administrative procedures create certain outcomes, regardless of the mechanisms by which the administrative procedures are put into place. The analysis here remains useful because government-wide administrative procedure is generally the

¹⁶⁰ HORWITZ, *supra* note 16, at 244.

function not of political battles specifically between producers and consumers of a given good or service, but instead among all political actors with an interest in the actions of the administrative state. As a result, administrative procedures applied as a result of a far larger political battle have a significant impact on much narrower battle for trade protection of a specific good or service.

The analysis itself also leaves questions open. The study does not answer how the analysis would apply to a broader range of countries beyond the industrialized democracies of the OECD. It does not answer whether administrative procedures affect the intensity as well as the pervasiveness of non-tariff barriers. It does not answer whether the existence of a tariff barrier on a particular good affects the likelihood of a non-tariff barrier being imposed. These questions are all important avenues of further inquiry to shed further light on this important relationship between administrative procedure and barriers to trade.

This paper has attempted to shed light on the debate over the impact of administrative procedure on substantive outcomes by analyzing the example of administrative trade policy formulation. The results of the analysis have shown the important impact of administrative procedure by shifting the relative power of different private actors to influence the administrative decisionmaking process. The conclusions suggest that efficiency in trade barriers and democracy in trade-relevant administrative policymaking can both be enhanced with specific procedural constraints on bureaucratic action.

¹⁶¹ See McCubbins et al, *supra* note 28.

APPENDIX A: A SIMPLE MODEL

Let us say that the tariffs ultimately imposed are a function (a) of the amount of influence on the administrative bureaucracy brought to bear by those opposed to the tariff and (b) the amount of influence on the administrative bureaucracy brought to bear by those in favor of the tariff. Let us also acknowledge that tariffs are affected by a series of political variables including treaty commitments as well as other policy goals of the political leadership. Then we can say

$$T = T(I_f, I_o, P), \quad (1)$$

where T is the tariff, I_f is the amount of influence brought to bear by those in favor of the tariff, I_o is the amount of influence brought to bear by those opposed to the tariff, and P is a matrix of other political variables affecting trade policy. Let us further assume that the more influence a constituency can bring to bear on those deciding trade policy, the closer the ultimate policy will be to that constituency's goals. Then

$$T'(I_f) > 0 \quad (2)$$

and

$$T'(I_o) < 0. \quad (3)$$

Next let us say that the amount of influence a given constituency can have over the ultimate policy is a function (a) of the amount of information that constituency has about the issue and the policymaking involved, (b) the amount of time the constituency has to mobilize resources towards influencing that policy, and (c) the total resources controlled by that constituency at time t_0 , when the policymaking process begins. Then we may define

$$I = I(d, t, r), \tag{4}$$

where I is the amount of influence exerted, d is the amount of information held by the constituency, t is the amount of time the constituency has from the point at which it finds out about the potential tariff until the policy is chosen, and r is the total initial resources controlled by the constituency. Then

$$I'(d) > 0 \tag{5}$$

$$I'(t) > 0 \tag{6}$$

and

$$I'(r) > 0. \tag{7}$$

Consider as well that while influence is increasing in terms of information, time, and resources, it is increasing at a decreasing rate. This decreasing marginal benefit to information is apparent by considering that the first piece of information, that the policy is being considered at all, is necessary for any influence whatsoever to be exerted. Similarly, an additional day to mobilize is much more important when that day is added to three days than when it is added to three years. Therefore,

$$I''(d) < 0 \tag{8}$$

and

$$I''(t) < 0. \tag{9}$$

Now we can examine d and t more closely. Certainly the amount of information in the hands of a particular constituency is a function of its resources, how much time it has to collect the information, and the legal constraints upon the administrative bureaucracy from which the information originates. Likewise, the amount of time a particular constituency enjoys to exert its influence is a function of how quickly it knows

about the possibility of the tariff, an informational question, and the legal constraints upon the administrative bureaucracy in which the decision is made. Therefore,

$$d = d(r, t, l) \tag{10}$$

and

$$t = t(d, l), \tag{11}$$

where l represents the legal constraints upon the administrative bureaucracy in which the policy is determined. As legal constraints increase, so does l . Therefore,

$$d'(r) > 0 \tag{12}$$

$$d'(t) > 0 \tag{13}$$

$$d'(l) > 0 \tag{14}$$

$$t'(d) > 0 \tag{15}$$

and

$$t'(l) > 0. \tag{16}$$

Likewise,

$$d''(t) < 0 \tag{17}$$

$$d''(l) \leq 0 \tag{18}$$

$$t''(d) < 0 \tag{19}$$

and

$$t''(l) \leq 0. \tag{20}$$

Again, the decreasing marginal benefit of time for information, and of information for time, is trivial, as is the non-increasing marginal benefit of legal constraints on administrative process for both information and time.

Before we analyze the dynamics of legal constraints on administrative procedure on tariffs, we must make one final assumption, namely, that those in favor of a given tariff have greater financial and political resources than those opposed. The reasoning behind that assumption is that often tariffs are imposed to protect domestic industries with political and economic clout, and those that are hurt by those tariffs are the consumers purchasing the goods. Of course, some products are imported only by producers, and in those cases both producers and consumers may have an interest in keeping tariffs on those goods low. However, for the purposes of this model let us examine the case of the industry which seeks protection, and the consumers who would prefer to purchase cheaper or higher quality goods.

Now we are ready to analyze the dynamics of the legal constraints on tariffs. We are interested in how tariffs change as legal constraints increase, or $T'(l)$. If we assume that I_f and I_o have equal coefficients in T , then we can determine the sign on $T'(l)$.

Because $r_f > r_o$, because (12) is positive, and because (18) and (20) are negative, we have

$$d'_f(l) < d'_o(l) \tag{21}$$

and

$$t'_f(l) < t'_o(l) \tag{22}$$

which then give us, applying (5) and (6),

$$I'_f(l) < I'_o(l), \text{ or} \tag{23}$$

$$I'_f(l) - I'_o(l) < 0. \tag{24}$$

Therefore, applying (2) and (3) and the fact that I_f and I_o have the same coefficients in T , we have the conclusion that

$$T'(l) < 0. \tag{25}$$

Note that this analysis is furthermore robust to (18) and (20). Even if $d''(l) > 0$ and $t''(l) > 0$, (14) and (16) still hold. Therefore, given again that $r_f > r_o$, we have

$$d_f > d_o$$

and

$$t_f > t_o.$$

Applying (8) and (9), we return again to

$$I'_f(l) < I'_o(l)$$

and subsequent steps (24) and (25), taking us to the same result.

In other words, if legal constraints on administrative processes do in fact increase the time and information about tariff imposition available to interested private parties, then those who start with less political and financial resources will benefit more from the legislation. As a result, producers with substantial political and economic capital may be less able to capture administrative officials responsible for imposing protective tariffs. Protective tariffs which hurt other, less political mobilized constituencies may therefore be less likely to be imposed. The state as a whole will be better able to open its markets to foreign businesses, and the state may thus more easily be able to participate in international economic institutions whose prerequisites for membership include lower trade barriers.

The model in its formality excludes a number of interesting and significant considerations that would strengthen its conclusions. For example, the prohibition under many administrative law systems on *ex parte* communications for certain kinds of issues may hurt those with greater political capital and informal relationships with officials much more than it would hurt those with less capital and fewer relationships. As a result,

such a prohibition may further level the playing field by raising the cost of access to officials for those with greater resources.

The robustness of the model to all but the two primary assumptions of marginally decreasing benefit of time and information and the greater political resources of producers over consumers highlights its power. The two assumptions it does make are supported both by extensive political economy literature¹⁶² as well as by the empirical analysis conducted in this paper.

¹⁶² See *supra* note 141.

APPENDIX B: STATISTICS BACKGROUND

Variable Definitions

<u>Variable</u>	<u>Description</u>
NTB	Pervasiveness of non-tariff barriers. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, INDICATORS OF TARIFF AND NON-TARIFF TRADE BARRIERS (1996). This variable is the dependent variable in the first two regressions. Measured as production-weighted percentages of goods and services with non-tariff barriers to trade applied.
Private Right to Govt Info	The existence of a private right to trade-relevant government-held information. This information comes from the comparative description of trade-relevant administrative law, <i>supra</i> text accompanying notes 32-121.
Formal Hearings	The existence of a regulatory, statutory, or constitutional right to formal hearings for importers and exporters on trade-relevant issues. This information comes from the comparative description of trade relevant administrative law, <i>supra</i> text accompanying notes 32-121.
Gross Domestic Product	The gross domestic product, measured in thousands of U.S. dollars. ORGANIZATION FOR ECONOMIC CO- OPERATION AND DEVELOPMENT, OECD STATISTICAL COMPENDIUM (1995); ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD STATISTICAL COMPENDIUM (1991).
Total Trade	Total volume of trade, measured in thousands of U.S. dollars. ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD STATISTICAL COMPENDIUM (1995); ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, OECD STATISTICAL COMPENDIUM (1991).
Agriculture, % of Exports	The percentage of total manufacturing exports that are agricultural. WORLD DEVELOPMENT INDICATORS, WORLD BANK (1998).
1993 Dummy	If the observation is from 1993, the value of the variable is 1. Otherwise, it is 0.
ASEAN	Membership in the Association of South East Asian Nations.
EFTA	Membership in the European Free Trade Association.

Selected Summary Statistics

<u>Variable</u>	<u>Max</u>	<u>Min</u>	<u>Mean</u>	<u>Standard Deviation</u>
NTB	17.90%	0%	6.37%	4.93%
Gross Domestic Product	1.63e+9	64,714.74	2.22e+8	49,635,404
Total Trade	1.10e+9	7,304,421	1.75e+8	288,545,621
Agric., % of exports	25%	0%	6.42%	6.37%

APPENDIX C: REGRESSION RESULTS

The Impact of a Private Right to Government-Held Information on Non-Tariff Barriers

Dependent Variable: Pervasiveness of Non-Tariff Barriers

	1	2	3	4	5
Private Right to Govt Info	-6.454** (-3.430) ¹⁶³ SC: ¹⁶⁴ -.630	-4.358** (-2.826) SC: -.425	-6.606* (-2.446) SC: -.645	-6.526** (-3.348) SC: -.637	-4.750* (-2.454) SC: -.464
Gross Domestic Product	-7.367e-9** (-4.560) SC: -0.741	-7.656e-9** (-4.496) SC: -0.770	-3.386e-9** (-1.769) SC: -0.341	-7.834e-9** (-4.598) SC: -0.788	
Agric., % of exports	0.272 (1.757) SC: 0.351		0.221 (0.996) SC: 0.285	0.147 (0.981) SC: 0.190	
Total Trade	1.186e-8** (4.363) SC: 0.693	1.150e-8** (4.003) SC: 0.672		1.217e-8** (4.188) SC: 0.712	
1993 Dummy	0.264 (-0.209) SC: 0.027	-0.394 (-0.308) SC: -0.041	-0.050 (-0.028) SC: -0.005		
ASEAN	-4.318* (-2.427) SC: -.387	-3.265 (-1.839) SC: -0.293	-4.740* (-1.858) SC: -0.425		
EFTA	-1.842 (-1.328) SC: -.188	-1.565 (-1.071) SC: -0.160	-1.651 (-0.830) SC: -0.168		
Constant	8.051** (5.515)	9.175** (6.598)	9.802** (4.864)	7.209** (6.272)	7.950** (7.113)
Adjusted R ²	.655	.613	.289	.601	.179
N	24	24	24	24	24
F	7.240**	7.064**	2.559	9.672**	6.020**

** Significant at 1% level.

* Significant at 5% level.

¹⁶³ The number in parentheses is the t-statistic. For a N=24, the t-statistic values for different significance levels in a two-sided test are as follows:

1% t > 2.797

5% t > 2.064

¹⁶⁴ The standardized coefficients.

The Impact of Formal Hearing Requirements on Non-Tariff Barriers

Dependent Variable: Pervasiveness of Non-Tariff Barriers

	1	2	3	4	5
Formal Hearings	-2.031 (-1.056) SC: -0.198	-2.101 (-1.162) SC: -.205	0.503 (0.214) SC: 0.049	-1.169 (-0.615) SC: -.114	1.250 (0.576) SC: 0.122
Gross Domestic Product	-7.829e-9** (-3.480) SC: -0.787	-7.80e-9** (-3.584) SC: -.785	-2.671e-9 (-1.172) SC: -0.269	-8.098e-9** (-3.488) SC: -.815	
Agric., % of exports	-0.023 (-0.145) -0.029		-0.133 (-0.658) -0.172	-0.176 (-1.248) SC: -0.227	
Total Trade	1.346e-8** (3.622) SC: 0.787	1.36e-8** (3.832) SC: .793		1.340e-8** (3.481) SC: 0.784	
1993 Dummy	-0.511 (-0.323) SC: -0.053	-.459 (-.307) SC: -.048	-1.119 (-0.544) SC: -.116		
ASEAN	-5.075* (-2.178) SC: -0.455	-5.241* (-2.660) SC: -.470	-4.776 (-1.567) SC: -0.428		
EFTA	-2.002 (-1.080) SC: -0.204	-2.040 (-1.145) SC: -.208	-1.028 (-0.428) SC: -0.105		
Constant	8.934** (4.550)	8.819** (5.063)	9.827** (3.855)	7.339** (4.881)	5.950 (1.252)
Adjusted R ²	0.440	.473	.041	.378	-.030
N	24	24	24	24	24
F	3.585*	4.435**	1.166	4.501**	0.332

The Impact of a Private Right to Government-Held Information on Barriers to Trade

Dependent Variable: Total Trade / GDP

	1	2	3	4	5
Private Right to Govt Info	88.597** (4.700) ¹⁶⁵ SC: ¹⁶⁶ 0.763	47.619* (2.603) SC: 0.410	46.906* (2.339) SC: 0.404	73.499** (4.675) SC: 0.633	78.467** (4.303) SC:0.676
Gross Domestic Product	1.091e-9 (0.059) SC: 0.010	-4.57e-8** (-2.908) SC: 0.406	-2.701e-8 (-1.901) SC: -0.240	-4.926e-8* (-2.838) SC: -0.437	
Agric., % of exports	1.632 (1.270) SC: 0.186	3.358* (2.232) SC: 0.383	3.118 (1.896) SC: 0.355		
Total Trade	-1.967e-8 (-0.643) SC: -0.102	5.563e-8 (2.105) SC: 0.287		5.115e-8 (1.747) SC: 0.264	
1993 Dummy	8.665 (0.901) SC: 0.079	10.342 (0.842) SC: 0.095	8.867 (0.660) SC: 0.081	2.212 (0.170) SC: 0.020	
ASEAN	-26.942 (-1.702) SC: -0.213	-54.358** (-3.142) SC: -0.430	-56.339** (-2.975) SC: -0.446	-41.361* (-2.285) SC: -0.327	
EFTA	-45.600** (-4.103) SC: -0.411	-57.300** (-4.249) SC: -0.516	-56.402** (-3.817) SC: -.508	-53.866** (-3.619) SC: -0.485	
NTB	6.350** (3.340) SC: 0.561				
Constant	3.502 (0.185)	54.624** (3.848)	62.838** (4.200)	68.507** (4.832)	33.178** (3.151)
Adjusted R ²	0.845	0.746	0.695	0.686	.432
N	24	24	24	24	24
F	16.615**	10.642**	9.716**	9.386**	18.514**

¹⁶⁵ The number in parentheses is the t-statistic. For a N=24, the t-statistic values for different significance levels in a two-sided test are as follows:

1% t > 2.797
5% t > 2.064
10% t > 1.711

¹⁶⁶ The standardized coefficients.

The Impact of Formal Hearing Requirements on Non-Tariff Barriers

Dependent Variable: Total Trade / GDP

	1	2	3	4	5
Formal Hearings	31.821 (1.896) SC: 0.274	28.669 (1.793) SC: 0.247	44.757 (2.104) SC: 0.386	35.113* (2.341) SC: 0.303	69.519** (3.508) SC: 0.599
Gross Domestic Product	-2.352e-8 (-0.935) SC: -0.209	-3.567e-8 (-1.908) SC: -0.317	-4.176e-8 (-1.631) SC: -0.371	-2.255e-8 (-1.547) SC: -0.200	
Total Trade	1.334e-8 (0.316) SC: 0.069	3.423e-8 (1.108) SC: 0.177	1.027e-8 (0.247) SC: -0.053		
Agric., % of exports	5.287** (3.979) SC: 0.603	5.252** (4.013) SC: 0.599		4.971** (3.846) 0.567	
1993 Dummy	15.366 (1.150) SC: 0.140	14.573 (1.110) SC: 0.133	2.692 (0.153) SC: -0.025	13.026 (0.991) SC: 0.119	
ASEAN	-37.006 (-1.654) SC: -0.293	-44.883* (-2.317) SC: -0.355	-6.706 (-0.289) SC: -0.053	-44.122* (-2.264) SC: -0.349	
EFTA	-48.830** (-3.015) SC: -0.440	-51.937** (-3.370) SC: -0.468	-43.139 (-2.058) SC: -0.389	-49.459** (-3.222) SC: -0.446	
NTB	1.552 (0.736) SC: 0.137				
Constant	29.723 (1.185)	43.589* (2.671)	68.507** (4.832)	45.860* (2.814)	36.160** (3.160)
Adjusted R ²	0.690	0.699	0.431	0.695	0.330
N	24	24	24	24	24
F	7.394**	8.620**	3.904**	9.721**	12.305**

APPENDIX D: BRIEF DEFINITIONS OF BASIC ECONOMETRICS AND STATISTICS CONCEPTS

t-statistic	The t-statistic measures whether the value of the coefficient is significantly different from 0. The higher the value of the t-statistic, the more likely the value of the coefficient is significantly different from 0. In these regressions, the coefficient is at least 95% likely to be different from 0 if the t-statistic is greater than or equal to 2.064 and at least 99% likely to be different from 0 if the t-statistic is greater than or equal to 2.797.
Significance	A coefficient is significant at a particular level if the chances of the coefficient equaling zero are less than that number. Therefore, if a coefficient is significant at a 5% level, then there is at least a 95% chance that the coefficient is not equal to zero. If a coefficient is not equal to zero with a high probability, then we can be confident that the variable plays the role in the regression indicated by the sign on the coefficient
Adjusted R ²	The percentage of the variation in the pervasiveness of non-tariff barriers explained by the particular regression. In other words, the adjusted R ² measures how much of the variation in the pervasiveness of non-tariff barriers is explained by the existence of certain administrative law mechanisms, taking into account the other economic and political variables.
Dummy	A dummy variable enters the regression as “1” when certain conditions are true and as “0” when they are not true.
N	The number of observations calculated in a particular regression.
F	The F-statistic. The F-statistic measures the significance of the regression equation as a whole. It is possible that even though individual coefficients are significantly different from 0, the regression as a whole may not significantly explain anything. The F statistic tests for this possibility.
Standardized Coefficient	The coefficient on the variable converted to a value between 0 and 1. The standardized coefficient is helpful for comparing the relative importance of different variables in explaining the dependent variable.