THE INTERACTION BETWEEN ADJUDICATORS AND LEGISLATIVE STATES BEHIND THE BALANCING ANALYSIS IN INTERNATIONAL TRADE LAW AND INVESTMENT LAW

Ying-Jun Lin[*]

ABSTRACT

The balancing analysis, an interpretative approach and principle that emerged in World Trade Organization (hereinafter "WTO") dispute settlements and investor-State arbitration, has been observed as the convergence between international trade law and investment law. International lawyers value the balancing analysis as an instrument for international adjudicators to reconcile competing interests and respect states' right to regulate. Accordingly, many studies have been explored the convergence and divergence of the balancing from the normative perspective. This article, however, aims to contribute to the studies of the balancing analysis from the institutional perspective. Two issues reflect the institutional perspective: how do international adjudicators react to the textual arrangements through the balancing analysis? Moreover, what consequences would be caused by how adjudicators employed the balancing analysis to react to the decisions of legislative States embodied in a treaty? Through the two issues, the

[*] Assistant professor, School of Law, Chungyuan Christian University, Taiwan. Partial outcomes of my doctoral dissertation provide the basis of the article. I am grateful to Tony Cole, Dr. Paolo Vargiu and Professor Federico Ortino for their guidance and insights on my doctoral study. I am also grateful to anonymous reviewers' insightful comments to help the article more concentrated and comprehensive. All errors and omissions that remain are mine. The author can be reached at: yingjunlin@cycu.edu.tw.

臺灣大學學術期刊資料庫

article observes that the more ambiguous the intention of reconciling competing interests and policy purposes in a treaty, the more efforts international adjudicators need to devote to interpreting the textual grounds for the balancing analysis. In identifying the textual grounds for the balancing analysis, however, international adjudicators are at the risk of adjusting the textual arrangement and political decisions made by the legislative States. That is the situation that arbitrators of investor-State arbitration confronted. Therefore, the article argues that the balancing analysis may increase the tension between adjudicative bodies and legislative States while it is helpful to restore regulatory autonomy for the exercising States. The perspective of adjudicators reacting to the political decisions by States provides insights into the application of interpretative approaches in different regimes. Moreover, the struggle of determining the scope of the adjudicative authority in the textual grounds of WTO Agreements and investment treaties sheds light on the way to discuss the relationship between the states' consent and the decision by international adjudicators.

KEYWORDS: *the balancing analysis, technical balancing, WTO adjudicators, investor-State arbitration, regulatory autonomy, the principle of state consent, the discretion of international adjudicators*

臺灣大學學術期刊資料庫

I. INTRODUCTION

International trade law and investment law are significant pillars of the governance of international economic activities. Consequently, the convergence and divergence between the two regimes have been concerned by international lawyers. Recently, many studies explore the balancing approach in the World Trade Organization (hereinafter "WTO") jurisprudence and investor-State arbitrations to shed light on the unity of international trade law and investment law.

These studies mainly concentrate on how adjudicators adopt the balancing approach in dispute settlement and the consequence of the balancing approach on reconciling the conflict of interests. For instance, Piker takes a comparative study of judicial review at the domestic and international levels, including the experiences of WTO law, investment treaties, German and US constitutional law, and the European Convention on Human Rights. He argues that the process of balancing is typical to these jurisprudences while the practice shows differences in interpretative structures and considering elements.[1] For the unity of international trade law and investment law, in particular, Piker proposes an analysis structure to standardize the application of the balancing approach.[2]

For the second issue of reconciling competing interests, Bücheler and Henckels explore how the process of balancing is used by arbitrators to settle the conflict of investment protection with the State's regulatory autonomy in cases.[3] In particular, Henckels agrees that the process of balancing is crucial to determine the violation of expropriating obligation although she argues the practice of investor-State arbitration lacks structural analysis and consistent application compared with the WTO jurisprudence.[4] Concerning the shared experiences of the balancing approach, Kingsbury and Schill go further to suggest cross-reference of judicial experiences and the standardization of the principle of balancing for a more enormous scope of global administrative law. Specifically, investment arbitrators are suggested more reference to the WTO jurisprudence for the predictability and stability

---

[1] *See generally* BENEDIKT PIRKER, PROPORTIONALITY ANALYSIS AND MODELS OF JUDICIAL REVIEW (2013).

[2] *Id*. at 31-38.

[3] *See generally* GEBHARD BÜCHELER, PROPORTIONALITY IN INVESTOR-STATE ARBITRATION (2015); Caroline Henckels, *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration*, 15(1) J. INT'L ECON. L. 223 (2012) [hereinafter Henckels, *Indirect Expropriation*]; Caroline Henckels, *The Role of the Standard of Review and the Importance of Deference in Investor–State Arbitration*, *in* DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS: STANDARD OF REVIEW AND MARGIN OF APPRECIATION 113-34 (Lukasz Gruszczynski & Wouter Werner eds., 2014) [hereinafter Henckels, *The Role of the Standard of Review*].

[4] *See* Henckels, *The Role of the Standard of Review*, *supra* note 3, at 116-20.

臺灣大學學術期刊資料庫

of the investor-State arbitration.[5]

It is no doubt that, from the comprehension of the international law system, the practice of interpretative approaches and judicial experiences can be mutually learned between international trade law and investment law.[6] However, a technical cross-reference might not be the answer to the unity of the two regimes without exploring the contexts in which the balancing approach is grounded in each regime. That is related to the question of why adjudicators invent the balancing approach.

To the "why" question, the article suggests reviewing the balancing approach from three dimensions: the textual ground, the adjudicators' function, and the political concern. In detail, the text ground refers to the said provisions of trade agreements or investment treaties that are in interpretation. Except for the textual instruction, the difference in institutional design and structure between the WTO dispute settlement mechanism and investor-State arbitration will also influence the application of the balancing approach. Nevertheless, either for treaty interpretation or the settlement of the international dispute, the process of balancing involves the way to settle the conflict of interests between parties, to which a nation-state is a party. In this regard, the balancing approach implicates the political concern of adjudicators on the issues of their function and their relationship with signatory States. In light of these indicators, we can more comprehensively capture the differences and similarities in the balancing approach between international trade law and investment law.

The article argues that the more explicit the text draws the line for the conflict of interests, the more technical aspect adjudicators highlight the balancing approach. In other words, the balancing approach is an extension of the balanced concern embedded in the text. In contrast, the notion of balancing might be the product of treaty interpretation that adjudicators invent to compensate for the unclear or incomplete textual instruction. At the same time, the consequence is at the risk of exceeding the adjudicative authority.

The article is divided into three major parts. Section II analyses the textual ground in which the balancing approach is applied in the WTO jurisprudence and investor-State arbitration. It, in particular, explains the shift of interpretative patterns caused by the balancing approach in investor-State arbitration. Section III explores the motivations behind the balancing

---

[5] *See generally* Benedict Kingsbury & Stephan W. Schill, *Investor-State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law* (N.Y.U. Inst. for Int'l Law & Justice, Working Paper No. 2009/6, 2009).

[6] This idea of cross-reference of shared experiences and legal opinions is argued by lawyers of public law and international administrative law. *See, e.g.*, Yuval Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16(5) EUR. J. INT'L L. 907 (2005); Caroline Foster, *A New Stratosphere? Investment Treaty Arbitration as 'Internationalized Public Law'*, 64(2) ICLQ 461 (2015).

臺灣大學學術期刊資料庫

approach by the WTO adjudicators and investment arbitrators, especially their conception of the political decisions made by legislative States. Following sections II and III, the article argues that developing the balancing analysis reveals the interaction of adjudicators towards the textual indications and political decisions in a treaty that indicates the scale of tension between adjudicative bodies and legislative States in the different regimes. Finally, section V explores the tension between legislative states and international adjudicators in the two jurisprudences and suggests the possible answer to avoid the critics of judicial law-making.

II. TEXTUAL GROUNDS OF THE BALANCING ANALYSIS IN THE WTO ADJUDICATION AND INVESTOR-STATE ARBITRATION

In past years, the balancing approach has been one of the interpretative approaches in the WTO jurisprudence and investor-State arbitration. For instance, WTO panels and the Appellate Body (hereinafter "AB") repeatedly highlighted the weighting and balancing analysis as part of determining the requirement of necessity. Investment arbitrators also applied the balancing approach to interpreting the term "indirect expropriation" or to define the scope of legitimate and reasonable expectations of foreign investors in investor-State disputes. The shared practices raise an issue of whether international trade law and investment law can be united to a certain extent.

Instead of the convergence of international trade law and investment law, the article is more concerned with the different textual ground and political consequences between the balancing analysis in the two regimes. This section starts with the texts in which the balancing approach is grounded in the two jurisprudences. It also approaches how the textual grounds frame the application of the balancing approach. Finally, this section concludes that the difference behind a similar interpretative approach reflects the relative functions of international adjudication to WTO disputes and investor-State arbitration.

A. The Requirement of the Necessity of General Exceptions and Substantive Obligations in the WTO

The cases of WTO dispute settlements indicate the balancing analysis mainly employed to interpret and determine the requirement of necessity. Panels and the AB have developed a set of considering elements to determine whether a disputed measure is necessary to the claimed policy objective. These elements include: (i) the relative importance of common interests or values protected by a measure; (ii) the relationship between the measure and the claimed objectives or protected interests; and (iii) restrictive effects of the measure. When applying these considering elements to the fact, the AB

臺灣大學學術期刊資料庫

highlights the importance of the weighing and balancing analysis. As the AB stated in the *Korea — Beef* case, which is the case the weighing and balancing analysis firstly mentioned, "determination of whether a measure, which is not 'indispensable', may nevertheless be necessary within the contemplation of Article XX(d), involves in every case a process of weighing and balancing a series of factors . . . ."[7]

The WTO jurisprudence reveals two significant groups of WTO provisions that the necessity test is principally applied and associated with balancing analysis. One group is about general exceptions such as Article XX of the General Agreement on Tariff and Trade (hereinafter "GATT") and Article XIV of the General Agreement on Trade in Services (hereinafter "GATS"). Another group is about the provisions concerning substantive obligations for trade measures, for instance, the Agreement on the Application of Sanitary and Phytosanitary Measures (hereinafter "SPS Agreement") and the Technical Barriers to Trade (hereinafter "TBT Agreement").

Taking a close eye to these provisions, they share similar textual characteristics. First, WTO Agreements tend to clarify the respect of regulatory autonomy of WTO members for non-trade policy purposes in the preamble or the chapeau of certain substantive provisions. For instance, the preamble of GATT firstly recognizes trade and economic endeavors conducted with a view to other social and environmental concerns.[8] Then the chapeau of Article XX clarifies that nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures only if these measures are satisfied with the required conditions. Article XIV of GATS also provides similar wording. Likewise, the preamble of the SPS Agreement and the TBT Agreement at first recognizes that member States are not prevented from taking measures necessary to ensure specific legitimate policy purposes.[9] The SPS Agreement, then, highlights

---

[7] Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶ 164, WTO Doc. WT/DS161/AB/R (adopted Jan. 10, 2001) [hereinafter *Korea — Beef* Appellate Body Report].

[8] General Agreement on Tariffs and Trade pmbl., Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194:

> Recognizing that their relations in the field of trade and economic endeavour should be conducted to raise standards of living, ensure full employment and a large and steadily growing volume of real income and effective demand, developing the full use of the resources of the world and expanding the production and exchange of goods.

[9] Agreement on the Application of Sanitary and Phytosanitary Measures pmbl., Apr. 15, 1994, 1867 U.N.T.S. 493 ("Reaffirming that no Member should be prevented from adopting or enforcing measures necessary to protect human, animal or plant life or health . . ."); Agreement on Technical Barriers to Trade pmbl., Jan. 1, 1995, 1868 U.N.T.S. 120: "Recognizing that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate . . . .")

臺灣大學學術期刊資料庫

in Article 2 that "Members have the right to take sanitary and phytosanitary measures necessary for the protection of human, animal or plant life or health, provided that such measures are not inconsistent with the provisions of this Agreement," although the TBT Agreement does not have the similar announcement in its substantive provisions.

While WTO members are not deprived of regulatory sovereignty after making commitments of market access, the exercise of regulatory sovereignty is not unlimited. A set of conditions frames the exercise of regulatory autonomy. These conditions to the use of regulatory autonomy lead to the second shared character. Among the four WTO Agreements mentioned above, the conditions include a list of legitimate policy objectives, the requirement of necessity, the contribution of the measure to achieve the claimed policy objectives, and the prohibition of the measure constituting a means of arbitrary or unjustifiable discrimination. Among these conditions, the requirement of necessity is often used to define the linkage between trade measures and the claimed policy objectives. For example, Article XX of GATT provides the requirement of necessity as the gatekeeper to the legitimate policy objectives such as protecting public morals, human, animal, or plant life or health, the compliance of laws and regulations consistent with GATT. Article XIV of GATS shares a similar arrangement. In the SPS Agreement, paragraph 2 of Article 2 controls the exercise of sanitary or phytosanitary measures by requiring these measures applied "only to the extent necessary to protect human, animal or plant life or health." Likewise, paragraph 2 of Article 2 of the TBT Agreement indicates that the adoption of technical regulations is limited to the extent that trade restriction is "not more than necessary to fulfill a legitimate objective."

The text of these provisions shows that WTO drafters tended to strike a balance between trade liberalization and non-trade concerns and indicated the ways to draw the line between the conflicting interests. The requirement of necessity is one of the important elements that WTO drafters designed to control the space of regulatory autonomy.

In this regard, the term "necessary to" has two functions in practice. First, it demands causality between the adopted measure and the claimed objective. Thus, the exercising State is not only required to provide reasoning to justify its decision. Moreover, it must prove that the adopted measure is the means sufficient to the claimed purpose or the protected interest. Second, the requirement of necessity indicates the extent to which international trade interests distorted is accepted and reasonable. Because of the two functions, it could say that the requirement of necessity is an indicator of the balanced concern by WTO drafters inserted in the text.

In sum, the texts reveal that the notion of balancing has been embodied in WTO agreements. General exceptions and substantive obligations are possible forms of the embodiment of balancing in text. A set of conditions

臺灣大學學術期刊資料庫

materializes the notion of balancing while the word "balancing" is missing in the text. The textual indications, including the requirement of necessity, not only reveal the intention of WTO drafters. From the perspective of the relationship between legislative States and adjudicators, nevertheless, these texts limit the authority of WTO panels and the AB on conflicting interests. In other words, the preamble and conditions concerning the use of regulatory autonomy for multiple policy purposes set up a framework of the interpretation and application of WTO's provisions. In Section III. A., the article will discuss how WTO panels and the AB interpreted the notion of balancing embodied in the disputed provisions, particularly the requirement of necessity, and analyze the extent to which the balancing approach in practice departing from the textual grounds.

B. The Expropriation Clause and the FET Obligation of Investment Treaties

Most investment treaties concluded before Argentine ICSID cases raised in the 2000s neither contain exceptions to reserve regulatory autonomy for States nor provide explicit indications to define States' regulatory space in substantive obligations, compared with WTO agreements.[10]

Because of the imbalanced preference for investors' interests, Brabandre and Cruz consider international investment law a "naturally imbalanced field."[11]

Concerning the imbalanced preference for investors' interests in investment treaties, the United Nations Conference on Trade and Development (hereinafter "UNCTAD") has suggested reforming old-generation investment treaties in line with sustainable development objectives. The principle of balancing is one of the proposed principles to reform investment treaties to achieve sustainable development. According to UNCTAD's policy suggestion, the principle of balancing sets the line to adjust the rights and obligations between signatory States and the relationship between investors and host States in the context of investment

[10] Kenneth J. Vandevelde, *Rebalancing Through Exceptions*, 17(2) LEWIS & CLARK L. REV. 449, 451 (2013); Julie Kim, *Balancing Regulatory Interests Through an Exceptions Framework Under the Right to Regulate Provision in International Investment Agreements*, 50(2) GEO. WASH. INT'L L. REV. 289, 293 (2018).

[11] Eric de Brabandere & Paula Baldini Miranda da Cruz, *The Role of Proportionality in International Investment Law and Arbitration: A System-Specific Perspective*, 89 NORDIC J. INT'L L. 471, 478-79 (2020).

臺灣大學學術期刊資料庫

protection and promotion.[12][13] Nevertheless, the incorporation of exceptional provisions is still novel to investment treaties.[14]

Under the conventionally imbalanced structure of investment treaties, the case law of investor-State arbitration instead reveals the emergence of the principle of balancing.[15] Two situations are more often involving the principle of balancing. One situation is to determine indirect expropriate in line with the expropriate provisions. Another is about the scope of investment protection covered by the fair and equitable obligation (hereinafter "FET obligation").

1. The Expropriation Clause — In the context of indirect expropriation, tribunals in cases such *Tecmed* and *LG&E*[16] have advocated the balanced concern to define the boundary of investment protection or consider host States' regulatory power for public interests. In the *Tecmed* award, the textual ground of the balancing analysis is the expropriation clause of the Spain–Mexico Bilateral Investment Treaty (hereinafter "BIT") 1995, Article V. The provision requires the States that nationalization, expropriation, or any other measure of similar characteristics or effects must be conducted for public interests and in the manner of non-discrimination and compensation is paid to the investor as required.

Likewise, the expropriation clause of the US–Argentina BIT 1991 is the textual ground in which the tribunal in *LG&E* highlighted the balanced concern against the host State's right to regulate. Article IV of the US–Argentina BIT 1991 is similar to Article V of the Spain–Mexico BIT 1995. It also requires expropriation or nationalization (direct or indirect) or other measures tantamount to expropriation or nationalization must be for a public

---

[12] U.N. Conference on Trade and Development [hereinafter UNCTAD], *Investment Policy Framework for Sustainable Development*, at 8, 11, 30, 77-78, U.N. Doc. UNCTAD/DIAE/PCB/2015/5 (2015).

[13] The trend of reforming investment treaties is continuing. According to the World Investment Report 2021, all investment treaties concluded in 2020 provided a range of provisions safeguarding States' policy space in investment treaties. The limitations to the FET treatment, clarification of indirect expropriation, detailed exceptions to the free-transfer-of-funds obligation and general exceptions are all possibly appeared in new-generation investment treaties. *See* U.N. Conference on Trade and Development, *World Investment Report 2021: Investing in Substantive Recovery*, at 132, U.N. Doc. UNCTAD/WIR/2021 (2021) [hereinafter *World Investment Report 2021*].

[14] *See* PEDRO J. MARTINEZ-FRAGA & C. RYAN REETZ, PUBLIC PURPOSE IN INTERNATIONAL LAW: RETHINKING REGULATORY SOVEREIGNTY IN THE GLOBAL ERA 35-38, 264-65 (2015); CATHARINE TITI, THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW 123-24, 134-36 (2014).

[15] Some investment arbitral awards instead apply the principle of proportionality to proceed with the balancing analysis. For instance, the *Tecmed v. Mexico* tribunal referred the interpretation of regulatory measures to the European Court of Human Rights practice and decided to determine the proportionality of the impact caused by the said measure. Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, ¶¶ 121-22 (May 29, 2003) [hereinafter Tecmed v. Mexico].

[16] LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶¶ 158, 189 (Oct. 3, 2006) [hereinafter LG&E v. Argentina].

臺灣大學學術期刊資料庫

purpose, in a non-discriminatory manner, and upon payment of prompt, adequate, and effective compensation.

According to the text of these provisions, however, it seems that the regulatory space of host States is minimal and no textual indication for the conflict of interests between investors and the host government. The tribunals in *Tecmed* and *LG&E* demonstrate diverse positions to the textual ground of the balancing analysis in terms of the expropriation clause.

When interpreting the concept of indirect expropriation, the *Tecmed* tribunal referred to the term "public interests." It stated that the requirement of exercising for public interests is the textual indication to consider whether the measure in dispute is proportional to the claimed public interest and whether the impact of the said measure is significant interference with investors' rights and interests before deciding the breach of the expropriation clause.[17]

Unlike the *Tecmed* tribunal, the tribunal in *LG&E* did not rely on the requirement of "a public purpose" of Article IV of the US–Argentina BIT 1991. Neither did it indicate the textual ground for the balancing analysis. Instead, it stated that "the [US–Argentina BIT 1991] does not define the term 'expropriation' and does not establish which measure, actions or conduct would constitute acts 'tantamount to expropriation.'"[18] Therefore, it referred to international law to interpret the concept of indirect expropriation. While the *LG&E* tribunal acknowledged two kinds of expropriation in international law (creeping expropriation or de facto expropriation), it believed that the determination process must be in line with balancing two competing interests. The competing interests are the degree of the measure's interference with the right of ownership and the power of the State to adopt its policies.[19] Nevertheless, the *LG&E* tribunal referred to the *Tecmed v. Mexico* award and supported applying proportionality to determine whether the said measure can be accepted without any imposition of liability.[20]

2. The FET Standard — The FET standard is another situation in which investment arbitrators highlighted the importance of the balancing analysis. For instance, the tribunal in *Saluka*[21] firstly adopted the balancing analysis to interpret the substance of the FET obligation and determine the claimed interests subject to the doctrine of legitimate expectations. Likewise, the *Total* tribunal[22] also applied the balanced concern and analysis to clarify the scope of the FET obligation.

---

[17] Tecmed v. Mexico, *supra* note 15, ¶ 122.
[18] LG&E v. Argentina, *supra* note 16, ¶ 185.
[19] *Id.* ¶¶ 188-89.
[20] *Id.* ¶ 195.
[21] Saluka Investments B.V. v. The Czech Republic, PCA Case No. 2001-04, Partial Award (Mar. 17, 2006), ¶¶ 300-01 [hereinafter Saluka v. Czech].
[22] Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/1, Decision on Liability, ¶ 121 (Dec. 27, 2010) [hereinafter Total v. Argentina].

臺灣大學學術期刊資料庫

In the *Saluka* case, the claimant argued that the Czech government unfolded its shareholding in IPB when the IPB was forced into privatization. The Czech government breached its obligation under Article 3 of the Netherlands–Czech Republic BIT, paragraphs 1 and 2 in particular. Paragraph 1 of Article 3 requires each of the States to "ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors." Paragraph 2 of the provision provides that "each Contracting Party shall accord to such investments full security and protection." While paragraph 2 sets out national and most-favored-nation treatment to indicate the substance of the obligation of full security and protection, it does not give explicit instruction to the scope of the general standard. Nor does paragraph 1 give a definition of fair and equitable treatment.

Without the textual indication, the *Saluka* tribunal confronted a problematic issue when interpreting the FET obligation. The issue is whether Article 3 (1) is interpreted as a treaty-based rule in line with the Netherlands–Czech Republic BIT or as the customary minimum standard in customary international law.[23] The tribunal chose the former interpretative method. Specifically, the *Saluka* tribunal took a three-stage interpretative approach regulated by Article 31.1 of the Vienna Convention on the Law of Treaties.

Because of the limited indication offered to the ordinary meaning of "fair and equitable," the tribunal tried to give the term in its "context." Accordingly, it identified the context of the FET obligation, including the preamble of the Netherlands–Czech Republic BIT. In the preamble, signatory States recognize that "the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of [the States] and that fair and equitable treatment is desirable."[24] Then, the tribunal reviewed the preamble and the title of the Netherlands–Czech Republic BIT and determined the "objective and purpose" of the Treaty not only for the protection of foreign investment. Instead, the Netherlands–Czech Republic BIT is also aimed to encourage foreign investment and strengthen signatory States' economic relations. The interpretation result led the tribunal to set out a balanced approach as the principal approach to interpreting all substantive provisions of the Netherlands–Czech Republic BIT. The FET obligation is no exception.[25]

According to the statements of the *Saluka* tribunal, the text of the FET treatment does not provide any explicit indication of the balanced concern. However, the objective and purpose of an investment treaty provide the basis

[23] Saluka v. Czech, *supra* note 21, ¶¶ 285-95.
[24] *Id.* ¶ 298.
[25] *Id.* ¶¶ 299-301.

臺灣大學學術期刊資料庫

for the balancing analysis. The basis is other policy purposes additional to investment protection.

In the *Total* case, the claimant asserted a similar allegation with the *Saluka* case. It claimed that the Argentine government's changed monetary policy on tariff calculation infringed its interests and was subject to the FET obligation under the France–Argentina BIT. In addition, to the allegation of the FET obligation, the *Total* tribunal also confronted the absence of textual specification and indication to the FET obligation in the France–Argentina BIT, Article 3. However, it did not review whether the notion of balancing embodied in the France–Argentina BIT. Instead, the *Total* tribunal highlighted the objective and purpose of the Treaty by reference to the preamble to ensure substantive provisions not constituting of absolute obligations. In this regard, the tribunal discussed other investment arbitration cases and other international standards to crystalize the substance of the FET obligation. One of the relevant principles is the doctrine of legitimate expectations.[26]

The *Total* tribunal interpreted the doctrine of legitimate expectations, not creating the absolute protection of investors and investments. Neither does it require the host State to freeze its regulatory sovereignty for the investor's benefit.[27] In this regard, it highlighted that the balance between competing requirements shaped the claimant's legitimate expectations is necessary to limit legitimate expectations, especially in the face of legislative or regulatory changes.[28]

According to the interpretation by the *Total* tribunal, the balanced concern is not found or revealed by the text. Instead, the balanced concern is the result of treaty interpretation. Someone may explain the difference between tribunals in *Saluka* and *Total* due to the textual arrangement in the treaties, i.e. the Netherlands–Czech Republic BIT and the France–Argentina BIT. A significant difference is the preamble language. The Netherlands–Czech Republic BIT highlighted the FET standard in the preamble, while the France–Argentina BIT does not have the same arrangement.

Except for the FET standard, the preamble of the Netherlands–Czech Republic BIT also mentions the purpose of investment promotion and economic relation consolidation. These languages provide the ground for the *Saluka* tribunal to deny the presumption that investment treaties are the instrument to protect foreign investors and investment. The competing interests and multiple purposes indicated by the preamble of the Netherlands–Czech Republic BIT further guides the *Saluka* tribunal to limit the scope of the FET obligation by balancing with the regulatory autonomy of the host State.

---

[26] Total v. Argentina, *supra* note 22, ¶¶ 102-16.
[27] *Id.* ¶¶ 114-17.
[28] *Id.* ¶ 121.

臺灣大學學術期刊資料庫

According to international law theories, the preamble language has limited legal effects on the texts regarding substantive rights and obligations of a treaty. Nevertheless, the *Saluka* tribunal demonstrates the importance of the contextual interpretative approach to managing incomplete texts and ambiguous terms. Therefore, if the *Total* tribunal could review the preamble language in more detail and take the contextual approach as the *Saluka* tribunal did, it might build up the balancing analysis on a more solid and persuasive textual ground.

3. Small Remarks — The analyses demonstrate the difference in how WTO adjudicators and investment arbitrations search the textual grounds for the principle of balancing. More substantial textual support for the balancing analysis can be found in the WTO jurisprudence. In contrast, the balanced concern and the balancing analysis are more like the invention by investment arbitrators. Thus, investment arbitrators need to rely more on interpretative principles to redefine the purpose of an investment treaty not in favor of investment protection only.

Nevertheless, identifying the textual ground of the balancing analysis is the first step. A more tough issue is how to apply the balancing analysis in dispute, including relevant considering elements and the process of determination. Therefore, the focus of the next section will shift from the text to the practice.

III. THE APPLICATION OF THE BALANCING ANALYSIS IN DISPUTE

A. The WTO Jurisprudence: Technical Balancing and Substantive Balancing

WTO cases demonstrate that panels and the AB have gradually standardized the interpretative approach to the requirement of necessity. The weighing and balancing analysis is part of the standard interpretative approach. Before examining the weighing and balancing analysis function, however, we need to discuss the considering elements to the necessity requirement at first.

According to the experience of interpreting the requirement of necessity, panels and the AB have shared that the necessity test is contextual and factual.[29] The interpretation and determination results may vary from measure by measure and provision by provision because of the flexibility inherent to the term "necessary to."

In the context of the general exception of GATT, the AB based on the panel's opinion and proposed the elements to consider the necessity of a trade

[29] *See, e.g.*, Appellate Body Report, *United States — Certain Country of Origin Labelling (COOL) Requirements*, ¶¶ 5.205-.206, WTO Doc. WT/DS384/AB/RW (adopted May 29, 2015) [hereinafter *US — COOL*].

臺灣大學學術期刊資料庫

measure. The elements include (i) the relative importance of the common interests or values protected by the measure; (ii) the contribution of the measure to achieve the claimed purpose; (iii) the availability of alternative means with less trade-restrictive impacts.[30] The AB further hypothesized two scenarios in line with these considering elements. First, a measure would be more likely to amount to a necessary measure if it protected the public interest more essential to the society. Secondly, a measure would be more easily determined necessary if it had a more significant contribution to achieving the claimed policy objectives. The last but not the least scenario is that a measure would be more consistent with the necessary requirement if it caused less restrictive impacts on international trade.[31] In other words, the causality between the measure and the claimed objective and the trade distortion effects of the measure are helpful for a panel and the AB to balance trade interests against regulatory autonomy in a dispute.

These proposed considering elements are affirmed and repeatedly reference by the AB in other cases involving GATT Article XX. For instance, in the *EC — Asbestos* case, the AB affirmed the application of the considering elements while the exceptional situation differed from the previous case. Nevertheless, the AB clarified the first element of the necessity test. It stated that the level of protection decided by the exercising State must be appreciated. In this case, the AB respected the France government's choice in the measure regarding asbestos products. The highest protection level chosen by France's measure was also the level that the AB determined the necessity of the measure and available alternatives.[32]

The different textual ground of the necessity requirement in the SPS and TBT Agreements also does not change the considering elements developed from the cases of GATT exceptions. Nevertheless, because of the science-based regulatory approach to SPS measures, the AB did modify the considering focus in line with the regulatory approach in the SPS Agreement. The AB in *India — Agricultural Products* added the elements of the relationship between the measure and scientific evidence, the sufficiency of scientific evidence, and the exercise of risk assessment in the consideration.[33] Specifically, scientific evidence and risk assessment are more crucial to assist a panel and the AB in evaluating the causality between the measure and the claimed policy objective and the contribution of the measure to the claimed

[30] *Korea — Beef* Appellate Body Report, *supra* note 7, ¶¶ 162-63.
[31] *Id*. ¶¶ 163-64.
[32] Appellate Body Report, *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, ¶ 172, WTO Doc. WT/DS135/AB/R (adopted Apr. 05, 2001) [hereinafter *EC — Asbestos*].
[33] Appellate Body Report, *India — Measures Concerning the Importation of Certain Agricultural Products*, WTO Doc. WT/DS430/AB/R, ¶¶ 5.11-.29 (adopted June 19, 2015*)* [hereinafter *India — Agricultural Products*].

臺灣大學學術期刊資料庫

objective.

The highly repeated cross-reference of interpretative experiences between WTO agreements, in fact, leads the AB to review the criteria for the necessary requirement of GATT Article XX. The retrospect has emerged in the AB report of *EU — Seal Products*.[34] To review the EU's assertion of GATT Article XX (a) and (b), the AB addressed the textual difference in the two exceptional situations. It stated that "risk-relevant requirements like that of the SPS Agreement are in favor of elaborating the content of GATT Article XX (b) because the exceptional situation is more relevant to the risk issue such as health risk. In contrast, the notion of risk is "difficult to reconcile with the subject matter of protection under GATT Article XX (a)."[35] The interpretation led the AB to deny Canada's assertion of applying a risk-relevant standard to evaluate the animal welfare claimed by the EU measures impacted by commercial seal hunts.[36]

Because the AB of *EU — Seal Products* mainly focused on examining GATT Article XX (a), it did not follow the point of the textural difference and modify the considering elements to the necessity requirement under GATT Article XX (b). Nevertheless, the opinion that scientific or other methods of inquiry such as risk-assessment methods may be recourse to assess the dangers or risks to human, animal, or plant life or health still sheds light on the future evolution of the necessity test of general exceptions.

Under the evolution of the necessity test, the weighing and balancing analysis is the only thing that remained stable. The AB in *Korea — Beef* firstly proposed the weighing and balancing analysis. The AB explained the weighing and balancing as a process of consideration and analysis of relevant factors to assess the necessity of a measure.[37] In *Brazil — Retreaded Tyres*, the AB further elaborated that "the weighing and balancing is a holistic operation that involves putting all the variables of the equation together and evaluating them about each other after having examined them individually, in order to reach an overall judgment."[38]

While the AB highly recommends the importance of the weighing and balancing analysis on the necessity requirement, it limits the function of the weighing and balancing analysis to the technical aspect. The AB in the *US — COOL* clarified this point.

When assessing the necessity requirement under Article 2 of the TBT

---

[34] *See* Appellate Body Report, *European Communities — Measures Prohibiting the Importation and Marketing of Seal Products*, ¶¶ 5.168-.199, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (adopted June 18, 2014) [hereinafter *EU — Seal Products*].

[35] *Id*. ¶¶ 5.197-.198.

[36] *Id.* ¶¶ 5.196, 5.198.

[37] *Korea — Beef* Appellate Body Report, *supra* note 7, ¶ 164.

[38] Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, ¶ 182, WTO Doc. WT/DS332/AB/R (adopted Dec. 17, 2007) [hereinafter *Brazil — Retreaded Tyres*].

臺灣大學學術期刊資料庫

Agreement, the AB of the *US — COOL* case also addressed the importance of a holistic weighing and balancing analysis of all relevant elements. The AB supported its opinion in previous cases that the weighing and balancing analysis is a considering framework. The framework can assist a panel to take a comprehensive and inclusive attitude toward treaty interpretation and dispute settlements.[39] Nevertheless, it clarified that weighing and balancing is not a guideline that requires the panel to consider relevant factors in a fixed sequence. Nor is a standard answer to interpret and apply a term and provision of WTO agreements.[40] In this regard, the AB would focus on whether the panel had considered all relevant elements and gave the weights and balances of these elements before reaching the final decision when reviewing the panel's reasoning.

In other words, the weighing and balancing analysis becomes a crucial criterion to examine whether a panel complied with its obligation of objective assessment under Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (hereinafter "DSU"). However, the technical perspective also leads the AB to take a lower standard of review to the weighing and balancing analysis. As a result, the formality of the weighing and balancing analysis is more valued than the substantive content and the result.

Accordingly, WTO panels and the AB characterized the balanced concern embodied in WTO agreements through the necessity test. The assessment involves the subjective judgment of the panel and the AB in line with each dispute's factual and legal context. Characteristics of the disputed measure, the importance of the claimed objective, and the provisions argued by the disputing parties are all relevant to reaching a final decision. Instead, WTO adjudicators tend to control the stability and quality of the determination by the weighing and balancing analysis. Seldom normative principles are invented by WTO adjudicators but highly reflected the notion of balancing arranged by WTO provisions.

B. Investment Arbitrations: Limits to the Scope of Investment Protection and the Consideration of Host States' Right to Regulate

The balancing analysis, in investor-State arbitration, is more like the creation by investment arbitrators. That is because investment arbitrators are inclined to employ the balancing analysis for ambitious purposes, adjusting the host States' imbalanced position in a treaty. As Anthea Roberts points out, the balancing analysis mirrors the pattern shifting international

[39] Appellate Body Report, *US — COOL*, *supra* note 29, ¶ 5.198.
[40] *Id.* ¶¶ 5.205-.206.

臺灣大學學術期刊資料庫

investment law. Interpretative approaches are more evolutionary than static. Investment arbitrators tend to evaluate an interpretative approach in response to new legal issues and novel reality. One of the emerging issues is respecting and restoring the States' right to regulate without textual indication.[41] The balancing analysis is the answer that investment arbitrators offered.

1. The Determination of Indirect Expropriation — In the context of the expropriation clause, the balancing analysis is an option to depart from the conventional effect-based approach and prevent the extreme application of police power doctrine.

The effect-based approach was traditionally common to determine expropriatory actions in investor-State arbitration.[42] The effect-based approach mainly focuses on the impacts of governmental intervene on the interests of foreign investments and investors. For instance, the tribunal in *Metaclad v. Mexico* interpreted the concept of indirect expropriation of the North American Free Trade Agreement (hereinafter "NAFTA") as "incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use of reasonably-to-be-expected economic benefit of property."[43] The *Tecmed* tribunal indicated a critical element to determine whether the claimed investor was deprived of its investments' economic use and enjoyment is the effects under the expropriation rule of the Mexico–Spain BIT 1996. The effects amount to expropriation or nationalization depends upon two issues: (i) whether the assets involved have lost their value or economic use of their holder; and (ii) the extent of the loss.[44] Based on the effect-based approach, the space for a host government's regulatory power would be more restricted if the effect scale and the scope of affected interests being interpreted in a border manner.

The practice of an effect-based approach actually reflects the rationale behind investment treaties, the preference for investment protection. Influenced by the effect-based approach, those investment treaties at the early stage also expanded the coverage of expropriation. Two places evidence the changes in investment treaties: the focus of expropriation shifting to indirect expropriation and regulatory measures and the scope of investment expanded from physical properties and assets to intangible economic rights, values, and beneficial use.

It is no doubt that the scope of investment protection is more comprehensive through the concept of indirect expropriation. The concept of indirect expropriation, however, complicates the determination of

---

[41] Anthea Roberts, *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55(1) HARV. INT'L L.J. 1, 13 (2014).

[42] Some lawyers also name the effect-based approach as the "sole-effect approach." Rudolf Dolzer, *Indirect Expropriations: New Developments?*, 11 N.Y.U. ENVTL. L.J. 64, 79 (2002).

[43] Metaclad Corp. v. The United Mexican States, ICSID Case No. ARB(AF)/97/l, Award, ¶ 103 (Aug. 30, 2000) [hereinafter Metaclad v. Mexico].

[44] Tecmed v. Mexico, *supra* note 15, ¶ 115.

臺灣大學學術期刊資料庫

expropriation actions in practice. An issue difficult to investment arbitrators is to differentiate regulatory measures from de facto expropriation. As a result, some investment arbitrators are more inclined to support the host government's defense grounded in the doctrine of police power. Specifically, the doctrine of police power is used to respect the host government's regulatory autonomy and define the scope of investment protection under the expropriation clause in dispute.

For instance, the tribunal in *Marvin Feldman v. United Mexican States* highlighted the doctrine of police power in the determination of expropriation.[45] The claimant claimed that Mexico's tax laws infringed its interests and benefits collected from cigarettes exports, such as tax refunds. The Mexican government's conduct violated the expropriation clause under NAFTA, Article 1110. The tribunal confronted a challenging issue of whether tax laws and regulations constituted expropriation without compensation.

In the recourse to the *Third Restatement of the Foreign Relations Law of the United States* (1987) and another NAFTA awards involving NAFTA's expropriation issue, such as *Azinian v. United Mexican States*[46] and *Metalclad v. United Mexican States*,[47] the *Marvin Feldman* tribunal confirmed that non-compensable government actions or regulations are accepted in theory. The tribunal further relied on the doctrine of police power to decide the Mexican tax laws in this case not constituting expropriation.[48]

In the reasoning, the *Marvin Feldman* tribunal stressed that the conventional position in international investment law, the investment-protection-priority, is changing.[49] Not all business problems experienced by foreign investors constitute indirect expropriation or creeping expropriation under Article 1110 of NAFTA. The tribunal explained that governments might exercise their regulatory power to "change laws and regulations in response to changing economic circumstance or political, economic or social considerations."[50] The tax laws in dispute were undeniably a measure of general taxation. This kind of regulation is usually an instrument for public policy and fiscal policy. However, as the Mexican government defended, the tax laws affecting cigarettes export were aimed to address the smuggling of cigarettes that was a severe problem confronting Mexico.[51] Because of the

[45] Marvin Roy Feldman Karpa v. The United Mexican States, ICSID Case No. ARB (AF)/99/1, Award (Dec. 16, 2002) [hereinafter Marvin Feldman v. Mexico].
[46] Robert Azinian et al. v. The United Mexican States, ICSID Case No. ARB (AF)/97/2, Award (Nov. 1, 1999).
[47] Metaclad v. Mexico, *supra* note 43, ¶¶ 73, 103.
[48] Marvin Feldman v. Mexico, *supra* note 45, ¶¶ 104-07.
[49] *Id.* ¶ 103.
[50] *Id.* ¶ 112.
[51] *Id.* ¶¶ 114-15.

臺灣大學學術期刊資料庫

rationale policy objectives and the smuggling problem, the tribunal decided that no finding of expropriation in this case.[52] It could see that the nature of governmental actions and the policy objectives are key to the persuade the *Marvin Feldman* tribunal to deny the claimant's assertion, while the tribunal did not elaborate the doctrine of police power in detail.

After the *Marvin Feldman* award, investment arbitrators have gradually recognized certain policy objectives in line with the assertion of the doctrine of police power, such as the protection of public order and morality, general welfare, and the protection of human health and the environment.[53] In the *Saluka v. Czech* case, the tribunal further clarified the legal consequence of the doctrine of police power. Because of the absence of the exception to the exercise of regulatory power in the Netherland–Czech Republic BIT, the *Saluka* tribunal decided to import the practice of customary international law to interpret the term "deprivation" in the Treaty. Accordingly, the tribunal stated that, according to customary international law, "a deprivation can be justified if it results from the exercise of regulatory actions aimed at the maintenance of public order."[54] Therefore, the tribunal suggested the host government not liable to pay compensation if its exercise of regulatory power satisfied certain conditions, conducted a non-discriminatory manner, and in the form of bona fide regulations for the general welfare.[55]

While the doctrine of police power enables investment arbitrators to consider the benefits of the regulatory power of States, however, it does not provide measurement to reconcile the conflict between investors' interests and host governments' regulatory space. Thus, the practical issue of weighing the effects and the purposes of a measure leads the tribunal in *LG&E v. Argentina* to employ an alternative approach, the balancing analysis developed by the *Tecmed* tribunal.[56]

The *LG&E* case is one of the series of investor-State arbitration confronting the Argentine government. In interpreting the expropriation clause of the US–Argentina BIT 1991, the *LG&E* tribunal highlighted that the Treaty does not deprive the States of their regulatory power. The States still reserves the right to exercise their sovereign power to expropriate private properties for public interests only if the exercise must be with due process and compensation.[57] On the other hand, the tribunal clarified that regulatory

---

[52] *Id.* ¶ 136.

[53] Andrew Newcombe, *The Boundaries of Regulatory Expropriation in International Law*, *in* NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW 401, 421-22 (Philippe Kahn & Thomas Wälde eds., 2007); Ioannis Glinavos, *Investor Protection v. State Regulatory Discretion: Definitions of Expropriation and Shrinking Regulatory Competence*, 13(1) EUR. J. L. REFORM 97, 102 (2011).

[54] Saluka v. Czech, *supra* note 21, ¶ 254.

[55] *Id.* ¶ 262.

[56] LG&E v. Argentina, *supra* note 16, ¶ 194.

[57] *Id.* ¶ 186.

臺灣大學學術期刊資料庫

power and policy purpose are not decisive in determining indirect expropriation. There are limits to the right to regulate.

In this regard, the *LG&E* tribunal proposed two considering factors, the degree of the measure's interference with the right of ownership and the power of the State to adopt its policies.[58] In other words, the tribunal tends to merge the effect-based approach and the doctrine of police power into a single analytical framework. The framework enabled investment arbitrators to consider the interests from both sides of investors and host governments and weighed in the determination process.

The balancing analysis is a signal that the expropriation clause is departing from the domination of investment-protection-preference. Nevertheless, the shift in interpretative approach leads investors to change their litigation strategy. Nowadays, the FET treatment becomes a popular ground where foreign investors asserted a host government was breaching its obligations under a treaty and claimed their damages.[59]

2. The Scope of the FET Standard and the Doctrine of Legitimate Expectations — The FET treatment is not only the most frequently invoked obligation of an investment treaty. It is also the ground of breaching an investment treaty obligation and deciding the States' liability.[60]

The FET treatment in old-generation treaties is usually designed in a minimalist and open-ended way.[61] It neither focuses on particular types of governmental actions nor provides exceptions to States' regulatory autonomy. The incomplete nature provides a broader and flexible coverage of investment protection. On the other hand, it triggers a demanding issue in practice: how to interpret and identify the substance of the FET obligation?

As to the question, investment arbitrators have split into two strands. Some arbitrators argue that the FET obligation originated from customary international law, particularly the international minimum standard. The practice of customary international law is the principal reference to interpret and determine the FET rule in dispute. For instance, the *El Paso* tribunal suggested that that the FET standard of the US–Argentina BIT has to be interpreted given international law. It equated the FET standard with the international minimum standard developed in international law, regardless of the protection afforded by the national legal orders.[62]

---

[58] *Id.* ¶ 189.

[59] Mao-wei Lo, *Legitimate Expectation in a Time of Pandemic: The Host State's COVID-19 Measures, Its Obligations and Possible Defenses under International Investment Agreements*, 13(1) CONTEMP. ASIA ARB. J. 249, 252 (2020).

[60] UNCTAD, *Review of ISDS Decisions in 2019: Selected IIA Reform Issues*, 1 IIA Issues Note 1, 12 (2021), https://unctad.org/system/files/official-document/diaepcbinf2021d1_en.pdf.

[61] *Id.*

[62] El Paso Energy Int'l Co. v. Argentine Republic, ICSID Case No. ARB/03/15, Award, ¶ 337 (Oct. 31, 2011) [hereinafter El Paso v. Argentina].

臺灣大學學術期刊資料庫

Other arbitrators, instead, treated customary international law supplement to the FET standard of an investment treaty. They prefer the FET standard being interpreted as part of substantive obligations in the Treaty in dispute. For instance, the *Chemtura* tribunal highlighted the evolutionary nature of the FET standard in NAFTA (Article 1105). It stressed that "[the reference to customary international law] could not overlook the evolution of customary international law, nor the impact of BITs on this evolution."[63] In the stance of the FET standard as a treaty-based rule, the substance of the FET standard is not identified by the host government's defenses or the practice of customary international law. Instead, the interpretation is rooted in the context of the investment treaty in dispute and the relevance of customary law principles.

Nevertheless, a fundamental issue behind the debate of the relationship with customary international law is identifying the types of governmental actions regulated by this rule. Therefore, the balancing analysis is proposed to beyond the debate and to define the scope of the FET obligation by addressing the conflict between investors' interests and host States' regulatory needs. Accordingly, the *Saluka* tribunal firstly opens the possibility of the balancing analysis in the context of the FET rule.

As analyzed in Section A, the *Saluka* tribunal adopted a three-step interpretative method to interpret the FET rule of the Netherlands–Czech Republic BIT (paragraph 1 of Article 3) not dominated by the investment-protection-priority policy. The interpretation result led the tribunal to employ the balancing approach to the principal approach to interpret all substantive provisions of the Treaty.[64] The tribunal relied upon the balancing approach to argue that investment protection is not unlimited to interpret the FET rule. Instead, the limits to the scope of investment protection depend upon whether the investor's expectations reach "the level of legitimacy and reasonableness in light of the circumstances."[65] Moreover, the host government's right to regulate domestic matters in public interests is crucial in assessing whether the investor's expectations are frustrated.[66]

The idea of balancing investment protection against public interests guides the *Saluka* tribunal to propose an analytical framework for the doctrine of legitimate expectations. The framework is composed of three elements: (i) the investors' legitimate expectations, (ii) the regulatory interests of the host State, and (iii) a reasonable relationship to rational policies not motivated by a preference for other investments over the foreign-

[63] Chemtura Corp. v. Gov't of Can., PCA Case No. 2008-01, Award, ¶ 121 (Aug. 2, 2010) [hereinafter Chemtura v. Canada].
[64] Saluka v. Czech, *supra* note 21, ¶ 300.
[65] *Id.* ¶ 304.
[66] *Id.* ¶ 305.

臺灣大學學術期刊資料庫

owned investment.[67]

The *Total* tribunal also employed the balancing approach to interpret and determine the breach of the FET standard of the France–Argentina BIT. The tribunal acknowledged that predictability and consistency are critical to the stability of legislation and regulation and important for investors to plan their investments. In addition, these characters of domestic laws and regulations are helpful to States to promote foreign investments.[68] Nevertheless, the States of an investment treaty are imposed an absolute obligation to keep laws and regulations frozen. In contrast, the States still enjoy their regulatory power and have their governmental responsibility to admen legislation in response to the changing situation or the emerging needs in the society.[69] The *Total* tribunal further clarified that the incompletion or absence of respect to the right to regulate in the text does not mean the States' legislation is automatically subject to the guarantee of stability.[70]

In this regard, the *Total* tribunal set up an essential criterion for the doctrine of legitimate expectations, "an investor's legitimate expectations may be based on any undertaking and representations made explicitly or implicitly by the host State. A reversal of assurances by the host State which has led to legitimate expectations will violate the principle of fair and equitable treatment."[71] In the balance between competing requirements, the host government's legislative or regulatory changes must be taken into account to limit the scope of legitimate expectations.[72]

According to these tribunals' opinions, the balancing approach implicates three points. First, the FET standard is not an absolute obligation for the States to an investment treaty to implement. Second, the States' right to regulate is not deprived by entering into an investment treaty. Nor are they required to freeze their legal system in order to protect the investors' basic expectations. Therefore, the changes of legislation and regulations are also the considering element to limit the scope of legitimate expectations. More importantly, the balancing approach guides the discussion of customary law principles in the factual and legal context of a dispute.

3. Small Remarks — The WTO jurisprudence and the case-law of investor-State arbitration demonstrate different development of the balancing analysis.

In the WTO jurisprudence, the balancing analysis is divided into two dimensions. The weighing and balancing analysis is limited to the analytical framework, while the substantive balancing relies on the whole

---

[67] *Id.* ¶ 307.
[68] Total v. Argentina, *supra* note 22, ¶ 114.
[69] *Id.* ¶ 115.
[70] *Id.* ¶ 117.
[71] *Id.* ¶ 120.
[72] *Id.* ¶ 121.

臺灣大學學術期刊資料庫

determination of the necessity requirement. The practice has firmly closed to the textual arrangement.

By contrast, investor-State arbitration cases highlight the normative perspective of the balancing analysis more than the WTO jurisprudence. The balancing approach signals the policy presumption of international investment law altered. Investment protection is no longer dominated in investment law and arbitration. Moreover, the balancing approach creates a framework for arbitral tribunals to address the conflict between competing interests and rights.[73]

Nevertheless, the limited application leaves the nature of the balancing analysis as a general principle of international investment law debatable.[74] According to the author's empirical study of investor-State arbitration during 1995 and 2015, the number of cases that mentioned the notion of balancing and employed the balancing approach has not reached one–third of whole settled cases. The practice of the balancing approach by arbitral tribunals was at its peak during the period between 2010 and 2011.[75] The limited application has not significantly improved, although investment treaties are entering into regulatory reform that departs from the preferential favor of foreign investors and investments.

The comparative study of the balancing analysis in practice gives insights into international adjudication in international trade and investment law. The gap between the text and the practice seems wider in the practice of investment arbitration than that in the WTO dispute settlements. A wider gap means that investment arbitrators must give more effort to fill the textual gap and incompletion. The gap-filling mission, however, may raise the concern of exceeding arbitrators' authority and intervening in the legislative power of the States to a treaty. The following section will discuss the relation between adjudicative bodies and legislative bodies behind the balancing analysis.

IV. THE POLITICAL PERSPECTIVE OF THE BALANCING ANALYSIS

The practice of the balancing analysis in the WTO jurisprudence and investment arbitration demonstrates the way international adjudicators consider competing interests and multiple policy purposes and reach final decisions. However, the balancing approach is not simply an interpretative approach to reflect the legal meaning and decide legal consequences. The result of the application might cause political consequences.

---

[73] de Brabandere & Baldini Miranda da Cruz, *supra* note 11, at 481.
[74] *Id.* at 484.
[75] Ying-Jun Lin, Balancing and Sovereignty in International Law: Reviewing Convergences and Divergences in International Investment Law and Trade Law 92-94 (May 17, 2019) (unpublished Ph.D thesis, University of Leicester) (on file with University of Leicester).

臺灣大學學術期刊資料庫

The section explores the political consequences of the balancing approach by asking two questions. The first question is whether the treaty relation and arrangement are maintained or altered by WTO adjudicators or investment arbitrators through the balancing approach. The question will lead to the following question. That is the relation between adjudicative bodies and legislative bodies in the WTO and international investment law. In specific, the balancing approach might trigger the concern of judicial activism and judicial law-making if the signatory States gave no instructions and decisions to balance competing interests and multiple policy purposes under a treaty.

A. Is the Treaty Arrangement Maintained or Altered by International Adjudicators?

According to the practice of the balancing analysis in WTO cases, we can observe that WTO panels and the AB divide the notion of balancing in practice into two parts. One part is a standard interpretative process through the weighing and balancing analysis. Another part is to reach substantive results through the determination of the necessity test. The two parts of the notion of balancing, however, are the extension of the balanced concern decided by WTO drafters.

Some commentators have noticed the formalist tendency of WTO adjudicators in terms of the balancing analysis. For example, Gerstetter argues that the formalist approach prevents panels and the AB from second-check the WTO drafters' decisions. Especially, the standardization of considering elements and interpretative process highlighted by the AB reveals the AB is more inclined to leave the balance of competing values to members States.[76] Consequently, the technical balancing is how WTO panels and the AB respect and reserve WTO members' right to regulate. The decision over the competing values and interests made by WTO drafters is also maintained.

Will, instead, questions the technical balancing developed by WTO panels and the AB. First, she questions the weighing and balancing analysis as the creation of the AB because the interpretative approach is seldom developed in international law. Secondly, she argues that "weighing and balancing" are vague languages. The languages easily create an illusion that the interpretation results reflect the balance of competing interests embodied in the covered WTO agreement. The disconnection with the practice of

[76] Christiane Gerstetter, *The Appellate Body's 'Response' to the Tensions and Interdependencies Between Transnational Trade Governance and Social Regulation*, *in* CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION 111, 124 (Christian Joerges & Ernst-Ulrich Petersmann eds., 2011).

臺灣大學學術期刊資料庫

international law and unclear indication leads Will to suggest WTO adjudicators making more efforts to elaborate the term "necessary to" and develop the necessity test of WTO law.[77]

It is not doubted that the "weighing and balancing analysis" is different from the practice of international law on competing interests, the principle of proportionality. However, the balancing analysis or the proportionality principle refers to competing interests, values, and policy purposes. A slight difference between the two approaches is the analytical focus. The balancing analysis focuses more on a conceptual framework that can reconcile the competing interests and multiple choices. At the same time, the proportionality principles are more likely to evaluate the competing interests from the perspective of the States' regulatory power. Because of the shared function, some lawyers have treated the balancing approach as a constitutional principle in international law, as the proportionality principle.[78] Therefore, the article disagrees that the balancing analysis, including the weighing and balancing analysis, is a unique creation by WTO panels and the AB.

Moreover, as the article argued before, panels and the AB divide the balancing analysis into the substantive and technical aspects. The technical balancing highlights an analytical framework, i.e., the weighing and balancing analysis. It is to standardize the analytical process the necessity test and crystalize the obligation of objective assessment that WTO drafters imposed on panels and the AB. As to the substantive balancing, the considering elements are crystal of the textual arrangements of a WTO provision.

Understandably, no active engagement in elaborating the term of "necessity" or developing additional elements to supplement the texts of WTO provisions look like panels and the AB avoiding making value-choice over a specific dispute. However, it can be explained by the function of the dispute settlement mechanism in the WTO. Paragraph 3 of Article 3 of DSU explicitly points out the function of the WTO dispute settlement mechanism is to maintain "a proper balance between the rights and obligations of Members" that is impaired by measures taken by other Members. Therefore, the tendency of panels and the AB to interpret the balancing approach closed to the textual arrangement is framed by their institutional function, rebalancing the treaty relation among WTO members instead of the relation between the disputing parties only. In this regard, the article argues that the conservation to involving a second value-choice is to respect regulatory

---

[77] Ulrike Will, *The Extra-Jurisdictional Effects of Environmental Measures in the WTO Law Balancing Process*, 50(4) J. WORLD TRADE 611, 614 (2016).

[78] *See generally* Kingsbury & Schill, *supra* note 5; William W. Burke-White & Andreas von Staden, *Private Litigation in a Public Law Sphere: The Standard of Review in Investor-State Arbitrations*, 35(2) YALE J. INT'L L. 283 (2010).

臺灣大學學術期刊資料庫

autonomy of the exercising States in dispute and respect the value-choice made by all WTO drafters and embodied in the text.

In contrast to maintaining the textual arrangements by WTO adjudicators, investment arbitrators have a more positive engagement in proposing an alternative to the incomplete texts through the balancing analysis.

Treaty interpretation is the enforcement of treaties. The process of interpretation not only provides the final answer to the dispute but also clarifies the meaning of treaty terms and unsettled legal principles. Compared with WTO agreements, the text of investment treaties has many unclear, ambiguous, and unsettled terms and principles. As Alschner argues, investment treaties are like incomplete contracts between the States.[79]

Except for the incomplete and unclear indications of substantive obligations, another more serious issue is the policy presumption of investment treaties. According to the analysis of Anthea Roberts, investment treaties negotiated at the early stage were usually asymmetric to host States. The asymmetric position of host States under an investment treaty involves the treaty relationship between signatory States and the legal relationship with foreign investors. The imbalanced position is also extended to the design of investor-State dispute settlement. Protecting the interests of foreign investors and investment is the rationale behind the investor-State dispute settlement. The role of host governments is not sufficient consideration in the frame of the dispute settlement mechanism, while host governments are the party to the treaty in dispute.[80]

In the textual arrangement and the policy rationale of an investment treaty, investment arbitrators are supposed to preference the interests of investments and investors. Moreover, the substantive obligations without exceptions or leave space for regulatory autonomy would be interpreted as the absolute standard and obligations imposed on the host States. The possible effects of regulatory chill caused by investment treaties have gradually changed by States' actions. These actions include the withdrawal of the *ICSID Convention*, the suspension of investor-State arbitration clauses, and the reform of treaty rules such as providing reference of regulatory autonomy in the FET and expropriation rules.[81]

To investment arbitrators, the difficulty is whether they have the authority to break the imbalanced arrangement under an investment treaty worshipping ordinary political preference of investment protection and how.

---

[79] Wolfgang Alschner, *Interpreting Investment Treaties as Incomplete Contracts: Lessons from Contract Theory* 3 (July 18, 2013) (draft submitted for the 30th Annual Conference of the European Association of Law and Economics).

[80] Roberts, *supra* note 41, at 5, 24, 26-27.

[81] *Id.* at 26-27; Caroline Henckels, *Should Investment Treaties Contain Public Policy Exceptions?* 59(8) B.C. L. REV. 2825, 2839-41 (2018).

臺灣大學學術期刊資料庫

The application of the doctrine of police power signals the trend of rebalancing rights and obligations between investors and host States that emerged in investor-State arbitration. As Alain Pellet argues, the police power doctrine is evidence that investment arbitral tribunals attempt to reconcile the sovereign right of host States. The doctrine of police power provides a normative ground for arbitrators to respect host States' regulatory power over domestic social and economic activities and to take public interests into account.[82] Advanced from the doctrine of police power, the balancing analysis expands the appreciation of regulatory autonomy of host States from the expropriation rule to other substantive obligations. In addition, the balancing analysis prevents investment arbitrators from making irrational and unreasonable favor to host governments. Therefore, the balancing approach creates room for investment arbitration to consider all competing interests and make value-judgment that is silent in a treaty.

The balancing approach shifts the focus of interpretation and application of substantive obligations by investment arbitrators. The application has a symbolic value of investment arbitrators on the changing conception over the policy presumption of investment treaties. On the other hand, it implies the political preference of arbitrators to proposing the line between investment protection and other interests such as the States' right to regulate and the benefits of society as a whole.

In the lack of textual support and indications, the balancing analysis could be critiqued as an unreasonable and unjustifiable favor of the interests of host States by investment arbitrators. In this regard, the balancing analysis might beyond the function of gap-filling in the process of international adjudication. Instead, it more likes the result of value-judgment and law-making by arbitrators while it favors the interests of the host governments. Without the consent of the contracting States, it is a risky argument that the rearrangement of rights and obligations imposed on the host States is justified.

B. Is the Balancing Approach the Reflection of Political Decisions by the Legislative States or the Result of Judicial Law-Making?

According to the traditional legal positivism of international law, States are the subject and object of international law. Because of self-commitments, the contracting States are binding to international agreements that will regulate their exercise of sovereign power and restrict their regulatory power to a certain extent. That is the principle of state consent, the ground of legitimacy of international agreements.

---

[82] Alain Pellet, *Police Power or the State's Right to Regulate*, *in* BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 447, 447 (Meg Kinnear et al. eds., 2015).

臺灣大學學術期刊資料庫

The principle of state consent has another meaning: the presumption of the equilibrium between the contracting States under a treaty. It means that the content of a treaty is supposed the balance of rights and obligations between the States regardless of whether the States have equal political and economic positions or not. The presumption of international agreements is acknowledged and reckon in WTO law and international investment law.

As we mentioned before, Article 3 of the DSU has explained that the function of dispute settlement mechanism is to maintain the balance between the rights and obligations of Members under WTO agreements. This provision also indicates the way to rebalance the relation between WTO members as a whole. In specific, panels and the AB are required to ensure that (i) the result is consistent with the agreement at issue; (ii) the result does not nullify or impair benefits accruing to any Member State under the agreement; (iii) the result does not impede the attainment of any objective of the agreement at issue.

Following the indication of the DSU, panels and the AB acknowledge that WTO agreements are the balance of rights and obligations among member States. On the other side, the balanced relationship relies on implementing WTO rules, including the preamble, general exception, and substantive obligations. Even the preamble of the WTO Establishing Agreement, as the AB stated in *China — Raw Materials* stated, reflects "the balance struck by WTO Members between trade and non-trade-related concerns, as a whole."[83]

From the perspective of the conflict of interests, the balanced relation between WTO members includes the value choice and decision over competing interests and policy purposes. The article has analyzed in section A that panels and the AB interpreted general exceptions of GATT and GATS and the substantive requirements of the SPS and TBT Agreements in line with the balanced concern. Because of the textual grounds, panels and the AB are inclined to leave the value-choice to WTO Members. The notion of balancing in practice is also restricted to the technical and formalistic function. Therefore, in the context of the balancing analysis, WTO adjudicators have devoted themselves to mirror and maintain political decisions made by legislative States of the WTO.

The case law of investor-State arbitration also demonstrates investment arbitration sharing the understanding with WTO adjudicators. The content of an investment treaty means that the negotiation of rights and obligations between contracting States reached a balanced resolution. Accordingly, the States' consent is the foundation of treaty interpretation and decision making.

[83] Appellate Body Report, *China — Measures Related to the Exportation of Various Raw Materials*, ¶ 306, WTO Doc. WT/DS394/AB/R (adopted Feb. 22, 2012) [hereinafter *China — Raw Materials*].

臺灣大學學術期刊資料庫

For instance, the *Grand River* tribunal interpreted the investment chapter in NAFTA to embody a balance of rights and obligations for all contracting States. The balanced result is concerned with the protection of foreign investors and investment.[84] In the *El Paso* case involving the exceptional clause of the Argentina–US BIT, the tribunal interpreted the exceptional clause as the reflection of the arrangement between the contracting States on the issue of investment protection reaching to a balanced resolution.[85]

In the *Daimler* case, the tribunal further highlighted the political meaning of an investment treaty by elaborating the principle of state consent and the concept of sovereignty.[86] First, the *Daimler* tribunal clarified that a treaty is representative of the policy decision made by both of the signatory States. The policy decision includes the priority of domestic policies concerning economic development and establishing relations with other States in terms of promoting and protecting foreign investments. Secondly, the content of a treaty characterizes the instruments that the contracting States decided to promote and protect foreign investments. Consequently, an investment treaty contains the negotiation result between the contracting States and embodies the contracting States' political decisions over domestic and international policies concerning foreign investments.[87] Based on the understanding, the *Daimler* tribunal realized that investor-State arbitration is one of the privileges granted to foreign investors. Even though the privileges are imbalanced to the host States, "they are often precisely defined due to the treaty's negotiation process."[88]

The practice of the balancing analysis, however, seems to contradict the point that a treaty means the rights and obligations between the States in balance. As the article analyzed before, the balancing analysis is not only an interpretative approach for specific provisions of a treaty. More importantly, the rationale behind the balancing analysis is to refine the asymmetric position of the host States under an investment treaty. In other words, the balancing analysis is used to deny the presumption that the content of a treaty means the balance of rights and obligations between the States.

The opposition to the policy presumption of investment treaties explains why the balancing analysis, including the consideration of host States' interests and regulatory autonomy, is with limited textual connection or, in certain situations, without textual grounds. Consequently, the balancing analysis not only refines the political decisions made by the contracting States but also alters the relationship between investors and host States.

---

[84] Grand River Enterprises Six Nations, Ltd. et al. v. United States of America, NAFTA/UNCITRAL, Award, ¶ 69 (Jan. 12, 2011) [hereinafter Grand River v. US].
[85] El Paso v. Argentina, *supra* note 62, ¶ 604.
[86] Daimler Fin. Servs. AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award (Aug. 22, 2012) [hereinafter Daimler v. Argentina].
[87] *Id.* ¶¶ 162, 164.
[88] *Id.* ¶ 161.

臺灣大學學術期刊資料庫

While the balancing analysis signals a novel understanding of the purpose of investment treaties, some tribunals are aware of the risk of judicial activism and try to prevent an extreme political consequence from the abuse of adjudicative authority. For instance, the *Lemire* tribunal stated that the preamble language of economic development indicates that the Treaty is "an objective which must benefit all, primarily national citizens and national companies, and secondarily foreign investors."[89] The statement shows how the *Lemire* tribunal opens the room for the regulatory autonomy of host States by interpreting the purpose of a treaty from a more conceptual and higher-level perspective, the benefits of society as a whole.

Compared with the WTO jurisprudence, the balancing analysis in investment arbitration is more inclined to the product of judicial law-making, creating additional normative principles to investment law. However, an unsettled issue is to what extent the re-interpretation of political decisions made by States does not constitute exceed the authority of investment arbitrators.[90] The difficulty is mirrored in the *LG&E* tribunal's statement. While the *LG&E* tribunal is one of the tribunals supporting the application of the balancing analysis, it struggled with the baseline of treaty interpretation that is interpreting provision "in conformity with the interpretation given and agreed by both parties at the time of its signature."[91] Therefore, the inconsistent attitude implies that the balancing analysis in international investment law needs a more solid and stronger legitimate ground.

V. A COMMON ISSUE, DIFFERENT STRUGGLES? THE STATES' CONSENT AND THE DISCRETION OF INTERNATIONAL ADJUDICATORS

Through the analysis of the balancing analysis in WTO dispute settlements and investor-State arbitration, the article argues that international adjudicators interpret the notion of balancing depends upon the clarity of states' intentions inserted in the text. The legal ties of the balancing analysis lead adjudicators of WTO disputes and investor-State arbitration to take different responses. Adjudicators of WTO disputes tend to a relatively conservative approach, while the counterparties of investor-State arbitration are willing to have creative interpretation. According to the consequences of the balancing analysis, the article claims that different regulatory approaches of the conflict of interest raise the tension between the international adjudicator and legislative states to a different extent. In this section, the

[89] Joseph Charles Lemire v. Ukr., ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, ¶ 273 (Jan. 14, 2010) [hereinafter Lemire v. Ukraine].
[90] Martinez-Fraga & Reetz, *supra* note 14, at 106-07.
[91] LG&E v. Argentina, *supra* note 16, ¶ 213.

臺灣大學學術期刊資料庫

article explores the tension behind the balancing analysis by reviewing the authority of international adjudicators entrusted by legislative States.

A. In the Context of WTO Agreements: The Discretion of International Adjudicators Entrusted by the States with Explicit Textual Arrangements

As the article analyzed, WTO Agreements and investment treaties exemplify two models of textual arrangement concerning the conflict of interests and policy purposes. WTO Agreements have a greater explicit textual arrangement and clear indications to the adjudicators, while investment treaties provide limited or inexplicit indications in the text. The explicit indications, however, might be interpreted in two ways. Explicit indications mean that the States to the treaty have framed the restraints on the exercise of adjudicative authority, including the discretion of international adjudicators to appreciate the states' policy space. On the other hand, explicit indications can be interpreted that the states had entrusted international adjudicators in interpreting, applying, and performing treaty provisions. To answer the question, we need to explore the consent of the states to a treaty on the function of dispute settlements as well.

As to the dispute settlement system of the WTO, WTO drafters gave their consent in the DSU. Article 3 of the DSU explicitly announces that "[T]he dispute settlement system is a central element in providing security and predictability to the multilateral trading system." Paragraph 3 of Article 3 further explains that except for the security and predictability, the effective function of the WTO and the balance between the rights and obligations of Members are also concerns of the dispute settlement system. Therefore, WTO drafters agreed to engage the dispute settlement procedures in good faith to solve the dispute efficiently and effectively (paragraph 10 of Article 3). On the other side, WTO drafters indicated the responsibility of panels to make an objective assessment of the matter in dispute (Article 11), and the entrusted the AB to review the issues of law covered in the panel report and legal interpretations developed by the panel (paragraph 6 of Article 17). Therefore, these procedural rules explicitly set up the principles to the behaviors of WTO Members and international adjudicators in the dispute settlement system.

According to the DSU, the authority of panels and the AB seems to be restrained by several elements: (i) the balance between rights and obligations of WTO Members agreed by an agreement or provision in dispute; (ii) the requirement of objectivization to determine legal and factual matters of a dispute; (iii) the rights and obligations provided by the disputed Agreement as the benchmark to review legal issues and the legality of treaty interpretation. Therefore, WTO drafters restrain the authority of WTO panels

臺灣大學學術期刊資料庫

and the AB by the principles of states' consent and objective assessment. Panels are required to explain how to interpret the states' consent embodied in the textual arrangements and take an objective manner to consider factual and legal issues. The AB's function of reviewing the panel's reasoning is to examine the panel's objectiveness of interpretation and application of WTO provisions. The rights and obligations of WTO Agreements are the benchmarks to the assessment. In other words, it is an "objective consent" that is WTO drafters entrusted in panels and the AB.

The requirement of objective consent explains the standardization of considering elements, the weighing and balancing analysis, and the higher legal ties of the balancing analysis in the WTO jurisprudence.

In this regard, whether explicit textual grounds are the restriction or the entrustment in international adjudicators is hardly answered in a duality scenario. Taking the WTO system, for example, the authority of panels and the AB is restricted by the textual arrangement that embodies WTO Members' consent to the choice of competing interests. However, panels and the AB have the discretion to consider factual matters and legal issues of a dispute and apply provisions to solve the dispute as long as they can explain the decision-making process by objective elements. Therefore, panels and the AB may rely on considering objective elements to ensure the choice of competing interests by WTO drafters in response to the practical demands, although their discretion of modifying the states' choice is tightened.

B. In the Context of Investment Treaties: The Scope of Adjudicative Authority Consent by the States Without Explicit Textual Arrangements

By contrast, it is common in investment treaties that the textual arrangement is incomplete and textual indication is inexplicit. The inexplicit textual grounds are not only about substantive provisions but also procedural rules.

A standard method for the dispute between foreign investors and the host government is investment arbitration. However, a central dispute settlement for all investor-State arbitration has not existed. Because of the limited membership, the International Centre for Settlement of Investment Disputes (hereinafter "ICSID") cannot evidence a central dispute settlement system of investor-State disputes, like the WTO dispute settlement mechanism. As a result, the percentage of investor-State disputes settled through non-ICSID approaches is around 10%-15% of all investor-State cases.[92]

[92] *World Investment Report 2021*, *supra* note 13, at 129.

臺灣大學學術期刊資料庫

Investment arbitration, like any arbitration, is consensual.[93] The commencement and the proceeding are based on the parties' consent, which is materialized by an arbitration agreement. Although the form of an arbitration agreement is flexible, either a clause or a more significant contract, and it can be concluded before or after a dispute arising, its scope might be unclear.[94] The unclear scope of an arbitration agreement is also typical in investment arbitration.

Take the US–Argentina BIT 1991 and the Netherlands–Czech Republic BIT that were discussed before, for example. In the US–Argentina BIT 1991, paragraph 3 of Article VII states that a foreign investor might choose to consent in writing to the submission of the dispute for settlement by the binding arbitration. The binding arbitration includes the dispute is submitted before the ICSID, or through the Additional Facility of the ICSID, or according to the Arbitration Rules of the United Nations Commission on International Trade Law (hereinafter "UNICTRAL"), or ad hoc arbitration before any other arbitration institution following any other arbitration rules. The Netherlands–Czech Republic BIT instead also provides a flexible method for investor-State disputes. Article 8 (5) allows an investor-State dispute to be settled through the procedure agreed by the parties as long as the procedure is in accordance with the UNCITRAL rules. Article 8 (6) further indicates a non-exclusive list that the tribunal should interpret and apply the disputed provisions. However, these provisions leave the scope of adjudicative authority of arbitral tribunals to the arbitration agreement and the arbitration rules consent by the disputing parties.

The ICSID Convention and the UNCITRAL rules do provide specific indications on the authority of tribunals. First, Article 42 (2) of the ICSID Convention directs the tribunal to decide even on the ground of "silence or obscurity of the law." It means that the incomplete texts or the silence of legislative states on an issue may not excuse the tribunal to refuse to make decisions. Therefore, some international lawyers believe that the choice of law listed in Article 42 (1) provides sufficient resources for the tribunal to answer any question relevant to the dispute.[95] According to Article 42 (1), in theory, general principles of international law and non-binding authority are all possible to consider by the tribunal through analogy and interpretative approaches.[96] In this regard, the tribunal has broad discretion in interpreting and applying the treaty provision to a dispute as long as it satisfies the

[93] For instance, Article VII of the US–Argentina BIT 1991 provides arbitration as a possible method for foreign investors to settle the dispute against the host government; Article 8 of the Netherland–Czech Republic BIT also provides arbitration to settle the dispute between foreign investors and each treaty party.

[94] TONY COLE & PIETRO ORTOLANI, UNDERSTANDING INTERNATIONAL ARBITRATION 51-53 (2019).

[95] CHRISTOPH H. SCHREUER ET AL., THE ICSID CONVENTION: A COMMENTARY 630, ¶¶ 245-46 (2d ed. 2009).

[96] *Id.* at 631, ¶¶ 247-48.

臺灣大學學術期刊資料庫

responsibility of giving reasons required by Article 48 (3).

Secondly, the 2010 version of the UNCITRAL rules indicates that the tribunal has the power to conduct the arbitration in such manner as it considers appropriate and exercise its discretion to ensure the efficiency and fairness of the proceedings for the disputing parties and resolve the dispute (Article 17 (1)). However, there are no further details of the terms "appropriate" and "discretion." As international lawyers observe, Article 17 (1) of the UNCITRAL rules 2010 gives the tribunal broad power in investment arbitration proceedings.[97]

According to the ICSID Convention and the UNCITRAL rules, arbitrators of investment arbitration seem to enjoy a greater discretion than their counterparties in the WTO dispute settlement mechanism. This point explains that the tribunals in *LG&E*, *Total*, and *Saluka* interpreted the notion of balancing embodied in the treaty despite insufficient and unclear textual grounds.

Nevertheless, the limited application of the balancing analysis in practice is opposite to the point. Moreover, the practice seems to imply more hesitations of investment arbitrators in involving the relationship of the Contracting Parties to a treaty.

To the situation, the article argues the struggle between the dispute-solution-mind and the order-keeper-mind among investment arbitrators. In the dispute-solution-minded scenario, the tribunal may exercise discretion to balance the rights and obligations between the disputing parties even though the treaty favors investment protection. The exercise of balancing may be achieved by either reserving more policy space to the host government or highlighting the responsibility of the claimant investor. Consequently, the tribunal may consider other resources outside of the investment treaty to support its decision. The practice of other international courts and tribunals and general principles of international law are all possible considering resources.

By contrast, the order-keeper-minded scenario highlights legislative states' consent to a treaty more than the relationship between the disputing parties. In other words, an investor-State dispute is a way to crystalize the rights and obligations between legislative states rather than to break the agreed arrangement. The balance had been decided by legislative states when they agreed on the favor of the interests of foreign investors and investments. In this regard, it is the choice by the tribunal not to deciding competing interests to avoid the infringement of the treaty relationship between legislative states.

[97] CLYDE CROFT ET AL., A GUIDE TO THE UNCITRAL ARBITRATION RULES 176, ¶ 17.5 (2013).

臺灣大學學術期刊資料庫

C. The Answer to the Tension Between Legislative States and Adjudicators

The jurisprudences of WTO dispute and investor-State arbitration demonstrate international adjudicators' issues in line with various textual grounds. Either in the explicit or inexplicit textual grounds, international adjudicators confront the same issue of determining the scope of their authority. On the other hand, the comparative study reveals the difficulty of finding a universal answer. The text that embodies the consent of legislative states remains the key to the issue.

However, both WTO Agreements and the rules concerning investment arbitration indicate the elements that international adjudicators may avoid the critics of judicial law-making. The shared elements include the principle of good faith provided by Article 31 of the Vienna Convention on the Law of Treaties (VCLT) required and the obligation of giving reasons as the ICSID Convention directed. The adjudicator's approach to determining its mandate in international disputes must ensure the interpretation and application of treaty provisions in good faith. It means that the adjudicator's decision should not impair the function of the treaty and fundamental interests protected by the treaty.[98] In addition, the decision can be assessed objectively and reasonably. Legal reasoning is the way to ensure the objectiveness of the decisions by international adjudicators.

VI. CONCLUSION

The article explores the practice of the balancing analysis between the WTO jurisprudence and investor-State arbitration. Its purpose is not to discuss the unity of international trade law and investment law, nor the standardization of the balancing approach in international law. Instead, the article argues that the same interpretative principle may be employed for different purposes and generate different consequences.

On the surface, the balancing analysis in the WTO dispute settlement mechanism and investor-State arbitration is both to reconcile competing interests. However, the legal and political consequences of the balancing approach largely depend upon how adjudicators interpret the treaty text and exercise their authority. While the text indicating the balanced concern is vital to employ the balancing analysis in practice, the case law of investor-State arbitration demonstrates an alternative pattern. Investment arbitrators interpret the balancing analysis by relying on the intention of establishing economic relations between the contracting States instead of the textual arrangement such as genera exceptions and substantive requirements that

[98] EIRIK BJORGE, THE EVOLUTIONARY INTERPRETATION OF TREATIES 62 (2014).

臺灣大學學術期刊資料庫

reserve regulatory power for the States.

The article argues that limited textual ground of the balancing analysis in investor-State arbitration would raise the concern of judicial law-making. That is because the consequence of the balancing analysis alters the textual arrangement of an investment treaty that is granted imbalanced privileges to foreign investors and investments. The concern of exceeding the authority of investment arbitration could further intensify the tension between adjudicative bodies and legislative States.

Treaty interpretation and dispute settlement are vital to the compliance of international law. The way adjudicators interpret the content of a treaty and develop an interpretative approach to determine the legal effect, however, will generate legal consequences and political impacts on the treaty in dispute. Therefore, exploring the practice of international adjudication through legal and political perspectives will deepen the understanding of the influence of a principle and realize the extent of cross-reference between different regimes. Moreover, it provides insights to strengthen the legitimacy of the interpretative approach in international adjudication and reform the textual arrangement of international agreements.

臺灣大學學術期刊資料庫

REFERENCES

Books

BJORGE, EIRIK (2014), THE EVOLUTIONARY INTERPRETATION OF TREATIES.

BÜCHELER, GEBHARD (2015), PROPORTIONALITY IN INVESTOR–STATE ARBITRATION.

COLE, TONY & PIETRO ORTOLANI (2019), UNDERSTANDING INTERNATIONAL ARBITRATION.

CROFT, CLYDE ET AL. (2013), A GUIDE TO THE UNCITRAL ARBITRATION RULES.

MARTINEZ-FRAGA, PEDRO J. & C. RYAN REETZ (2015), PUBLIC PURPOSE IN INTERNATIONAL LAW: RETHINKING REGULATORY SOVEREIGNTY IN THE GLOBAL ERA.

PIRKER, BENEDIKT (2013), PROPORTIONALITY ANALYSIS AND MODELS OF JUDICIAL REVIEW.

SCHREUER, CHRISTOPH H. ET AL. (eds.) (2009), THE ICSID CONVENTION: A COMMENTARY, 2d ed.

TITI, CATHARINE (2014), THE RIGHT TO REGULATE IN INTERNATIONAL INVESTMENT LAW.

Articles

Burke-White, William W. & Andreas von Staden (2010), *Private Litigation in a Public Law Sphere: The Standard of Review in Investor–State Arbitrations*, 35(2) YALE JOURNAL OF INTERNATIONAL LAW 283.

de Brabandere, Eric & Paula Baldini Miranda da Cruz (2020), *The Role of Proportionality in International Investment Law and Arbitration: A System-Specific Perspective*, 89 NORDIC JOURNAL OF INTERNATIONAL LAW 471.

Foster, Caroline (2015), *A New Stratosphere? Investment Treaty Arbitration as 'Internationalized Public Law'*, 64(2) THE INTERNATIONAL & COMPARATIVE LAW QUARTERLY 461.

Gerstetter, Christiane (2011), *The Appellate Body's 'Response' to the Tensions and Interdependencies Between Transnational Trade Governance and Social Regulation*, *in* CONSTITUTIONALISM, MULTILEVEL TRADE GOVERNANCE AND SOCIAL REGULATION 111 (Christian Joerges & Ernst-Ulrich Petersmann eds.).

Glinavos, Ioannis (2011), *Investor Protection v. State Regulatory Discretion: Definitions of Expropriation and Shrinking Regulatory Competence*, 13(1) EUROPEAN JOURNAL OF LAW REFORM 97.

Henckels, Caroline (2012), *Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor–State Arbitration*, 15(1) JOURNAL OF INTERNATIONAL ECONOMIC LAW 223.

臺灣大學學術期刊資料庫

Henckels, Caroline (2018), *Should Investment Treaties Contain Public Policy Exceptions?*, 59(8) BOSTON COLLEGE LAW REVIEW 2825.

Henckels, Caroline (2014), *The Role of the Standard of Review and the Importance of Deference in Investor–State Arbitration*, *in* DEFERENCE IN INTERNATIONAL COURTS AND TRIBUNALS: STANDARD OF REVIEW AND MARGIN OF APPRECIATION 113 (Lukasz Gruszczynski & Wouter Werner eds.).

Kim, Julie (2018), *Balancing Regulatory Interests Through an Exceptions Framework Under the Right to Regulate Provision in International Investment Agreements*, 50(2) GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 289.

Lo, Mao-wei (2020), *Legitimate Expectation in a Time of Pandemic: The Host State's COVID-19 Measures, Its Obligations and Possible Defenses Under International Investment Agreements*, 13(1) CONTEMPORARY ASIA ARBITRATION JOURNAL 249.

Newcombe, Andrew (2007), *The Boundaries of Regulatory Expropriation in International Law*, *in* NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW 401 (Philippe Kahn & Thomas Wälde eds.).

Pellet, Alain (2015), *Police Power or the State's Right to Regulate*, *in* BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 447 (Meg Kinnear et al. eds.).

Roberts, Anthea (2014), *State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority*, 55(1) HARVARD INTERNATIONAL LAW JOURNAL 1.

Vandevelde, Kenneth J. (2013), *Rebalancing Through Exceptions*, 17(2) LEWIS & CLARK LAW REVIEW 449.

Shany, Yuval (2005), *Toward a General Margin of Appreciation Doctrine in International Law?*, 16(5) THE EUROPEAN JOURNAL OF INTERNATIONAL LAW 907.

Will, Ulrike (2016), *The Extra-Jurisdictional Effects of Environmental Measures in the WTO Law Balancing Process*, 50(4) JOURNAL OF WORLD TRADE 611.

Cases

Appellate Body Report, *Brazil — Measures Affecting Imports of Retreaded Tyres*, WTO Doc. WT/DS332/AB/R (adopted December 17, 2007).

Appellate Body Report, *China — Measures Related to the Exportation of Various Raw Materials*, WTO Doc. WT/DS394/AB/R (adopted February 22, 2012).

Appellate Body Report, *European Communities — Measures Affecting Asbestos and Products Containing Asbestos*, WTO Doc. WT/DS135/AB/R (adopted April 05, 2001).

Appellate Body Report, *European Communities — Measures Prohibiting the*

臺灣大學學術期刊資料庫

Importation and Marketing of Seal Products, WTO Doc. WT/DS400/AB/R & WT/DS401/AB/R (adopted June 18, 2014).
Appellate Body Report, *India — Measures Concerning the Importation of Certain Agricultural Products*, WTO Doc. WT/DS430/AB/R (adopted June 19, 2015*)*.
Appellate Body Report, *Korea — Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WTO Doc. WT/DS161/AB/R (adopted January 10, 2001).
Appellate Body Report, *United States — Certain Country of Origin Labelling (COOL) Requirements*, WTO Doc. WT/DS384/AB/RW (adopted May 29, 2015).
Chemtura Corporation v. Government of Canada, PCA Case No. 2008-01, Award (August 2, 2010).
Daimler Financial Services AG v. Argentine Republic, ICSID Case No. ARB/05/1, Award (August 22, 2012).
El Paso Energy International Company v. Argentine Republic, ICSID Case No. ARB/03/15, Award (October 31, 2011).
Grand River Enterprises Six Nations, Ltd., et al. v. United States of *America*, NAFTA/UNCITRAL, Award (January 12, 2011).
Joseph Charles Lemire v. Ukraine, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability (January 14, 2010).
LG&E Energy Corporation v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability (October 3, 2006).
Marvin Roy Feldman Karpa v. The United Mexican States, ICSID Case No. ARB (AF)/99/1, Award (December 16, 2002).
Metaclad Corporation v. The United Mexican States, ICSID Case No. ARB(AF)/97/l, Award (August 30, 2000).
Robert Azinian et al. v. The United Mexican States, ICSID Case No. ARB (AF)/97/2, Award (November 1, 1999).
Saluka Investments B.V. v. The Czech Republic, PCA Case No. 2001-04, Partial Award (March 17, 2006).
Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003).
Total S.A. v. Argentine Republic, ICSID Case No. ARB/04/1, Decision on Liability (December 27, 2010).

U.N.-related Documents

United Nations Conference on Trade and Development, *Investment Policy Framework for Sustainable Development*, U.N. Doc. UNCTAD/DIAE/PCB/2015/5 (2015).
United Nations Conference on Trade and Development, *World Investment Report 2021: Investing in Substantive Recovery*, U.N. Doc. UNCTAD/WIR/2021 (2021).

臺灣大學學術期刊資料庫

Treaties

Agreement on Technical Barriers to Trade, January 1, 1995, 1868 U.N.T.S. 120.

Agreement on the Application of Sanitary and Phytosanitary Measures, April 15, 1994, 1867 U.N.T.S. 493.

General Agreement on Tariffs and Trade, October 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

Working Papers, and Other Sources

Alschner, Wolfgang (2013), *Interpreting Investment Treaties as Incomplete Contracts: Lessons from Contract Theory* (draft submitted for the 30th Annual Conference of the European Association of Law and Economics).

Kingsbury, Benedict & Stephan W. Schill (2009), *Investor–State Arbitration as Governance: Fair and Equitable Treatment, Proportionality and the Emerging Global Administrative Law* (New York University Institute for International Law & Justice, Working Paper No. 2009/6).

Lin, Ying-Jun, Balancing and Sovereignty in International Law: Reviewing Convergences and Divergences in International Investment Law and Trade Law (May 17, 2019) (unpublished Ph.D thesis, University of Leicester) (on file with University of Leicester).

United Nations Conference on Trade and Development, *Review of ISDS Decisions in 2019: Selected IIA Reform Issues*, IIA ISSUES NOTE (2021), https://unctad.org/system/files/official-document/diaepcbinf2021d1_en.pdf.

臺灣大學學術期刊資料庫