

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

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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

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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*