Rule-making through the WTO dispute settlement mechanism

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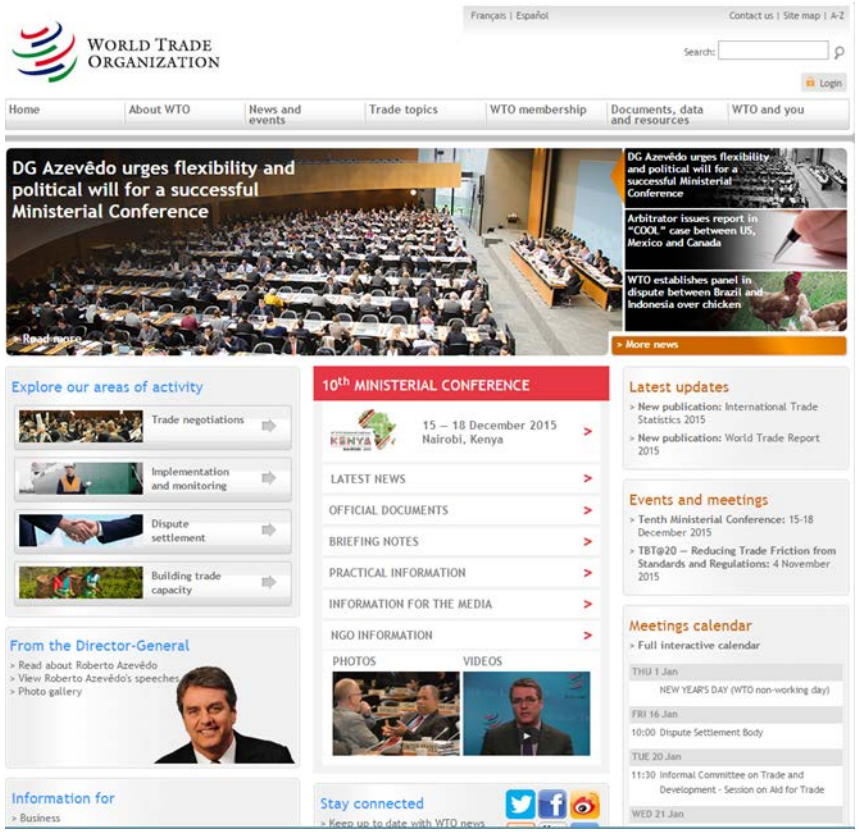
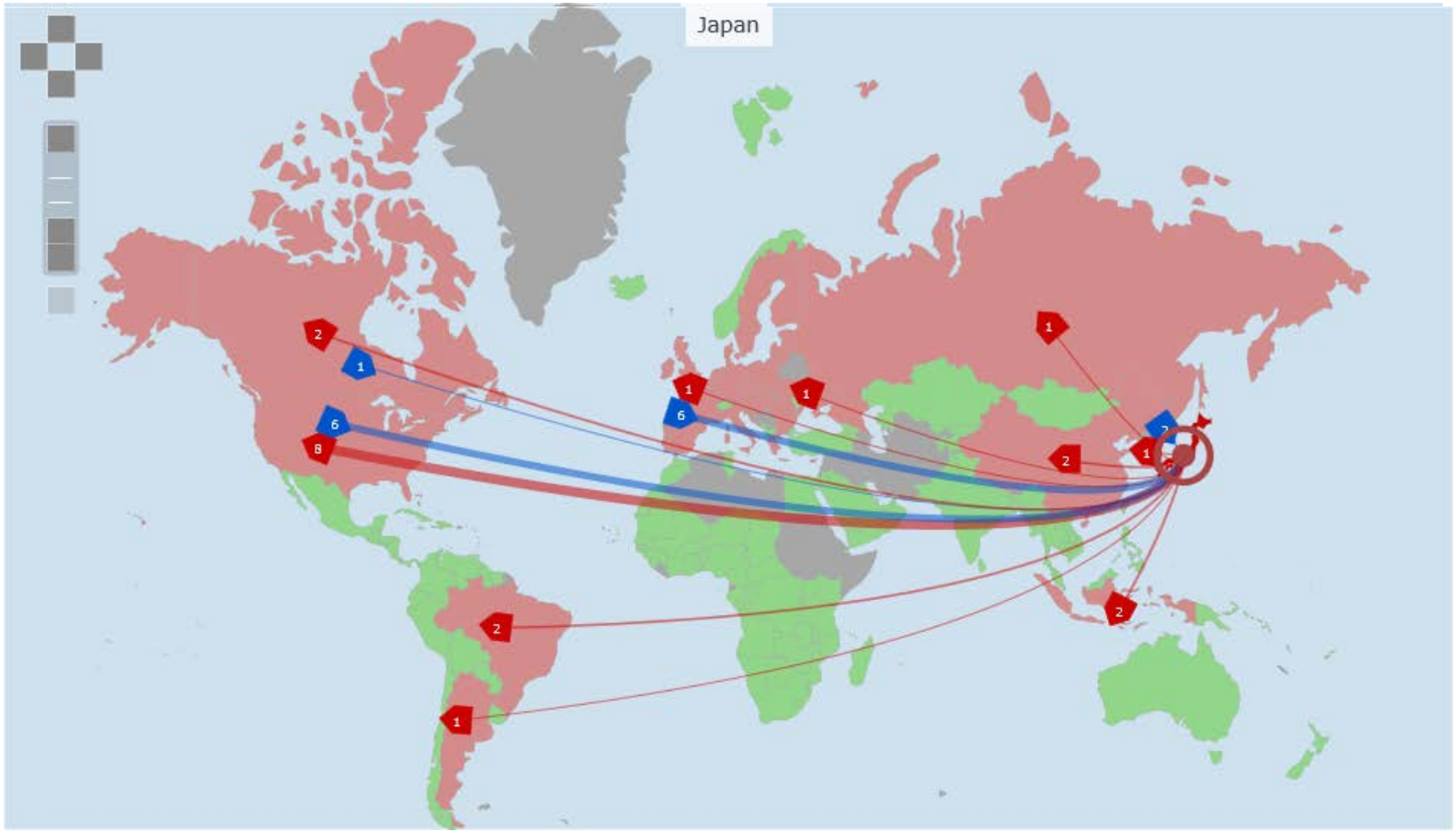
I. CURRENT STATUS OF WTO DISPUTE SETTLEMENT MECHANISM

Active Use of DS / DDA Stalemate



Active Use by Japan



No Formal Law-making Power of WTO Judicial Body

DSU Article 3.2, last sentence – "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

DSU Article 19.2 – "In accordance with paragraph 2 of Article 3, in their findings and recommendations, the panel and the Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."

Precedential Value of Appellate Body's Interpretation

Early stage - "… we do not agree with the Panel's conclusion in paragraph 6.10 of the Panel Report that "panel reports adopted by the GATT CONTRACTING PARTIES and the WTO Dispute Settlement Body constitute subsequent practice in a specific case" as the phrase "subsequent practice" is used in Article 31 of the *Vienna Convention*." (Appellate Body Report, *Japan – Alcoholic Beverage II*, p.13)

Later stage - "Ensuring "security and predictability" in the dispute settlement system, as contemplated in Article 3.2 of the DSU, implies that, absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case. (Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160.

Questions

- What has the active use of the dispute settlement mechanism produced?
- Is it legitimate that the Appellate Body, or the WTO judicial process, is developing WTO rules rather than Members, or the negotiation process?

These questions will be addressed respectively in Sections II and III, but the second question appears more important.

II. EXAMPLES OF JUDICIAL LAW-MAKING

Examples of Judicial Lawmaking

Areas where significant jurisprudential developments in jurisprudence are observable are, for example:

(1) De facto discrimination;

(2) Tight regulations of export restrictions;

(3) Illegalization of zeroing;

(4) “serious prejudice” claims

(5) Revival of “unforeseen development”

(6) “but for” analysis preferred for causation …

The following examples will be discussed:

- Technical Regulations – TBT Article 2.1
- Export Restrictions – GATT Article XX(g)
- Safeguard Measures – GATT Article XIX:1 & SA Article 2.1

1. DISCIPLINES OVER TECHNICAL REGULATIONS

Article 2.1 of TBT Agreement

"Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country."

Interpretative Issues on Technical Regulation

Not only de jure discrimination but also de facto discrimination will be found inconsistent with TBT Article 2.1.

In what situation a technical regulation that seeks a legitimate policy objective will be found inconsistent?

Appellate Body on *US – Tuna II (21.5)*

… one of the ways to determine whether the detrimental impacted caused by a technical regulation is even-handed and therefore stems exclusively from a legitimate regulatory distinction is by examining whether the regulatory distinction is designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination. (ABR, US - Tuna II (21.5), para. 7.94)

Future Issues – Proper Regulation of Regulations

- What policy objective is justiable?
- What measures are justifiable as tools taken for

2. DISCIPLINES OVER EXPORT RESTRICTIONS

GATT Article XX(g)

… nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:

(g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption…

Interpretative Issues on Export Restrictions

- Relationship with the “permanent sovereignty over natural resources”
- Is it GATT-consistent that a Member imposes quantitative limit on the domestic production of certain exhaustible natural resources, say, by 60,000 tons per year, and also imposes a quantitative limit on the exports thereof, say, by 40,000 tons per year?

“the purpose of export restrictions”

“… in our view, restrictions on domestic production or consumption must not only be applied jointly with the challenged export restrictions but, in addition, the purpose of those export restrictions must be to ensure the effectiveness of those domestic restrictions.” (Panel Report on *China - Raw Materials*, para. 7.397)

“so as to conserve”

“…, we have found above that Article XX(g) permits trade measures relating to the conservation of exhaustible natural resources if such trade measures work together with restrictions on domestic production or consumption, which operate so as to conserve an exhaustible natural resource.” (Appellate Body Report, *China - Raw Materials*, para. 360)

“so as to reinforce and complement”

Article XX(g) requires an effective limitation on domestic production or consumption that operates together with, and so as to reinforce and complement, the restriction imposed on international trade. (Appellate Body on *China – Rare Earths*, para. 5.168)

Q. Can quantitative limits on exports by the amount (say, 30,000 tons per year) less than those imposed on domestic production (say, 60,000 tons per year) “reinforce and complement” the latter restrictions?

Future Issue – Sovereignty over Natural Resources

- Full discretion of mining (i.e., when and to what extent natural resource reserves should be excavated)
- No discrimination against foreign consumption of natural resources.

Should GATT Article XX(g) apply only to exhaustible natural resources within its jurisdiction?

3. DISCIPLINES OVER SAFEGUARDS

GATT Article XIX:1 & SA Article 2.1

"… *as a result of unforeseen developments and of the effect of the obligations incurred by a contracting party under this Agreement, including tariff concessions*, any product is being imported into the territory of that contracting party in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers in that territory of like or directly competitive products, …".

"… such product is being imported into its territory in such increased quantities, absolute or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the domestic industry that produces like or directly competitive products."

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Interpretative Issues on Safeguard Measures

Have SA Article 2.1 amended GATT Article XIX:1 to eliminate the two requirements, “unforeseen development” and “the effect of … tariff concessions”?

No requirement of “unforeseen development” and “the effect of the tariff concession”

“…it is our conclusion that safeguard investigations conducted and safeguard measures imposed after the entry into force of the WTO agreements which meet the requirements of the new Safeguards Agreement satisfy the requirements of Article XIX of GATT. (Panel Report, *Argentine – Footwear (EC)*, para. 8.69)

Requirements of “unforeseen development” and “the effect of the tariff concessions” as “circumstances”

“ … we believe that there is a logical connection between the circumstances described in the first clause – "as a result of unforeseen developments and of the effect of the obligations incurred by a Member under this Agreement, including tariff concessions … " – and the conditions set forth in the second clause of Article XIX:1(a) for the imposition of a safeguard measure.” (Appellate Body Report, *Argentine – Footwear (EC)*, para. 92)

Requirement of “unforeseen development” as a “prerequisite”

“… as the existence of unforeseen developments is a prerequisite that must be demonstrated, as we have stated, "in order for a safeguard measure to be applied" consistently with Article XIX of the GATT 1994, it follows that this demonstration must be made before the safeguard measure is applied” (Appellate Body Report, *US – Lamb*, para. 72)

Requirement of "the effect of tariff concessions" as another prerequisite

"In our view, given that there may be several obligations that apply to the product in question, this demonstration necessitates identification of the specific relevant obligation(s), as it is difficult to see how this demonstration could otherwise be made. In addition, it should be remembered that pursuant to Article XIX:1(a) it is not just the obligation per se that is to be identified, but also its effect. … Moreover, it may be unclear which of several applicable obligations the competent authorities consider to be constraining their freedom of action. (Panel Report, *Ukraine – Passenger Cars*, para. 7.96).

Future Issue – Purpose of Safeguards

- To facilitate adjustment by domestic producers to the new situation where the relevant import duty rate is reduced. – *The import increase and resulted decrease in domestic sales were greater than expected.*
- To allow the cancelation of the tariff concessions if it turns out that the underlying consideration was incorrect. – *If the "unforeseen development" had bee foreseen, the tariff concession would not have been made.*

III. LEGITIMACY ISSUE FOR JUDICIAL LAW-MAKING

Possible Different Interpretative Approaches

- If the interpretation of the WTO Agreement is guided by the principle that the WTO Agreement is agreed by Members to pursue a common goal through *cooperation*, the act of interpretation will be of a technical nature in the sense that the best possible interpretation that will help achieve the common goal should be chosen.
- In contrast, if the interpretation should focus on identifying the balance of interests sought by Members, as agreed by them for their *co-existence*, and reflected on the text of the WTO Agreement, the act of interpretation will be in effect of a political nature.

Question: Which view better explains the state-of-play of the WTO?

Friedmann's Dichotomy Revisited

"The Changing Structure of International Law" (1964)

- International Law of Co-existence v. International Law of Cooperation

- conflicting interests v. a common or shared interest

Question: What interest or interests are sought through trade liberalization?

Rationale for Trade liberalization

Ricardo - Theory of “Comparative Advantage”

- To achieve the optimal production through specialization, including the optimal correction of “market failures”
- Cooperative?

USTR - Argument for “level-playing field”

- To balance between trade interest and regulatory discretion
- Co-existence?

Differences in Approaches to Sustainable Development

If the sustainability of human beings is taken for granted, there should be a conflict of interests between nations or generations on the allocation of resources available to them. – Co-existence?

But **if the sustainability of human beings is not granted (for example, due to the uncertainty that a natural disaster may occur thus the needs of human beings significantly increased), the common goal of all nations or people should be to maximize their sustainability by maximizing resources available to future generations (unless any nation tries to monopolize all resources available)? – Cooperative?**

Textual basis for two approaches in the preamble of the WTO Agreement

"Recognizing that their relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, while allowing for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development, …"

Either of the approaches appears consistent.

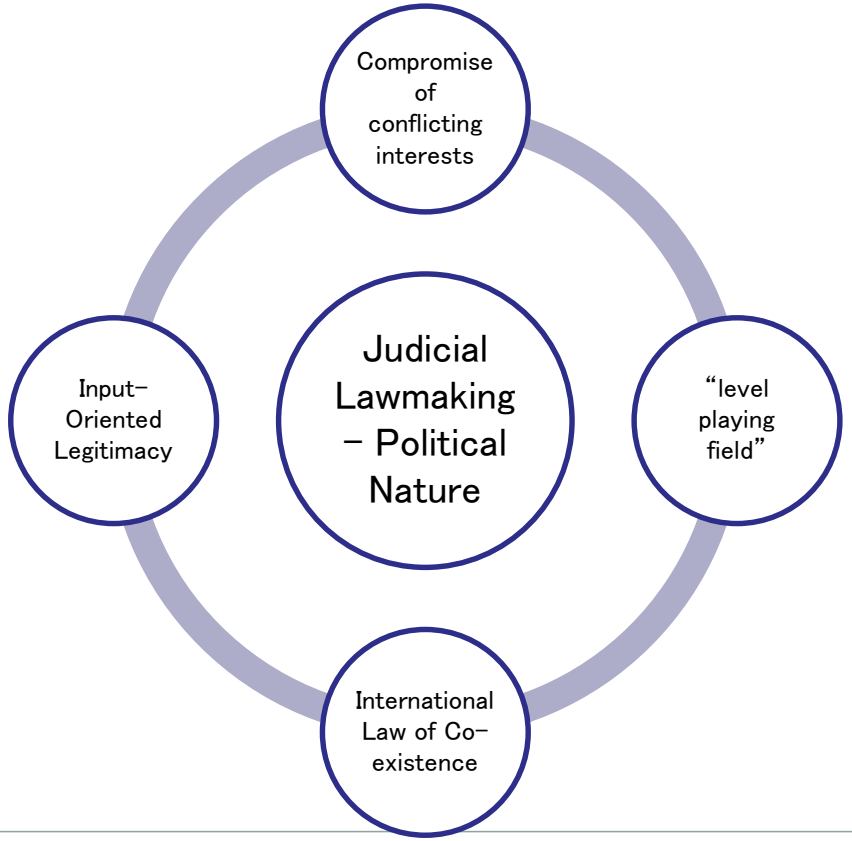
Legitimacy for Judicial Law-making

- *"Cooperation" approach*: If the WTO Agreement is agreed to achieve the common objective of maximizing the sustainability of human beings in Members, the Agreement can and should be accordingly interpreted by panels and the Appellate Body, and judicial law-making is justifiable and desirable; public participation is desirable for information gathering, but not indispensable.

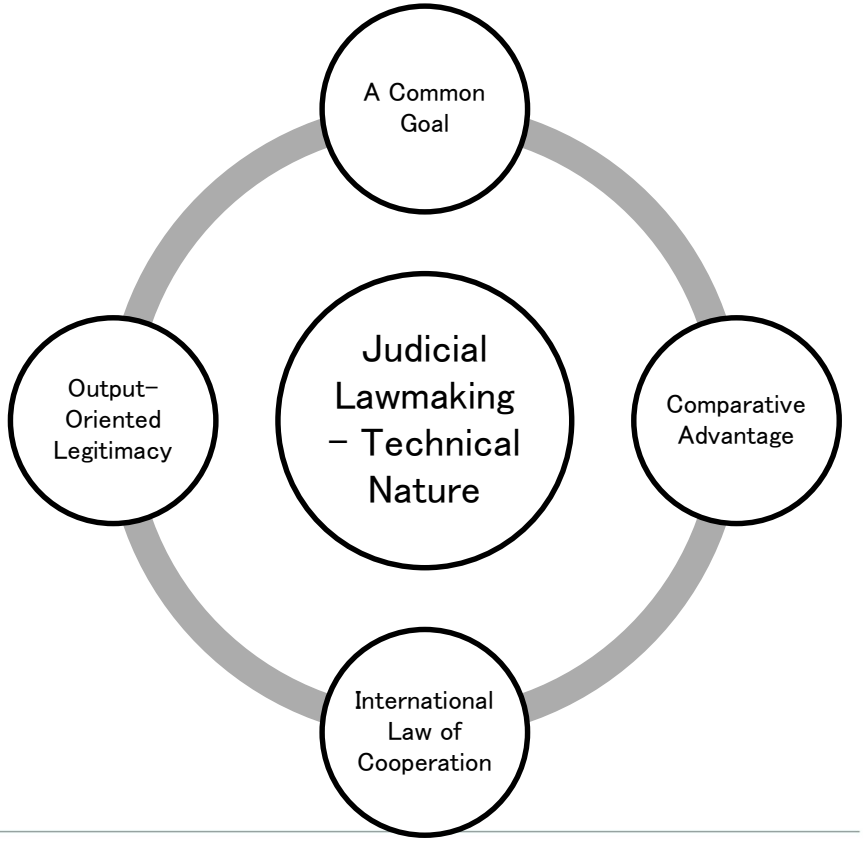
- *"Co-existence" approach*: If the WTO Agreement is agreed as a compromise between trade interests and regulatory discretion of Members, the Agreement should be textually interpreted, and thus, no judicial law-making is expected nor justifiable, or it might be permissible if the (input-oriented) legitimacy concern is fully addressed (e.g. public participation by amicus briefs).

Two Models

"Co-existence" Model



"Cooperation" Model



Utility of Dichotomy for Law-making by Negotiation in WTO & FTAs

- The "co-existence" model's explanation:
  - The DDA stalemate is understable. It should be difficult for non-like-minded Members to reach a compromise on a variety of issues on which their interests are conflicting with each other.
  - It is relatively easy for like-minded nations to strike a deal – FTAs.
- The "cooperation" model's suggestion:
  - Members should focus on solving non-political "technical issues" one-by-one, while giving up the "single-undertaking" approach, which inevitably renders technical negotiations into a political deal.

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Further Issues – Outside WTO context

The validity of the approaches proposed here need to be tested with respect to the other areas where judicial lawmaking is developing.

For example:

- ISDS arbitration under bilateral investment treaties
- DS mechanism under free trade agreements

Further Issues – Other Concerns

- The validity of the approaches proposed here should be tested in relation to the salient phenomena of “soft law” and “public participation” under international law.
  - Why is “soft law” created and complied with?
  - Why or for what purpose is “public participation” required?

END