The WTO Judicial Decision-Makers: How Do They Deal with Multilateral Environmental Agreements?

Christiane Gerstetter[1]

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The WTO dispute settlement system is commonly considered to be one of the most powerful judicial mechanisms at the international level. In combination with the trade liberalist orientation of WTO law this has fuelled fears of an excessive negative impact of WTO dispute settlement decisions on environmental regulation. This, in turn, has lead to extensive discussions on the legitimacy of the WTO in both normative and empirical terms. Against this backdrop, the paper sheds light at how the WTO dispute settlement bodies have decided two cases where the relationship between multilateral environmental agreements (MEAs) and WTO law was particularly relevant.

The underlying premise of the paper is that WTO law gives judges considerably leeway when deciding their cases due to its indeterminacy. This premise as well as the options that WTO judicial decision-makers are faced with in light of such indeterminacy will be explained in the first part of the paper. In a second step, the paper reviews two cases – the shrimp-turtles and the case on genetically modified organisms (GMOs) – with a view to how the judicial decision-makers have used the indeterminacy inherent in WTO law to construe the MEA/WTO relationship. Two different aspects will be investigated: the substantive interpretation that the WTO 'judges' have chosen at critical junctions and their judicial style when doing so.

Finally, these two aspects are brought together to offer a conclusion on if and in what way the WTO dispute settlement must be seen as an actor of international environmental governance. The contribution will thus deal with agency - of an actor external to, but with considerable influence on, environmental governance - as well as related issues of accountability and legitimacy.

[1] I am currently a Fellow at the Ecologic Institute, an environmental think tank, in Berlin (www.ecologic.eu). I wish to thank the DAAD for a travel grant as well as my employer for giving me the time to participate in the conference. The paper is an off-spring of a Ph.D project at the Law Faculty of Bremen University, which I started during my time as a researcher at the Collaborative Research Center 597 "Transformations of the State" at Bremen University. Contact: christiane.gerstetter@ecologic.eu.

1. Introduction

The World Trade Organization (WTO), in its almost 15 years of existence, has seen a lot of criticism. While it is currently less in the focus of public scrutiny than some years ago, academic critics and streets protestors have brought charges against almost every single one of the agreements under its roof and of many aspects of its decisions-making structure. The criticism is, in a nutshell, that the WTO promotes trade at the cost of non-trade concerns (notably environmental and health protection, social justice and development) and does so by restricting the scope for democratic, legitimate decision-making at the national level. The criticism is frequently all the more harsh as the WTO is seen as one of the most powerful international organisations due to its effective dispute settlement mechanism.[2] It is this dispute settlement mechanism and the judicial output it produces that the present paper is concerned with. The most troubling disputes from a normative point of view are the ones implicating non-trade concerns.[3] The present paper looks at how the dispute settlers have interpreted the relationship between WTO law and multilateral environmental agreements (MEAs).

Whenever an international judicial body is called upon to rule about a nation state's regulatory measure on the basis of inter/supranational economic law, two dimensions of normative importance overlap. The first dimension is a substantive one: does the judicial body (ab)use its judicial power to (unduly) prevent governments from pursuing non-trade goals, where the wording of the law gives it leeway, does it even complement the wording of the law to this end? In the case of the WTO, does trade always come first in the judicial decisions? The second

[2] Some authors have argued that the strong dispute settlement deprives Member of an option they otherwise have at their disposal when it comes to complying with norms of international law that they consider to be problematic – the option of non-compliance at relatively low cost. On this point and its significance for the problem of democratic legitimacy of WTO norms, Robert Howse, "How to begin to think about the 'democratic deficit' at the WTO," in Stefan Griller (ed): International economic governance and non-economic concerns: New challenges for the international legal order (Wien: Springer, 2003), 93; Armin von Bogdandy, "Law and Politics in the WTO: Strategies to Cope with a Deficient Relationship," Max Planck Yearbook of United Nations Law (2001): 106-109.

[3] This is reflected in the amount of scientific articles published on these cases. See only Altemöller 1998; Appleton 1999; Chang 2000; Cottier et al. 2003; Gaines 2001; Hohmann 2000; Howse 2002; Knox 2004; Mavroidis 2000; Neumann/Türk 2003; Notaro 2003; Perez 1998; Puth 2003; Scott 2001; Scott 2004; Wiers 2002; Winter 2003.

dimension relates to competences: how does the judicial (read: non-democratically elected) body deal with the regulatory measures enacted by a democratically elected government? How does it deal with other international agreements? Does it rather stick to the letter of the law, exercising self-restraint or is it "activist"? These questions, arising in the competence dimension, carry all the greater urgency at the international level given that the international (legal) system is – in general – much more under the suspicion of suffering from a democratic deficit than domestic law.[4] In a „polity" like the WTO system where there is no (effective) legislature at the supreme level, it is, according to a „classical" separation of powers ideal, all the more essential that the judicial branch does not overstep its competences at the cost of the legislators at the lower level.

Both dimensions – the substantive and the competence dimension - inevitably come to the fore in cases where the WTO dispute settlement bodies decide about its members' environmental measures and, in connection with that, on international environmental law. It seems thus adequate to both pursue them in parallel in the course of this paper. This will allow an assessment, in the end, if the WTO dispute settlement may be regarded as an actor of international environmental governance - or of international economic governance only.

This work is structured in the following way: I will first introduce different theories of judicial-decision making and argue that a judicial body, in particular, at the international level is always faced with a certain indeterminacy of the law. Its decisions will thus, inevitably have to be considered as involving an element of choice. In the second part, I will show how the WTO dispute settlement bodies have used their decision-making space in the cases where they had to make a statement on the relationship between WTO law and MEAs. In that context, both the substance of the decision and the decision-making style of the WTO adjudicators will be discussed. In conclusion, the paper will flesh out in what sense WTO adjudicators can be considered as actors in international environmental governance.

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[4] See from the voluminous literature on the legitimacy of international law only E. Stein, "International integration and democracy: No love at first sight," *American Journal of International Law* 95, no. 3 (2001): 489-534; J.H.H. Weiler und I. Motoc, "Taking democracy seriously: the normative challenges to the international system," in *International economic governance* and *non-economic concerns: New challenges for the international legal order* (Wien: Springer, 2003), 48-77.

2. Judicial decision-making in the view of indeterminacy – theoretical insights

Conceiving of judicial decision-makers as actors pre-supposes that they have leeway for taking decisions of their own, i.e. that their actions are not, entirely, pre-determined by the wording of the laws. In this section, I will show that (WTO) law is indeterminate and introduce theories on how judges act when faced with law's indeterminacy.

2.1. The indeterminacy of WTO law

The insight that the law is pervasively and inherently ambiguous and indeterminate and more than one interpretation can often be justified by established methodological standards was called a *"Gemeinplatz",* a truism, many years ago.[5] It is a well-established assumption that there are norms which are – as one observer has put it – "clear, self-executing, fully specified in advance and not in need of interpretation"[6] and others which are not.[7] The basic assumption that law is indeterminate is shared by different strands in legal theory. The aspect, about which they disagree, seems to be rather how deeply indeterminacy in entrenched in the law.

The word indeterminacy is itself, however, not a determinate term. What is meant by the term and what are the reasons that legal norms are indeterminate in many cases? A rough formula would be that the law is indeterminate whenever it is not evident to a trained reader, be it immediately or after giving some thought to it, what the law mandates in a certain factual constellation, and wherever two readers, acting in good faith, may after careful reflection arrive at diverging conclusions. Another possible definition is that the law is indeterminate where it is not predictable how a court would decide in a certain factual situation.[8]

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[5] Enderlein, Abwägung in Recht und Moral (Freiburg; München: Alber, 1992), 38.

[6] Trachtman, "The domain of WTO dispute resolution," 337 who draws on the distinction between rules and standards developed in the law and economics literature.

[7] As will become clearer in the next section, this basic starting point is shared by some of the eminent authorities in current legal theory, even though they put it differently.

[8] See D. Kennedy, A critique of adjudication {fin de siècle} (Cambridge; London: Harvard University Press, 1997), 60.

There are different reasons why the law is indeterminate. The first reason, which I am tempted to call an ontological one, is that the law *qua lege* is abstract and general.[9] Law creates categories of factual situations which are to be treated in a certain way. In applying the legal categories to a factual situation, it may be unclear whether a specific factual situation belongs to one legal category or the other. The indeterminacy, here, is built into the relation between the abstract and the concrete. The second reason for the law's indeterminacy is that law is always a text, i.e., language. One does not have to be a linguist to know that language is not a precision tool and misunderstandings and ambiguities occur frequently. Thus, the indeterminacy of the law, as language, reflects the indeterminacy of language itself.[10] The third important reason for the indeterminacy of the law is that. law is written by human beings and they may either be unwilling or incapable to make the law more precise. Unintended indeterminacy occurs, for example, when conflicts between a draft law and existing legal norms go unnoticed during the legislative process or when a formulation used in a legal norm is more ambiguous than necessary (in the light of the indeterminacy of language as such). Indeterminate legal norms may also be attributable to a lack of imagination on part of the law-writers which simply do not envisage certain future factual constellations and therefore do not cater for them when writing the law.[11] Intended indeterminacy, in contrast, reflects a lack of political will to make the law more precise, for example due to the absence of a political consensus.[12] In international law, leaving legal norms indeterminate, is sometimes a deliberate way of enabling countries to interpret the law their own

[9] See H. L. A Hart, The Concept of Law, 2undefined Aufl. (Oxford: Clarendon, 1994), 20-21; A. Marmor, "The rule of law and its limits," Law and Philosophy 23 (2004): 1.

H. L. A Hart, *The Concept of Law*, 2. Aufl. (Oxford: Clarendon, 1994), 124-135 describes at some length the "open texture" of law; R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1981), 83, speaks of "hard cases", in which "no settled rule dictates a decision either way"; J. Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts* (Frankfurt a.M.: Suhrkamp, 1992), 266 writes that all legal norms with the exception of few highly specified ones, are originally ("*von Haus aus"*) indeterminate.

[10] Richard H Steinberg, "Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints," *American Journal of International Law* 98 (2004): 254.

[11] This point is emphasised by Hart, *The Concept of Law*, 128-135.

[12] For international law K.J. Alter, "Resolving or exacerbating disputes? The WTO's new dispute resolution system," *International Affairs* 79, no. 4mlm/ep, ue/P; cge/ep (2003): 793.

way and thus conclude an agreement despite prevailing political controversies.[13] The indeterminacy of WTO law is, *inter alia,* attributed to a deliberate move of the parties to leave the agreements like this in order to have to show some success domestically.[14] Sometimes the lack of determinacy of legal norms constitutes a deliberate delegation to a judicial body.[15]

There are, however, not only different reasons for the indeterminacy of the law, indeterminacy also takes different forms in positive law. A brief typology of the sources of indeterminacy or types of interpretive questions a WTO judge will stumble over in the course of judicial proceedings would have to include at least the following:

- *Linguistic indeterminacy:* It has been pointed out that some of the most central terms of WTO law are fuzzy and highly in need of judicial interpretation. This is especially true for the General Agreement on Tariffs and Trade (GATT),[16] an agreement which is particularly relevant for cases in which environmental measures are at stake.

- *Lacunae:* Spotting a lacuna in law is a bit like trying to chase a chameleon. The hunter sees it from far away, but once having arrived, the animal has faded into the background and is no longer detectable. One of the difficulties it that "lacuna" and "indeterminacy" are a matter of degree. Moreover, it is not always easy to decide whether a norm covers a certain factual situation, but does not support a specific claim or whether the norm does not cover the factual situation and hence a lacuna exists. Somewhat clear cases of lacunae or gaps in WTO law are the ones given by Steinberg, although they are gaps rather in

[13] See for international law especially P. Hector, *Das völkerrechtliche Abwägungsgebot - Abgrenzung der Souveränitätssphären durch Verfahren* (Berlin: Duncker & Humblot, 1992), 190-191; S. Wesche, "Auslegung, Fortbildung oder Schöpfung des Rechts? Überlegungen zur juristischen Interpretation anhand der Theorie Ronald Dworkins," in S Wesche and V Zanetti (eds): *Dworkin - un débat - in der Diskussion - Debating Dworkin* (Brüssel; Paderborn: Mentis, 1991), 270.

[14] P. Holmes, "The WTO and the EU: Some Constitutional Comparisons," in: de Burca and Scott (eds): *The EU and the WTO: Legal and Constitutional Issues* (Oxford: Hart, 1999), 65.

[15] This has been observed both for domestic law – H. Hubmann, *Wertung und Abwägung im Recht* (Köln: Heymanns, 1977), 51; and for international law – Trachtman, "The domain of WTO dispute resolution," 336.

[16] C. J. Arup, "The State of Play of Dispute Settlement "Law" at the WTO," *Journal of World Trade* 37, no. 5 (2003): 910.

procedural than in substantive WTO law:[17] the issue of the admission of amicus-curia-briefs in dispute settlement proceedings and the question whether private lawyers may represent parties to the dispute. Both issues have been decided by the adjudicators.

- *Collisions:* Collisions, in contrast, are easy to detect. The hard part is to decide how to proceed in collision cases. Collisions exist – at least according to some legal scholars – both within WTO law and between WTO law and other international law.[18] This paper investigates one potential case of collision, the relationship between WTO law and MEAs.

More than one of those types of indeterminacy may be present in a concrete situation. The statement that there is a lacuna or a conflict depends sometimes on prior interpretations – for which linguistic indeterminacy plays a role. Another example where different types of indeterminacy accumulate is when two colliding norms are vague in formulation each. Curiously enough, this latter example is also indicative of the fact that the presence of more than one type of indeterminacy does not necessarily increase the overall indeterminacy. If two conflicting norms are each indeterminate in language, a judge may arrive at the finding that the *prima facie* conflict can be solved through an interpretation which brings both norms into accord.

Indeterminacy can undoubtedly also be described by a different kind of typology and the categories above are rather different perspectives on the same thing than radically separate categories.[19] Still, the typology illustrates the point I wanted to illustrate that law, the black letter positive law, is indeterminate.

[17] Steinberg, "Judicial Lawmaking at the WTO," 252.

[18] The most comprehensive study of these conflicts, is probably Jan Neumann, *Die Koordination des WTO-Rechts mit anderen völkerrechtlichen Ordnungen* (Berlin: Duncker & Humblot, 2002).

[19] For other "checklists" of situations of indeterminacy in the law and the steps of judicial decision-making see U. Fastenrath, *Lücken im Völkerrecht - Zu Rechtscharakter, Quellen, Systemzusammenhang, Methodenlehre und Funktionen des Völkerrechts* (Berlin: Duncker & Humblot, 1991), 213-235; Hubmann, *Wertung und Abwägung im Recht*, 55; Trachtman, "The domain of WTO dispute resolution," 337.

2.2. Theories of judicial decision-making in the face of indeterminacy

The indeterminacy of the law described is not only one of the reasons, why judicial bodies are needed in first place; it also poses problems for the individual judge. How is she to decide the case where the law is indeterminate? Does indeterminacy of the law mean that a judge decides in an act of volition and arbitrariness where the law does not tell her what to do? Different answers have been given to these questions in recent scholarship. They cannot be dealt with exhaustively in the present context – but neither can they be ignored. Some broad lines by manner of an overview must, therefore, suffice.

A first answer to the question what a judge does when faced with the indeterminacy of legal rules is provided by those that would subscribe to the above given account of the indeterminacy of the law without any further modification. To them, the indeterminacy of the positive law – or, as Hart has put it, its "open texture" – is where the story ends. The positive law is simply indeterminate sometimes – and where determinacy ends, the judge cannot but decide the case according to her own preferences, ideas of justice or ideology. This position can be found in a strong version and a weak version. The strong version, which has most prominently been advocated by legal realism[20] and subsequent strands like the Critical Legal Studies movement,[21] assumes that indeterminacy is the "normal case". Hence, the judge routinely does not interpret, but rather "make law" when deciding a case. Others propose a weaker version of the thesis. To H. L. A. Hart, to invoke a famous name, the cases where the judge makes law, are but the tip of a legal iceberg which is to a large part made up by clear legal rules, open to subsumption by the judge. The indeterminate cases are only a minor part.[22]

[20] On US-American legal realism see T.W. Bechtler, "American legal realism revaluated I," in *Law in a social context - Liber amicorum honouring Prof. Lon. L. Fuller* (Beventer: Kluwer, 1978), 5-48 and for its concept of the legal process especially 23-30. It should be noted that US American legal realists focussed mainly on common law, much less on statutory interpretation. .

[21] See for a recent CLS contribution Kennedy, *A critique of adjudication {fin de siècle}*.

[22] Moreover, Hart stresses that "formalism", ie, an attitude that considers it desirable that judicial choice be reduced to a minimum by making rules as clear and precise as possible, is not necessarily normatively desirably, at 128-136. Hart, *The Concept of Law*, 135-136, 152-154.

A number of objections have been raised against this theory of judicial volition.[23] Some of them, discussed below, have been voiced by those that subscribe to a different view of judicial decision-making. There is, however, a much more straight-forward objection to this description of the work of the judge: Are there not the familiar tools of legal interpretation – the canon of methods of legal interpretation – textual interpretation of the norm, interpretation of the norm in its context, historical interpretation and teleological interpretation (to name the important ones) – and the typical forms of legal arguments like inferences *e contrario, ad absurdum,* analogies that lawyers may use to find out what the law says? Can indeterminacy not be eliminated by the use of such tools?

It is true that an interpretation that is reached pursuant to one of these rules of legal interpretation can be regarded as being a defensible judicial interpretation. Thus, these methods of interpretation help the judge to cope with the indeterminacy of the law. And judges do indeed use them. But, so the argument goes, how a judge uses them and which rule of interpretation she prefers, is largely left to her. Canons of legal interpretation are themselves general rules and thus give rise to ambiguities of their own.[24] There is no pre-established hierarchy between the customary rules of interpretation in public international law.[25] The canons of legal interpretation therefore do not fully eliminate the indeterminacy of the law. A second tool that a judge may use to reduce indeterminacy is "model solutions" to the case at hand – existing in the form of precedents. It is evident that precedents can help to reduce legal indeterminacy from the perspective of a judge. However, as long as there is – like in WTO law – no formal rule that the judge has to take into account the decision taken by a different court the decision whether to take into account a precedent is still the judge's own decision.[26] Altogether, the indeterminacy dilemma is, not fundamentally solved through the *lege artis* tools of legal interpretation although

[23] See for example J. Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts* (Frankfurt a.M.: Suhrkamp, 1992), 247,248.

[24] See Enderlein, *Abwägung in Recht und Moral*, 329f; Hart, *The Concept of Law*, 126; Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts*, 276 also notes the circularity of an argument that relies on the established methods of legal interpretation to reduce the indeterminacy of the law.

[25] Steinberg, "Judicial Lawmaking at the WTO," 258.

[26] Rafi, *Kriterien für ein gutes Urteil*, 56.

they help to mitigate it. According to the strands of theory described above, a residual space for judicial volition and discretion is thus inevitably part of any legal system.

The thesis that a residual indeterminacy will remain in at least some cases and inevitably lead to a subjective bend in a judge's decision is rejected by another strand of the discussion. Dworkin is the most prominent,[27] but not the only voice.[28] According to this position, the indeterminacy thesis is adequate as far as the surface of the law, consisting of a set of positive legal norms, is concerned. These norms may indeed confront the judge with "hard cases" in which it is not clear at first or second sight what the law stipulates.[29] In contrast to proponents of the first position, Dworkin and others do not think, however, that in such cases a "right answer", i.e., one interpretation of the law that captures what the law "really" says, is simply not available. They hold that a legal system will provide determinate answers, if a judge does the right thing. Dworkin proceeds to demonstrate this by inventing judge Hercules, a judge endowed with super-human capacities in all relevant judicial disciplines.[30] Judge Hercules, when faced with a hard case, will, in essence, initiate a process of theoretical reconstruction of the existing legal system and its underlying principles. This reconstruction will take into account the principles underlying the existing rules, institutions and prior case law. In the light of this reconstruction, it will be possible to find among the different interpretations of the positive law which are tenable from a linguistic point of view, the one which also "fits" into the existing legal system as a whole.

[27] Dworkin has developed his theory in a series of books with considerably change in detail over time, especially as far as terminology is concerned, see R.M. Watkins-Bienz, *Die Hart-Dworkin Debatte - Ein Beitrag zu den internationalen Kontroversen der Gegenwart* (Berlin: Duncker & Humblot, 2004), 75-76. As all what is needed for the present context is a rough sketch, this need, however, not concern us here.

[28] Two more doctrinally-minded authors that use the Dworkinian model are Hector, *Das völkerrechtliche Abwägungsgebot - Abgrenzung der Souveränitätssphären durch Verfahren*, especially at 178 and A. Emmerich-Fritsche, *Der Grundsatz der Verhältnismäßigkeit als Direktive und Schranke der EG-Rechtsetzung* (Berlin: Duncker & Humblot, 2000).

[29] The "hard case" terminology is used by R. Dworkin, *Taking Rights Seriously* (London: Duckworth, 1977), 81-130.

[30] See Ibid., 101-125 for the following.

Dworkin insists that a judge does – and should[31] – not "make new law" according to his own preferences, but is able and bound to detect a solution that is already present in the existing law.

It is important to note, however, that Dworkin does not reject the idea that it may matter who the judicial decision-maker in a given case is. Dworkin acknowledges that the "judgement" of the individual judge that sets out for "detecting" the right solution within in the existing legal system is needed for deciding the case. He does not deny that two judges may come to different conclusions in a given case.[32]

In sum, then, major thinkers in contemporary legal theory, representing different theoretical strands, concur that judges in some, many, or all cases, will be faced with legal norms that do not mandate a specific outcome and will still have to decide the case.

2.3. Judicial reason-giving in the face of the indeterminacy of the law

So far, I have discussed models of how judicial decision-makers decide a case in practice. What is missing, however, is an account of how judicial decision-makers may be expected to argue and support their decisions - decisions that are taken, sometimes or regularly, in the face of the indeterminacy of the law.

The style of judicial-decision making of a certain judicial body is important, for at least two reasons. The first reason is that a judicial body positions itself as either an "activist" or more cautious body through using a certain style. A court that follows a more traditional, formal, text-based approach to judicial reasoning will likely appear as more "court-like" and less activist, less encroaching upon the domain of political decision-makers. The imperative that the judicial branch should interpret the law, and must not make law, is to be heeded.[33] A court that gives short

[31] There is some ambiguity as to whether Dworkin's model is a normative ideal that judges should aspire to follow to the largest degree possible, see E.P. Soper, "Legal theory and the obligation of a judge: the Hart/Dworkin dispute," in M Cohen (ed): *Ronald Dworkin and Contemporary Jurisprudence* (Totowa: Rowman & Allanheld, 1983), 13-14.

[32] Dworkin, *Taking Rights Seriously*, 123-129.

[33] See only K. Iida, "Is WTO Dispute Settlement Effective?," Global Governance 10, no. 2 (2004): 211.

thrift to the letter of the law makes itself more vulnerable to charges of (inappropriate) judicial activism and of occupying a space that belongs to the legislature alone than a court that does not.[34]

The second reason is that courts, in particular those at the international level that have only weak means of enforcement at their disposal require legitimacy. They need to be accepted as an authoritative source for judicial decisions that will be obeyed. In this regard, the style used by a judicial body is, apparently, of huge significance. It has been argued that the particular style of a specific judicial body responds to specific needs for legitimacy. Lasser,[35] in an intriguing study, has compared the judicial style of three courts, the ECJ, the French Cour de Cassation and the US Supreme Court. He finds that they are very different: The French Cour de Cassation has a very formalist, extremely short style; the US Supreme Court, in turn, integrates a more formalist style of judicial reasoning and more policy and equity oriented arguments in its much longer judicial decisions. The ECJ, Lasser argues, is somewhere in the middle. Lasser relates these judicial styles to the issue of legitimacy. According to him, the French court's style is linked to an institutional model for a court's legitimacy – which the French court is able to draw upon, because of its long tradition and the degree to which the French state education system produces a homogenous body of lawyers. In the case of the US court, in turn, the judicial decisions themselves carry the entire weight of justifying a certain judicial decisions and thus making them acceptable; the ECJ, finally, moves again between both models.

Thus, when looking at the style the WTO Appellate Body employs, we may learn something about actual or perceived needs to generate legitimacy and the sources for its authority. A more formalist judicial style may be indicative of the fact that the WTO adjudicators have to tread carefully in order for their decisions to be accepted as legitimate; at the same time it would indicate that the Appellate Body relies on an institutional model for generating legitimacy. A perceived need to act cautiously may, in turn, influence the degree to which WTO adjudicators

[34] A. Rafi, *Kriterien für ein gutes Urteil* (Berlin: Duncker & Humblot, 2004), 41; J.P. Trachtman, "The domain of WTO dispute resolution," *Harvard Internatio*nal Law Journal (1999): 337-338.

[35] M. Lasser, *Judicial Deliberations - A comparative Analysis of Judicial Transparency and Legitimacy* (Oxford: Oxford University Press, 2004).

are willing or able to take decisions that have an impact on non-trade concerns, such as the protection of the environment.

It is important to note, however, that there is not necessarily a relationship between the "real" motives a judge has for deciding a case in a certain way and the reasons he gives for his decision. The "real" motives for deciding a case may not be the ones that a judge wants to or is allowed to write in his or her decision – and I am not referring here to corrupt judges who have been bribed to guarantee a certain outcome of the case and need to find a legally acceptable disguise for their partisan decision. The question is what is "say-able" in a certain legal discourse. When reading judicial decisions one will, for example, hardly ever find a statement to the end that the law was indeterminate and the judges now had to base their judgement on non-legal aspects. Such a statement would dangerously undermine the acceptance of the court's findings. The indeterminacy of law is not communicable within a judicial decision – but maybe behind the findings of a court. Moreover, the posture that a judicial body assumes through its judicial style does not necessarily correspond to the substantive significance and audacity of its decisions. For example, it has been held that the European Court of Justice, in its early, years consciously adopted a formal, deductive, traditional style of judicial reasoning, in order to appear as a neutral, non-political body. At that stage, it needed to be appear thus in order to be able to take far-reaching decisions on European law, notably on the supremacy and direct effect of European law.[36]

All this implies that reading judicial decisions will not necessarily allow any inferences with regard to the „real" motives of WTO adjudicators for taking a certain decision.[37] However, I would maintain that looking at both the style of the decisions and their substance will bring us as close to understanding the "real" motives (if any) for a judicial decision as possible through a mere reading of the texts: If decisions are, in substance, far-reaching, but the judicial style in

[36] M. Poiares Maduro, We, The Court (Oxford: Hart, 1998), 10-11.

[37] However, even though there are no guarantees in this respect, I find it more plausible to assume that people do what they say they do, rather than the opposite.

which they are presented implies that they are not or more or less self-evident that is a strong indicator that "something else is going on behind the scenes."[38]

3. The Appellate Body's approach towards the MEA-WTO relationship – evidence from the decisions

With these theoretical insights in hand, I will now turn to an analysis of the case law of the Appellate Body, concerning the relationship between WTO law and MEAs.

3.1. Substance

The first observation resulting from the analysis of WTO case law on the relationship between WTO law and MEAs is that the dispute settlement bodies have never explicitly, and once and for all, pronounced themselves on that relationship. However, the issue has been in the background of some of the decisions that the dispute settlement bodies had to take. I will, in the following, look at the two cases among the larger number of WTO dispute settlement decisions in which the relevance of MEAs for the interpretation of WTO law was of most relevance.

3.3.1 The shrimp-turtles case

The shrimp-turtles case is one the famous cases that the Appellate Body[39] has decided so far.[40] The case was brought before the WTO dispute settlement by India, Malaysia, Pakistan and Thailand against the US. The claimants held the view that a US import ban on shrimp harvested

[38] See on similar methodological issues J. McCall Smith, "WTO dispute settlement: the politics of procedure in Appellate Body rulings," WTR 2, no. 1 (2003): 98-99.

[39] The Appellate Body is the appeal body of the WTO dispute settlement. It become involved when the decision of a dispute settlement panel is appealed by one of the parties to the case and may decide on matters of law (as opposed to matters of fact) only.

[40] The case also has a rather long history of WTO dispute settlement: Not only was the initial case brought and the subsequent decision of the dispute settlement panel appealed. In addition, a complaint concerning compliance was also brought under Art. 21.5 of the WTO Dispute Settlement Understanding (DSU) and the decision of the compliance panel was, again, appealed. Thus, there are altogether four dispute settlement reports dealing with the case.

with commercial fishing technology which adversely affected sea turtles violated WTO law. The ban did not apply to shrimp from countries certified by the US.[41]

The MEA link of that case arose, inter alia, from the fact that sea turtles were, at the time of the dispute, included in Annex I of the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) and were thus protected under that convention – a fact that the US cited in defense of its import ban.[42] The claimants, in turn, relied on international soft law in form of in Principle 12 of the Rio Declaration on Environment and Development and the principle of multilateralism enshrined therein, in support of their argument that the unilateral character of the US measures should lead to a judicial statement of their incompatibility with WTO law. Interestingly, one of the WTO members acting as a third party in the case, also relied on CITES in support of its argument that the US should have adopted a multilateral approach for its measure to be WTO-consistent.[43] Thus, the same MEA, was used for arguing both in favor and against the WTO compatibility of the US measures.

However, the WTO judicial decision-makers did not decide on the status and meaning of these international agreements in the abstract, but in conjunction with a finding on a concrete norm. This norm, in the case, was Art. XX of the General Agreement on Tariffs and Trade (GATT). Article XX reads, in its relevant parts:

> Article XX
>
> *General Exceptions*
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any Member of measures:
>
> …

[41] For a full summary of the US regulations, see Appellate Body, United States - Import Prohibition Of Certain Shrimp And Shrimp Products, WT/DS58/AB/R, paras. 2-6.

[42] WT/DS/AB/R, para. 25.

[43] WT/DS/AB/R, para. 72.

…

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

The Panel, on whose finding the Appellate Body had to pronounce itself, had found that the US important ban could not be justified under this norm. It had argued that the type of measures of which the US important ban was representative could *per se* not be justified under Art. XX GATT. Measures conditioning market access for a given product upon the adoption by the exporting Members of certain policies would, according to the Panel, undermine the capacity of GATT 1994 and the WTO Agreement to serve as a multilateral framework for trade among Members as security and predictability of trade relations under those agreements would be threatened.[44] The Appellate Body rejected this approach by the Panel, but upheld, in substance, the finding that the US import ban was not justifiable under Art. XX GATT.

What role did international environmental law play for this finding of the Appellate Body? The Appellate Body referred to international environmental law in several paragraphs of its findings. First of all, when interpreting the term "natural resources", the Appellate Body resorted to the United Nation Convention of the Law of the Seas, the Convention on Biological Diversity (CBD), CITES, and the Resolution on Assistance to Developing Countries, adopted in conjunction with the Convention on the Conservation of Migratory Species of Wild Animals, to support its findings that sea turtles were "exhaustible natural resources" in the sense of Art. XX (g) GATT.[45] The status of sea turtles under CITES was seen, in this context, as evidence of the fact that turtles were exhaustible natural resources, while the other international agreements were used to help define the term "natural resources".

Secondly, and perhaps more importantly, the Appellate Body also referred to international environmental law when discussing whether the US unilateral important ban constituted "unjustifiable discrimination", under the chapeau of Art. XX GATT. Quoting passages from the Rio Declaration on Environment and Development, the CBD, and the Conservation of Migratory

[44] Panel Report, WT/DS58/R, para. 7.45.

[45] WT/DS/AB/R, para. 130, 132.

Species of Wild Animals, the Appellate Body stated that the protection of sea turtles was, due to the migratory attitude of sea turtles, a problem that demanded concerted and cooperative efforts on the part of those countries whose waters sea turtles traversed.[46] It also cited the Inter-American Convention for the Protection and Conservation of Sea Turtles, concluded in 1996 between the US and five Latin American countries, as evidence of the fact that seeking a multi-lateral solution for the protection of sea-turtles would have been a solution feasible from the perspective of the US.[47] The final conclusion, drawn by the Appellate Body, that the US import ban for shrimps amounted to an unjustifiable discrimination, not permitted by Art. XX GATT, seems to be based, in particular on the existence of the Inter-American Convention – evidence that the US tried to find a multilateral solution with some WTO members, but not with others.[48]

In terms of the construction of the relationship between WTO law and MEAs, the following observations on the decision in the Shrimp-Turtles case are important: First, the Appellate Body did, in substance, strike down a US measure which was in line with at least the objective of a MEA, the CITES, and another regional agreement, the Inter-American Convention. Neither did it refrain from making such a finding nor did it make any general statement as to the relationship between the relevant MEAs and WTO law or applied international environmental law directly to the dispute. It did, however, use MEAs as one source for discussing the meaning of certain terms of WTO law and as a source of factual evidence, notably on the feasibility of an alternative course of action for the US.

3.3.2 The GMO case

Another landmark environmental[49] case is the GMO case. This case was triggered by a complaint brought by the US, Canada and Argentina against the EC on the allegation that the EC's de-facto

[46] WT/DS/AB/R, para. 168.

[47] WT/DS/AB/R, para. 169.

[48] See in particular WT/DS/AB/R, para. 171.

[49] I call this case an environmental case, because frequently GMOs are regarded as an environmental issue, as well as an ethical or health issue. It should be noted, however, that it was adjudicated by the WTO panel mainly under the Agreement on Sanitary and Phytosanitary Measures (SPS), the "health" agreement of the WTO.

moratorium on the approval of GMOs and the safeguard measures on GMOs taken by some of the EC's member states violated WTO law. The Panel found, essentially, that the EC and its member states had violated the WTO's Agreement on Sanitary and Phytosanitary Measures (SPS), because their measures were not based on a risk-assessment and/or because they violated a procedural norm of the SPS Agreement.[50] The Panel decision was not appealed.

The MEA that the case was linked to was the Cartagena Protocol on Biosafety. The US is not a party to this agreement, while Canada and Argentina had signed it at the time of the dispute, and the EC is a party. The EC argued that its measures were in conformity with the Cartagena Protocol, and in particular the precautionary approach enshrined in that agreement, and that the Cartagena Protocol and the SPS Agreement should be interpreted in a mutually coherent way.[51] Moreover, it also maintained that its measures were based on the precautionary principle, a general principle in international environmental law and should thus be allowed to stand before the WTO.

The Panel rejected the EC's arguments. It argued that it was bound by the rules of interpretation of the Vienna Convention on the Law of Treaties (VCLT). Art. 31.3 lit c VCLT sets forth that in treaty interpretation "any relevant rules of international law applicable in the relations between the parties" shall be taken into account. The Panel concluded that as the US, Canada and Argentina were no parties to the Cartagena Protocol, the Protocol was not applicable in the relations between the parties and, thus, did not have to be taken into account in the WTO case.[52]

The Panel's statement on the status of the precautionary principle under international and its significance for the case at hand is even more interesting. The Panel first refers to the EC – Hormones case, a prior case, in which the Appellate Body had to deal with a claim by a party that

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[50] For a more extensive description of the Panel's findings see Gregory Shaffer, "A Structural Theory of WTO Dispute Settlement: Why Institutional Choice Lies at the Heart of the GMO dispute," *International Law and Politics* 41, no. 1 (2009): 78-102.

[51] Panel Report, European Communities – Measures Affecting the Approval and Marketing of Biotech Products, WT/DS291-293/R, paras 7.53-7.55

[52] WT/DS291-293/R, para. 7.75.

it should take into account the precautionary principle as a general principle of international law in its decision. The Appellate Body on that occasion stated the following, quoted by the Panel in the GMOs case:

> "The status of the precautionary principle in international law continues to be the subject of debate among academics, law practitioners, regulators and judges. The precautionary principle is regarded by some as having crystallized into a general principle of customary international e*nvironmental* law. Whether it has been widely accepted by Members as a principle of *general* or *customary international law* appears less than clear.
>
> We consider, however, that it is unnecessary, and probably imprudent, for the Appellate Body in this appeal to take a position on this important, but abstract, question. We note … that the precautionary principle, at least outside the field of international environmental law, still awaits authoritative formulation."[53]

The Panel, after quoting this passage, referred to international environmental agreements where the precautionary principle was mentioned as well as decisions by national and international courts. However, it arrived at the following conclusion:

> "Since the legal status of the precautionary principle remains unsettled, like the Appellate Body before us, we consider that prudence suggests that we not attempt to resolve this complex issue, particularly if it is not necessary to do so."[54]

Ultimately, the Panel based its decision on a finding of the violation of certain norms of the SPS Agreement for which a finding on the status of the precautionary principle under international law, was, indeed, no pre-requisite. Similarly, while the Panel did state that MEAs could (but did not have to), in principle, inform its interpretation of certain terms of the SPS Agreement, it found that in the concrete case no provision of any of the MEAs cited by the EC was useful to this purpose.[55] In sum, then international environmental law did not play an explicit role in the Panel's finding on the WTO consistency of the EC's GMO-related measures.

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[53] Report of the Appellate Body in the EC-Hormones case, para.121, quoted in WT/DS291-293, para. 7.87.

[54] WT/DS291-293, para. 7.89.

[55] WT/DS291-293, paras. 7.93-7.94

3.2. Style

The reading of the two cases above has focused on substantive aspects. I shall now address the style used by the dispute settlement.[56]

A first point to note is that the WTO dispute settlement reports have a considerable length – the two cases I have looked at are no exceptions. Notably, the Panel decision in the GMO case has, including various annexes, e.g. a verbatim re-production of experts' hearing, 2430 pages. This is much longer than any decision by, for example, the ECJ. An extensive reproduction of party submissions, and even those of third parties, is part of every report. The length is a more pronounced feature of the panel reports, which also describe factual findings, while the Appellate Body is limited to making findings on (certain) legal matters, but both types of reports are by no means short. The dispute settlement bodies seem to see a need for explaining their findings at great length to the parties and their wider audience.

A second point, observable in both cases, is that the dispute settlement bodies refer to the methods of interpretation applicable in public international law, including international environmental law, in general. They thus situate their findings within the larger international legal order, drawing on the neutrality, and thus legitimacy, of the rules of interpretation enshrined in the VCLT. Moreover, the Appellate Body, in the Shrimp-Turtles, case rejected the Panel's findings, because the Panel, in the view of the Appellate Body, did not apply the appropriate methods of judicial interpretation. The Appellate Body emphasized that WTO judicial decision-makers should, as set forth in Art. 3.2 of the DSU, apply the customary rules of interpretation of public international law. These

> "call for an examination of the ordinary meaning of the words of a treaty, read in their context, and in the light of the object and purpose of the treaty involved. A treaty interpreter must begin with, and focus upon, the text of the particular provision to be interpreted. It is in the words constituting that provision, read in their context, that the object and purpose of the states parties to the treaty must first be sought. Where the meaning

[56] It should be noted that while concerning the substance it is possible to focus rather narrowly on those parts of the decision of relevance for the WTO/MEA relationship, the same is not possible with regard to judicial style, which is a more general aspect of the dispute settlement decisions.

> imparted by the text itself is equivocal or inconclusive, or where confirmation of the correctness of the reading of the text itself is desired, light from the object and purpose of the treaty as a whole may usefully be sought."[57]

The Appellate Body, moreover, also stressed that when the wording of the law is not clear, and an adjudicator must, additionally, draw on the object and purpose of a norm, the object and purpose of that very norm should be taken into account, rather than only the overall object of the entire treaty. This, again, implies that the adjudicators should be guided as closely as possible by the text, and base their findings on its nuances.[58] Thus, the AB displayed, at least on the surface, a very strong commitment to the text of the WTO agreement and thus to a more formalist style of judicial reasoning. A final important point about the methods of interpretation of the WTO dispute settlement bodies is that they explain at great length their methods of interpretation, thus seeking to make their findings not only transparent in a substantive, but also in a procedural respect.

A third point concerns the status of normative, policy-oriented statements in the reports. We can observe two different approaches in the two cases. The Appellate Body, in Shrimp-Turtles, reminded its readers, at the very end of its decision, what it had not decided on:

> "We have *not* decided that the protection and preservation of the environment is of no significance to the Members of the WTO. Clearly, it is. We have *not* decided that the sovereign nations that are Members of the WTO cannot adopt effective measures to protect endangered species, such as sea turtles. Clearly, they can and should. And we have *not* decided that sovereign states should not act together bilaterally, plurilaterally or multilaterally, either within the WTO or in other international fora, to protect endangered species or to otherwise protect the environment. Clearly, they should and do."[59]

[57] WT/DS58/AB/R, para. 114.

[58] WT/DS58/AB/R, para. 116.

[59] WT/DS58/AB/R, para. 185.<

In that passage, the adjudicators make unequivocal statements about what they think should normatively be done – and about the reach of their decision. However, these statements are not integrated into the actual judicial discussion, but rather come at its end, before the findings are summarized, more or less as an annex. The GMO panel, in turn, when dealing with the status and relevance of the precautionary principle stated that it was not "prudent" to make a statement on the status of the precautionary principle – and found a way how it could avoid such a statement. The WTO dispute settlement bodies thus, despite a strong commitment towards textual interpretation, do not always shy away from making normative, policy-oriented, value-based statements. However, they do – at least in the two cases I have looked at – seem to do that in order to pre-empt any potential criticism of their findings as being either "anti-environmentalist" (as in Shrimps-Turtle) or as overstepping their competence (as in the GMOs) case.

How can we make sense of these features of the WTO judicial style? What unites them, in my opinion, is that they are all geared at generating legitimacy, in the sense of consent. Explaining in great detail what one does involves a message that there is no "hidden agenda", and that all arguments have been heard and been fully taken into account. A strong commitment towards established methods of interpretation and textual interpretation sends a signal that the respective judicial body stays within the "judicial realm", and does not step in areas that should be reserved to sovereign states as the law-makers of the international realm. More policy-oriented arguments come only into play to signal, again, that the WTO dispute settlement bodies are not arriving at any findings they should not make, in views of what is politically desirable or their appropriate role. Referring back to Lasser's models of judicial authority and legitimacy, the WTO dispute settlement does neither seem to be in a position to rely on a model of institutional authority, nor does it dare to rely all too openly on policy-oriented, normative, non-formalist arguments.

4. Conclusion: the WTO dispute settlement – an actor in international environmental governance?

Looking at both the substantive dimension of the cases I have reviewed and the insights on the WTO's judicial style, is the WTO to be considered an actor in international environmental governance and if so, and actor with what characteristics?

As described above, the WTO dispute settlement findings do have an impact on individual countries' environmental measures. The WTO dispute settlement bodies are, at the same time, very careful not to make any general statements on the WTO/MEA relationship and they have avoided basing their findings on MEA rules, other than for lending additional support to a certain interpretation of specific terms. At the same time, they use a judicial style whose very objective it seems to be to generate support for the WTO dispute settlement decisions.

Thus, it seems to be appropriate not to characterize the WTO dispute settlement as an actor that genuinely, openly and purportedly shapes international environmental governance. However, the judicial style used by the dispute settlement bodies indicates that they are very aware of a fact that is related to their role in international governance: While they do not make any statements that directly modify the right and obligations of states under international law, they are, if something like this exists, an indirect actor, in international environmental governance, one that does not have a direct impact, but may well shift the political balance in more indirect ways – while desperately trying to avoid the appearance that is does so in any inappropriate way.

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