Schriftenreihe des
ZENTRUMS FÜR EUROPÄISCHE RECHTSPOLITIK (ZERP) 78

Christiane Gerstetter

Substance and Style

WTO judicial decision-making in 'trade and ...' cases

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Schriftenreihe des
ZENTRUMS FÜR EUROPÄISCHE RECHTSPOLITIK
der Universität Bremen (ZERP)

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Gedruckt mit Unterstützung des Förderungsfonds Wissenschaft der VG WORT.

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the internet at http://dnb.d-nb.de

a.t: Bremen, Univ., Diss., 2017

ISBN 978-3-8487-5768-8 (Print)
978-3-8452-9942-6 (ePDF)

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library.

ISBN 978-3-8487-5768-8 (Print)
978-3-8452-9942-6 (ePDF)

Library of Congress Cataloging-in-Publication Data
Christiane Gerstetter
Substance and Style
WTO judicial decision-making in 'trade and ...' cases
Gerstetter, Christiane
634 pp.
Includes bibliographic references.

ISBN 978-3-8487-5768-8 (Print)
978-3-8452-9942-6 (ePDF)

Onlineversion
Nomos eLibrary

1st Edition 2021

An unlikely dedication in a book such as this, but still:

To those that continue to believe
that it is unnecessary to conquer the world,
because it is sufficient to build it anew.

(Remember: Pessimism of the intellect, optimism of the will)

Preface

Writing this book has taken a very long time (so long, in fact, that I am hesitant to disclose when it all started). With lapses and life happening in between, researching and writing it has been (mostly) a pleasure. If I had finished this work earlier, it would almost certainly have looked different, both in content and in language (and probably length). I am grateful for having had all this time to think about it, develop it, polish it, and to learn so much in the process. At the same time, it is immensely satisfying to see it finished. And it is a relief to know that there will no longer be a reason for this constant nagging feeling that there is still this writing project to be completed.

Given that I have taken such a long time to finish, this work has travelled with me through life, but also through the world. It has been researched and written in a number of different places. Among the ones that I can remember are rooms, offices, cafés, libraries, hostels, hotels, balconies, rooftops and even a camping site and an artist's atelier in Bremen, Berlin, Schwäbisch Hall, Heidelberg, Geneva, Beirut, Florence, the small Palestinian village of Yanoun in the West Bank, Istanbul, pre-war Damascus, Vienna, Belgrade, Sana'a (Yemen), Zagreb and, of course, "my" beloved Jerusalem. And an endless number of trains, fast and slow, old and new that took me from one place to another.

More important than places are, however, the people that in manners direct or indirect have contributed.

From the academic world, I owe the greatest debt of gratitude to Josef Falke, who was my primary supervisor. Josef Falke has been extremely supportive and patient over the years and has generously shared his immense knowledge of the details of EU and WTO law as well as the latest research. Without his offer to publish this book as part of the publication series of the Centre of European Law and Politics (ZERP), I am not sure the work would actually have turned into a book. Christian Joerges, my other supervisor, has also provided important intellectual guidance, in particular from private law and theoretical perspectives.

Both of them co-directed the research project on "Trade liberalisation and social regulation in transnational structures" at the University of Bremen, where I started the research that ultimately has led to this book. We were a mixed team of lawyers and political scientists in a larger Collabora-

tive Research Centre on "Transformations of the State", dominated by political scientists. This is were I first understood the beauty, but also the challenges of interdisciplinary work. I have learnt a lot from the other members of our small research team – Christine Godt, Leonhard Matthias Maier and Ulrike Ehling deserve being mentioned in particular. More generally, I have also benefitted from the intellectual environment and the exchange with so many young and more established researchers working in the mentioned research centre. Funding by the German Research Foundation (DFG) (and thus ultimately taxpayers in Germany) made it all possible.

From the University of Bremen, I would also like to thank Gerd Winter who not only taught me a thing or three about environmental law in my undergraduate studies, but also was willing to be a part of the committee for the oral "defense" of my PhD – and his dedication to environmental law, to teaching it and to interdisciplinary work were inspiring.

This work has benefited hugely from substantial comments by Ralph Bodle, Hanna Goeters and Maike Schmidt-Grabia, who each reviewed a (long) part of an earlier draft version. I also acknowledge with gratitude the proof-reading carried out by Anne Baumann, Olaf Heinrich, Damaris Mühe, Dagmar Seybold and Jürgen Weber.

At the very end, Pete Langman accepted the challenge of editing a PhD in a discipline that is not his own – and has not so much polished as thoroughly and brilliantly scrubbed chapters 2-4. If the text sounds English-English rather than German-English now, that is his work (and I like to believe that I have learned something from his edits above and beyond this specific text).

All errors remain mine, of course.

The "Förderungsfonds Wissenschaft der VG Wort" has provided generous financial support for the printing costs.

There have been more people, however. People who may not have directly contributed to this work, but without whom I would not be who I am, nor think or write the way I do.

I wish to thank my parents, Beate Scherrmann – Gerstetter and Albert Gerstetter, who have supported me in many ways over the years. They raised me to be interested in the world and trust my intellectual abilities; both were, to my mind, essential ingredients for successfully completing my legal studies and ultimately a PhD.

I am also indebted to the people at the Ecologic Institute, an environmental think tank where I have worked for a longer time than I had ever imagined working in one place. I have had the privilege to cooperate with

and learn from many brilliant colleagues and partners, coming from many disciplines (and places). In particular, I would like to thank the co-founder and (now former) director of this institute, R. Andreas Kraemer, as well as its present director, Camilla Bausch, for their constant encouragement, for giving me space to pursue my interests and grow and for altogether making the institute such a unique place (including one where it is fully acceptable that people may want to do different things in life and therefore work part-time).

I am also thinking – with no little gratitude and joy – of friends, flatmates, and the intense emotional and intellectual companionship of joint political activism. I have learnt from you and you have kept me going. I trust you know who you are and hope you know what you mean to me.

Thank you all, lovely people!
Christiane Gerstetter

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Abbreviations

AB	Appellate Body
AD	Anti-dumping
ADA	Anti-Dumping Agreement
AIDCP	Agreement on the International Dolphin Conservation Programme
BISD	Basic instruments and selected documents (GATT/WTO)
CBD	Convention on Biological Diversity
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
CTE	Committee on Trade and Environment
CLS	Critical Legal Studies
DS	Dispute settlement
DSB	Dispute Settlement Body
DSU	Dispute Settlement Understanding
EC	European Community
ECJ	European Court of Justice
ECtHR	European Court of Human Rights
EU	European Union
EPA	(US) Environmental Protection Agency
FTA	Free trade agreement
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GMOs	Genetically modified organisms
GSP	General system of preferences
IAC	Inter-American Convention for the Protection and Conservation of Sea Turtles
IACHR	Inter-American Commission on Human Rights
ICC	International Criminal Court
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for the Former Yugoslavia
IEC	International Electrotechnical Commission
ILC	International Law Commission
IMF	International Monetary Fund
ISO	International Organization for Standardization
ITLOS	International Tribunal for the Law of the Seas
MEA	Multilateral environmental agreement
NAFTA	North American Free Trade Agreement
NGO	Non-governmental organisation
PCIJ	Permanent Court of International Justice
SCM	Agreement on Subsidies and Countervailing Measures

SPS	Agreement on Sanitary and Phytosanitary Measures
TBT	Agreement on Technical Barriers to Trade
TFEU	Treaty on the Functioning of the European Union
TRIMS	Agreement on Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
TTIP	Transatlantic Trade and Investment Partnership
UNCLOS	United Nations Convention on the Law of the Sea
US	United States
USTR	Office of the United States Trade Representative
VCLT	Vienna Convention on the Law of Treaties
WIPO	World Intellectual Property Organization
WTO	World Trade Organization
WTOA	Agreement Establishing the World Trade Organization

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Introduction

"Oracular decisionmaking, the authority of which rests on the status of the decisor, rather than the quality of the reasoning, is antithetical to the judicial function."[1]

Several years ago, when I started working on this study, there was much concern about the impact of the World Trade Organization (WTO) on non-trade regulatory objectives and national policy-making. The concern was voiced at the academic level and in newspaper editorials, but also in the streets of Geneva, Seattle, Genoa and other places around the globe. Many – I among them – feared and continue to be concerned that the WTO serves to enforce trade liberalization at the global level at the expense of non-trade concerns, such as poverty reduction, environmental protection, public health, human rights or labour standards, making it more difficult for democratically elected national governments to make choices in favour of such objectives.

Today, the clamour – both academic and activist – around the WTO has become much quieter[2], with good reasons: Negotiations at the WTO about a number of topics have seen little progress over the years. There is also an ever-growing network of regional or bilateral investment and free trade agreements (FTAs) in place. These days, heated public debates about the relationship of international trade and investment rules and environmental issues are mostly triggered by negotiations about FTAs such as the EU - US Transatlantic Trade and Investment Partnership (TTIP)[3] or the

1 Weiler 2009, 137.

2 A piece of anecdotal evidence supporting this observation is that in the 1990ies and in the beginning of the 2000 decade almost every book or article carrying the terms "trade and environment" would in some way have a focus on WTO law or politics. By contrast, of the roughly two dozen chapters of a 2009 "Handbook on Trade and Environment" only three dealt directly with the WTO, see Gallagher 2009. Another indicator is the relative absence of protests during more recent high-level meetings of the WTO.

3 See for example on public opinion on TTIP in Germany Chan and Crawford 2017.

EU-Mercosur Trade Agreement[4] rather than by anything happening at the WTO.

However, the WTO has by no means become irrelevant to the trade and environment debate. WTO Members continue to discuss issues of trade and sustainability.[5] Moreover, WTO law is a reference point for other treaties: numerous bilateral or regional trade agreements take up or refer to formulations used in WTO law.[6] As a result, interpretations of WTO law have also become relevant for the interpretation of other trade and investment treaties.[7] Yet the influence of the WTO dispute settlement bodies' interpretation of WTO law is not *prima facie* limited to international economic law. The WTO dispute settlement system is the most active international judicial mechanism in existence. Thus, how it interprets the WTO treaties may also have an impact on the interpretation of international law more broadly.[8] Moreover, with the WTO dispute settlement system being the most prolific judicial mechanism at the international level it can also provide useful insights on judicial decision-making at the international level – itself an important topic given what some have described as the judicialization of international law. Hence, WTO dispute settlement still deserves attention.

Criticism of the WTO is predominantly linked to the way that non-trade concerns may be affected by WTO law and politics.[9] WTO law extends much beyond the non-discrimination approach and goods-only focus of the era when only the GATT existed. It includes substantive harmonization requirements in such agreements as the Agreement on Sanitary and

4 See for example Gruni 2020.

5 See for example WTO, New initiatives launched to intensify WTO work on trade and the environment, 17 November 2020, https://www.wto.org/english/news_e/news20_e/envir_17nov20_e.htm.

6 For an empirical analysis, see Allee, Elsig, and Lugg 2017.

7 Charlotin 2017, 294f finds an overall limited number of citations of WTO case law in non-WTO judicial decisions, but does not include an analysis of judicial decisions from inter-state dispute settlement under FTAs into his analysis. Marceau, Izaguerri, and Lanovoy 2013 identify 150 references to WTO rules and case law in judicial decisions taken by non-WTO international dispute settlement institutions. Peel 2012, 432 mentions one case where several ICJ judges in a dissenting opinion referred to a certain aspect of WTO dispute settlement practice, the reliance on scientific experts, as "best practice".

8 For example Livermore 2006, 789ff suggests that WTO judicial oversight could help improve and legitimize decision-making in the Codex Alimentarius Commission.

9 See for example Kelly 2006.

Phytosanitary Measures (SPS) and Technical Barriers to Trade (TBT) Agreements, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) or provisions on liberalization in the service sector in the General Agreement on Services (GATS). Much of the concern stems from the fact that the WTO has one primary aim, which is, according to the preamble of the WTO Agreement, to "develop an integrated, more viable and durable multilateral trading system".[10] This distinguishes WTO law, and hence also the judicial bodies faced with the task of interpreting it, from other parts of the international legal system that protect broader objectives, such as safeguarding core human rights.

Concerns over the negative impact of WTO law and FTAs on non-trade interests are intertwined with a second dimension: the way that the WTO legal framework may restrict the scope for democratic, legitimate decision-making at the national level, in particular through its strong dispute settlement mechanism. This mechanism deprives, as some have argued, WTO Members of an option they otherwise have in practice when it comes to norms of international law – non-compliance at relatively low political and economic cost.[11] Indeed, establishing an international judicial[12] body means delegating certain choices about the institutions that ultimately decide on certain matters to that body. In the case of the WTO, the WTO dispute settlement bodies will have to decide, for example, whether a national measure may remain in place (meaning that national level authorities decide), whether they hold the measure to be inconsistent with WTO law (meaning that the WTO decides), or whether they defer to provisions of non-WTO international law or strengthen international standards (meaning deference to the decisions of those who created these international

10 Obviously, the preamble of the WTO Agreement also mentions other objectives, namely raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, expanding the production of and trade in goods and services, and securing a share for developing countries in international trade growth. However, those are, according to the WTO approach, dependent on the attainment of the primary objective, i.e. an enhanced international trade system.

11 On this point and its significance for the problem of democratic legitimacy of WTO norms see Bogdandy 2003, 106–109; Howse 2003a, 93. The reputational and political costs of non-compliance are probably not different in the WTO legal universe than concerning other international legal agreements.

12 For the use of the word "judicial" when referring to the WTO dispute settlement, see chapter 1, section 4.1.1.

norms).[13] These questions carry all the greater urgency given that the international (legal) system is in general under the suspicion of suffering from a democratic deficit.[14]

An assessment of judicial decision-making by an international dispute settlement mechanism can obviously follow different approaches; indeed, scholars have researched the WTO dispute settlement system from various methodological and disciplinary angels and sought answers to a number of different questions.[15] This study looks at two dimensions of WTO judicial decision-making, both with a particular focus on the Appellate Body: the substantive outcome produced by and the judicial style of the WTO dispute settlement bodies.

Concerning the substantive outcome, the research question is how the WTO dispute settlement bodies have in practice decided the cases where non-trade issues were at stake. These "trade and …" or non-trade cases are the ones that tend to receive most public, critical attention and raise the most serious legitimacy issues with regard to the WTO's role in resolving them. In these "trade and …" cases, is there a pattern that the WTO adjudicators favour trade and economic concerns over other regulatory objectives to an extent not required by the wording of the law? In other words, can it be argued that the WTO dispute settlement system exhibits a pro-trade bias? When seeking to answer these questions, the present study goes beyond individual case notes or the analysis of specific legal issues of WTO case law. While it does contain summaries of specific aspects of WTO case law, notably the interpretation of certain articles, as well as a technical-legal discussion and critique of the way that the dispute settlement bodies have dealt with these issues, it does not stop there. Concerning the analysis of the substantive outcome in "trade and …" cases, the discussion of the case law only forms the basis for a systematic cross-case assessment of whether the interpretations chosen by the WTO adjudicators are more restrictive of the regulatory freedom of WTO Members than required. For assessing whether WTO law "requires" a certain interpretation, existing legal scholarship is used as a yardstick; for identifying defensible alternative interpretations, I will rely primarily on existing comments by legal observers, but also on differences between Panel and Appellate Body reports. This ap-

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13 The fact that judicial decision-making at the WTO involves institutional choices has been most clearly pointed out by Shaffer 2009.

14 See from the voluminous literature on the legitimacy of international law only Stein 2001; Weiler and Motoc 2003.

15 See chapter 1, section 5.1.

proach is based on the assumption that if there are alternative interpretations that a number of renowned legal scholars or practitioners agree on, this is an indication that the WTO adjudicators could also have defensibly interpreted the law in a different way. By implication, their actual interpretation must be considered a deliberate choice, rather than the only possible interpretation of WTO law.

The statement that adjudicators have a choice presupposes that the law actually provides them with such choices, i.e. that the law is indeterminate. However, if the law does not pre-determine outcomes, how is a given substantive interpretation justified by judicial decision-makers? This leads to the second topic of this work, the WTO's judicial style. The research question concerning the judicial style of the WTO dispute settlement bodies is how they justify their decisions. What methods of interpretation are used? What type of arguments and mode of reasoning can be found in the reports? How can the observed style be explained?

Altogether, this work is concerned primarily with the legal reality as it unfolds in the WTO universe. My aim is not to make a contribution to the debate on how WTO law *should* be interpreted – even though there are some dispersed comments on that as well – but to analyse how it *has* been interpreted, what effects the chosen interpretations have, and what could be reasons why they were chosen. The new insights I hope to add to the vast body of existing legal scholarship are both substantive and methodological: In substance, I purport to systematically assess the degree to which the interpretations contained in WTO case law in "trade and …" cases is restrictive or permissive vis-à-vis WTO Members' regulatory freedom via a reading of the judicial decisions. This is combined with an analysis of the rhetoric, the judicial style, used for justifying these decisions. These aspects have only infrequently been brought together in the existing literature on an equal footing and connected to a defined theoretical framework. Yet bringing them together is important: The legitimacy[16] of judicial decisions depends on both the substantive outcomes of cases, i.e.

16 A brief explanation is in place on the use of the terms legitimate and legitimacy. A distinction is frequently made between two meanings of this term, namely legitimacy in a normative sense and in an empirical or social sense. Legitimacy in an empirical sense means acceptance of a norm, decision, or policy by relevant constituencies as justified, legitimacy in a normative sense means that "a claim of authority is well founded" or "worthiness of acceptance", see Bodansky 1999, 601; Krajewski 2001, 168. The term will be used in both senses in the following, but I will try to make clear in which sense it is used in each instance where not evident from the context.

who wins and loses and what interpretations are adopted, and the way a judicial decision is justified. A judicial outcome that is perceived as unjust or inappropriate or not in line with the law is likely not to gain the acceptance of relevant constituencies, i.e. the parties to a case, the actors using an international dispute settlement mechanism, legal communities, or the larger public. At the same time, a judicial decision that is poorly reasoned, refers to arguments that by conventional wisdom should not be relevant for a judicial decision, or is inconsistent is not likely to be accepted, either. Thus, both the substance and style of judicial decisions matter – and this applies to WTO dispute settlement as well.

Concerning methodology, this study has a stronger interdisciplinary character than most WTO-related works coming from the legal discipline. The conceptual framework described further in chapter 1 is not taken primarily from the discipline of law; rather, it is informed by theoretical writings on the indeterminacy of law as well as insights on the real-world functioning of courts, taken mainly from political science studies. Chapters 2 and 3, constituting the empirical part of the study, follow partially a standard legal methodology; they describe and criticize how WTO law has been interpreted and discuss potential alternative ways how it could have been interpreted. However, they also go beyond a standard legal methodology in inquiring about the substantive and discursive effects of the case law. This work uses theoretical approaches, developed mainly by political scientists, on courts as strategic actors, as a conceptual framework while undertaking an in-depth empirical analysis of relevant case law with the methods of lawyers. It also bears noting that the overall approach of this work – having a theoretical framework which is brought to bear upon empirical material – is an approach not normally found in the discipline of law, but prevalent in social sciences. This work would not have been possible at a stage where there was little discussion about WTO law; the study can hence also be read as an attempt to reap the fruits of the lively discourse on WTO law of the past 25 years.

The study is structured as follows: The underlying theoretical assumptions are explained in chapter 1. The chapter first justifies and explains the assumptions on judicial decision-making at a general level, drawing on relevant works from legal theory and comparative studies of courts' reasoning. One assumption is that law in general and WTO law in particular are indeterminate, at least to a degree. This means that judges regularly need to decide cases on other than strictly legal grounds. Furthermore, I assume that judges are generally interested in maintaining and enhancing the reputation, credibility, legitimacy and mandate of the court they work for.

They will therefore seek to make their judgements acceptable to relevant constituencies. For doing so, the judge/s must observe certain standards of what is considered an acceptable legal argument. Having justified these assumptions about judicial decision-making in general terms, I discuss to which extent the resulting insights are also valid within the WTO context and what hypotheses concerning the outcome and style of the WTO dispute settlement can be formulated on their basis. For this purpose, the main point of reference is prior research by political scientists conceiving of courts in general and the WTO dispute settlement bodies in particular as strategic actors. Finally, chapter 1 also explains in more detail the methodology underlying the work.

Chapter 2 focuses on the substantive outcome produced by the WTO dispute settlement bodies. It reviews the relevant "trade and …" cases of the WTO with a view to how certain core norms of WTO law are interpreted in substance. The aim of this chapter is to ascertain the balance between trade and non-trade objectives, between international legal norms and national regulatory space that the WTO dispute settlement bodies strike through their interpretations. The review will focus on those norms which, by their rather indeterminate wording, offer judicial decision-makers considerable leeway, and are at the same time most relevant in cases where environmental protection, public health or other non-trade concerns are at stake. These are selected norms from GATT, the SPS and TBT Agreements and the GATS. Chapter 2 contains sections on each of these agreements.

Each of the sections is structured alike: I will first present the relevant case law on each of the agreements and will then analyse the respective case law from a legal-technical point of view in a part entitled "discussion". The rationale behind this approach is that, as discussed above, the type and quality of arguments that judges use matter for the legitimacy of a ruling. For example, when a certain interpretation is widely perceived as not covered by the everyday meaning of the term it seeks to interpret or there are inconsistencies between different parts of a ruling, this will undermine the perceived quality and thus acceptance of the respective judicial finding. In a part entitled "assessment", I will then assess the case law from a more normative-political point of view. I will inquire what alternative interpretations could have been chosen and whether the interpretations actually chosen are more or less restrictive of WTO Members' regulatory freedom than the potential alternatives. The chapter ends with an overall assessment of the case law in "trade and …" cases. This assessment summarizes the insights on whether an interpretive pattern is discernible that the WTO

adjudicators favour trade and economic concerns over other regulatory objectives to an extent not required by the wording of the law.

Chapter 3 is dedicated to the judicial style of the WTO dispute settlement bodies. Attention is paid, among others, to the methods of interpretation used (including the role of non-WTO international law), the standard of review, the role of principles and balancing in the jurisprudence, and the use of precedents and techniques to avoid deciding certain issues. In addition certain other aspects of the case law are discussed that are more rhetorical in character. For each of these issues, I will first explain in the respective section why the topic is important. I will then briefly summarize the most important insights and, where pertinent, discuss them from a legal-technical point of view, drawing also on relevant scholarship. For all of the aspects of the WTO judicial style, I will assess the discursive effects of the approach chosen by the adjudicators, what the approach means in terms of legitimizing the decisions and how it can be explained. The discussion and assessment sections feed into a description and assessment of the specific judicial style of the WTO in the last section of chapter 3.

Chapter 4 offers conclusions drawing on the insights on substance and style. It starts by offering evidence for the often-heard claim that the WTO dispute settlement system is a success by investigating the relative absence of counter-measures of WTO Members against it so far. I will then bring together the key results from chapters 2 and 3 concerning the substance and style of judicial decision-making at the WTO respectively in an attempt to explain the perceived success of the WTO dispute settlement system.