

# Substance and style – how the WTO adjudicators legitimize their decisions

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# Question

„How do the WTO judicial decision-makers legitimize their decisions“?

## **Legitimate:**

Legitimacy in normative sense: decision, law, behaviour worthy of recognition

Legitimacy in empirical sense: actual, empirical acceptance of decision, law, behaviour as worthy of recognition

# Underlying assumptions (I)

- Law is more or less indeterminate
- Courts/judges have certain space of agency (beyond being the „mouth of the law“), within the constraints of the law
- (International) courts use this space strategically to come to decisions that are both in line with the law and the anticipated preferences of Members/Parties
- Courts cannot and do not state in their judgments the full range of reasons for why they come to a certain decision – they need to appear to use arguments recognised as legal arguments

# Underlying assumptions (II)

For a judicial decision to be perceived as several dimensions are relevant

**Controlled  
by court**

Outcome of  
decision, legal  
interpretation  
(„substance“)

Arguments used for  
justifying  
judicial decision  
(„style“)

**(Mostly) not  
controlled  
by court**

Institutional and  
procedural factors

Legitimacy of wider  
institution/court as  
institution

# Substance

## **Result:**

- Relatively balanced outcome in terms of legal interpretations favoring/restricting regulatory autonomy of WTO Members (not in terms of who wins/loses – statistically defendants mostly lose)

## **Method:**

- Reading of decisions in non-trade/public interest cases (e.g. all Art. XX GATT cases, SPS cases) – most controversial cases
- Focus on, but not limited to Appellate Body reports
- Interpretation is considered as deliberate choice if there are – according to literature etc. – defensible alternative interpretations

# Some legitimising elements of WTO judicial **style**

- Strong reliance on textualism („the mouth of the law“)
- Strong (apparent) reliance on precedents
- Very long decisions, repeating every detail of parties' arguments
- Ample use of judicial economy: decision not to rule on certain of the litigants' legal arguments, deeming these unnecessary to solving the dispute at hand
- Explicit statements on what has not been decided

# Effects of judicial style

- Presenting decisions as inevitably resulting from text of WTO law, Appellate Body as interpreter, not maker of law
- Avoiding potentially controversial decisions

# Conclusion

„Through a reading of the dispute settlement decisions we can show that WTO judicial decision-makers actively seek to legitimise their decisions both through offering balanced interpretations of the law (in non-trade cases) and through using a certain judicial style.“



# Successfully generating legitimacy?

If measured by absence of countermeasures from WTO Members, probably yes

- Little activity by WTO Members to overturn decisions of WTO dispute settlement
- Some discussions on reform of WTO dispute settlement, but limited ambition
- No high levels of non-compliance
- No abatement in use of system over time

Thank you!

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