

The WTO Judicial Decision-Makers: How Do They Deal with International Environmental Law?

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WTO dispute settlement

- Two stage process: „panels“ as first instance, „Appellate Body“ as appeal body
- Relatively „judicialised“ body
- More than 300 disputes initiated since 1995
- Rather effective enforcement

Are the WTO dispute settlement bodies actors
that influence international environmental law
(IEL)?

I Theory

Courts as (judicial) decision-makers

- Law is indeterminate: linguistic indeterminacy, lacunae, collisions
- How do courts deal with it? They are not predetermined by law in all instances and thus have a certain element of discretion, but at the same time they cannot communicate the indeterminacy of law as a reason for their decisions.

Consequences for reading WTO dispute settlement decisions

- Different substantive outcomes are often legally feasible .
- Judicial style matters.

II Evidence from the dispute settlement

Shrimp – Turtles case

- Import ban by the US on shrimp from countries where shrimp is harvested with devices that harm sea turtles
- MEAs used to interpret terms of WTO law.
- Existence of regional environmental agreement used as factual evidence for finding of discrimination.
- No direct finding on relationship between CITES and WTO law.
- Result: US import ban incompatible with WTO law

GMO case

- Complaint against EC de-facto moratorium on approval of GMOs as well as member states safeguard measures
- Panel avoids finding on status of precautionary principle in international law
- Panel avoids finding on relevance of Biosafety Protocol
- Result: EC measures not compatible with WTO law

Style

- Very strong demonstrated commitment to the text
- Very long decisions
- Making methods of interpretation very explicit
- Positioning WTO law as part of public international law
- Very rarely relying on normative, policy-oriented arguments – only to show their own „prudence“

Understanding the style

All stylistic features used by the WTO dispute settlement bodies seem to aim at generating legitimacy and at signalling that WTO does not over-step its competences – either vis-à-vis legislators or international environmental law.

WTO dispute settlement – an actor influencing IEL?

- WTO dispute settlement bodies avoid findings that directly modify IEL.
- WTO dispute settlement bodies avoid any appearance of influencing IEL.
- However, likely indirect influence, because political measures must be made compatible with WTO law, as interpreted by dispute settlement.

Thank you.

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