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Christiane Gerstetter

Substance and Style

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

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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 *ha*s 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.

Chapter 1: Judicial decision-making at the WTO (and elsewhere) – a conceptual outline

"Courts and judges always lie. Lying is the nature of the judicial activity."[17]

In a simplifying and generalising statement one could say that 20th century theories on judicial decision-making largely agree that law is – sometimes/often/usually – indeterminate and that hence judicial decision-makers have a – limited/certain/large – degree of discretion or autonomous space when deciding a case brought before them. While the basic insight that law is indeterminate seems to be widely shared, the slashes in the previous sentence indicate that disagreement persists on various related questions: To which degree is the law indeterminate? What do judges do when faced with the indeterminacy of the law? And what ought they do? Obviously, judges and courts are different from each other. Yet the real-world differences between judicial systems and processes do not seem to fully explain why scholars have developed such diverse portrayals of the judicial decision-making process.

This chapter discusses insights into judicial decision-making and the applicability of these insights to the dispute settlement system of the WTO. In this context, judicial decision-making refers both to the way that judges "really" come to a decision and the way they justify their decision in the text of their judgement, which is often published.[18]

The study draws on existing theoretical accounts of judicial decision-making as well as on empirical studies on specific courts. Yet, given the longevity of judicial decision-making as a research topic and the resulting breadth of the literature, it is impossible to take into account all relevant theoretical or empirical literature.[19] For this reason the focus is on courts

17 Shapiro 1994, 159.

18 The assumption that both dimensions are different, i.e. that the factors motivating a judicial decision and the reasons given for justifying it are not necessarily identical, will be explained in this chapter.

19 Lindquist and Cross 2009, 2 observe that in the US context discussions about activist judges date back until the time of the framing of the US constitution; Hig-

at the international (rather than regional or national) level,[20] given that the WTO Appellate Body is itself such a "court"[21]. In addition, literature on the European Court of Justice (ECJ)[22] is taken into account. Similar to the WTO dispute settlement bodies, the ECJ frequently has to decide cases where trade, or, in the language of the EU[23], internal market concerns and non-trade concerns (e. g. environmental policy objectives) are pitched against each other.[24] Given that WTO law shares at least some features and functions with constitutional law, some studies on constitutional courts are also taken into account.[25] On the basis of the literature review, I proceed to formulate cautious hypotheses on what may be expected from the Appellate Body in terms of style and substance in "trade and ..." cases.

This chapter is structured as follows: Section 1 briefly summarizes the debate on the indeterminacy of the law, explaining the assumption that law is inherently indeterminate and describing different accounts of how

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gins 1968, 63 observes that the distinction between "legal" and "political" questions was first made in 1758.

20 More concretely, there are, besides the WTO dispute settlement system, currently three permanent international courts: the International Court of Justice (ICJ), the International Criminal Court (ICC) and the International Tribunal for the Law of the Sea (ITLOS). The ICC is considerably different from the others in that its mandate is to judge the behaviour of individuals rather than that of states.

21 For a discussion of the court-likeness of the Appellate Body, see below section 4.1.1.

22 With the Lisbon Treaty, the name of the Court has changed to "Court of Justice of the European Union" which is usually abbreviated CJEU. In this work, I still use the old and more widely known terminology, given that the events and cases I refer to are mostly from the pre-Lisbon era.

23 I use the term European Union (EU) to refer to the entity called this way since the Lisbon Treaty, even when a matter in the pre-Lisbon era is concerned. However, some of the earlier dispute settlement cases involved the predecessor "European Communities". In the context of such cases (and only there), I still use "EC" or "European Communities".

24 These similarities have given rise to a body of literature that compares EU and WTO legal rules and dispute settlement decisions, see Cheyne 2006; Neumayer 2001; Hohmann 2000; Holmes 1999; Joerges and Godt 2005; Ortino 2004; Notaro 2003; Scott 2004b; Slotboom 2003; Weiler 2000; for a discussion of differences and similarities between the WTO and the EU, see Búrca and Scott 2001.

25 Eeckhout 2010, 8. Another "court" that could arguably be taken into account is the dispute settlement procedures of NAFTA. Indeed, in some of the discussions of WTO dispute settlement, NAFTA is also taken into account, see for example Flett 2010, 310ff. However, NAFTA is a trilateral, rather than a multilateral agreement, and its dispute settlement system does not include an appellate review. Thus, similarities with the WTO are likely to be limited.

judges decide cases in the face of such indeterminacy. Section 2 presents different factors that influence the substantive outcome of judicial cases. Section 3 deals with what I call "judicial style" in this work; I discuss in this section what kind of arguments judges may and do use for justifying decisions that are based on indeterminate legal norms. In other words, section 1 sets the scene, section 2 relates to the "context of discovery", i.e. the non-textual factors determining the outcome of a case[26] and section 3 deals with the "context of justification", i.e. the reasoning used in judicial decisions to justify them. In section 4, I discuss to which extent general insights into factors influencing judicial decisions and judicial apply to the WTO context. This leads to several hypotheses on factors influencing the substantive outcome of cases brought before the Appellate Body and its judicial style. Section 5 serves as methodological double-check and presents details on the aspects of the WTO's judicial decision-making process that will be investigated in the remainder of this work.

1. *Judicial decision-making in the face of the indeterminacy of the law: a debate revisited*

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, years ago.[27] When the actions of judges are discussed is when the indeterminacy of the law becomes particularly relevant: it is the judges' task to decide what the law mandates in a specific case. Parties come to them to obtain an answer of "yes" or "no" or at least a "yes, but" or "partially no". Thus, the debate on judicial decision-making is as old as the one on the indeterminacy of the law, leading the author of one book published in 1999 to begin his work by stating that yet another book on adjudication required justification.[28] What follows cannot, therefore, be more than a rough sketch.

Before presenting the thoughts of some of the leading figures in the debate on the indeterminacy of the law and judicial decision-making, it is useful to take a closer look at the word indeterminacy, itself not a determi-

26 For the terms "context of discovery" and "context of justification", see, for example, Beck 2012, 46f; Martineau 2007, 994.
27 Enderlein 1992, 83.
28 Lucy 1999, 1.

nate term. What does it mean? One possible definition is that the law is indeterminate whenever it is not evident to a legal professional, immediately or after some reflection, what the law mandates in a certain factual constellation. A second possible definition is that the law is indeterminate whenever two legally trained readers, acting in good faith, arrive at divergent conclusions on a legal issue after careful reflection. A third possible definition is that the law is indeterminate when a court's decision in a given case situation cannot be predicted.[29]

Indeterminacy is a matter of degree. Take, for example, a provision that stipulates a prohibition to park a "car" in a certain designated area and provides for a fine as a consequence of any breech of that prohibition. It would be difficult for the police to make the case for fining someone for having his dog wait in this area while shopping. It may be disputable whether the same provision warrants fining a woman for parking her motorcycle in this area. Yet a truck driver, leaving her truck in the area, will undoubtedly have to pay a fine. Conversely, the limits that terms like "appropriate" impose on what a defensible judicial interpretation is are much less clear. Of course, there is no precise threshold for when precisely a law is "indeterminate" and when it is not. Moreover, a norm may appear determinate at first sight, but in the process of interpretation it may become clear that it is not.[30]

In the following, I will lay the foundations for the later analysis by briefly revisiting the main positions on the indeterminacy of the law and its implications for what judges do. The following broad overview is not nearly comprehensive or detailed enough to do justice to each piece of empirical research or all theoretical works on judicial decision-making.[31] My ambition here is more limited: I seek to establish that analysing WTO judicial decisions as involving at least a degree of discretion of the people taking them is a meaningful approach, in light of existing research on judicial decision-making. For this purpose, I draw on two well-known strands in legal theory on the indeterminacy of the law and judicial decision-making: formalist and realist approaches.[32]

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29 See Kennedy 1997, 60; some theorists arguing that the law is not determinate have replaced the term "predictability" of judicial decisions by the term "reckonability", meaning that outcomes may be predicted in most, but not in all cases, see Beck 2012, 3.

30 An example from German civil law is given by Rafi 2004, 41f.

31 For a more detailed account see Lucy 1999.

32 For a brief description see for example Beck 2012, 17ff who calls them "scientific vs heuristic" legal reasoning. Lucy 1999, 2 also identifies the two approaches, call-

Legal formalism can be both an empirical and prescriptive approach. The central basic assumption in legal formalism is (or maybe: was[33]) that positive legal norms are a more or less closed and comprehensive system adopted on the basis of, for example, political, economic and moral considerations by the responsible legislative bodies.[34] The judges' role is to apply and interpret these norms. When doing so, they lay bare what is already there, without letting themselves be guided by their own non-legal personal preferences and without considering the economic, political and social reality outside of the courtroom. Judge are constrained by legal norms, interpret these norms, use the established methods of legal interpretation, but do so in isolation of factors outside the textual universe of the law. Thus, it does not matter who the judge is. Whoever decides the case will arrive at the same conclusion, assuming that no (professional) mistake is made. There is one right solution, a legal truth that a judge can and must find.

What I describe here is, however, a rather strong version of formalism, which may not exist in this pure form;[35] indeed it may be more correct to say that according to formalist accounts of judicial decision-making adjudicators are "*relatively* constrained by standards *relatively* determinate of the dispute before them"[36]. Some scholars argue that while the law is *prima facie* indeterminate, at a deeper level it is not, or at least not in most cases. Dworkin may be the most prominent example,[37] but is certainly not the only proponent of this idea.[38] According to these scholars, the indetermi-

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ing them orthodox and heretical. Guthrie, Rachlinski, and Wistrich 2007, 2f also describe the two different strands, but hold themselves that neither formalist nor realist assumptions are entirely correct and posit that "judges generally make intuitive decisions but sometimes override their intuition with deliberation", at 3.

33 Or maybe not even that. Tamanaha 2009, 4 claims that "the age of 'legal formalism' never really existed as such" and was basically an invention of its critics. However, as I hope to show in this work, e.g. below in section 5.1., influential portrayals of WTO adjudication exist that can only be described as formalist.

34 For a good overview see Schauer 1988.

35 For example Beck 2012, 19 states that to his knowledge no pure example exists of what he labels a "scientific legal theory'" but what would be a formalist understanding in this work.

36 Lucy 1999, 2.

37 Dworkin developed his theory in a series of books with considerable change in detail over time, especially as far as terminology is concerned, see Watkins-Bienz 2004, 75–76. As all that is needed for the present context is a rough sketch, this need, however, not concern us here.

38 A more doctrinally-minded author that uses the Dworkinian model is Hector 1992, especially at 178; another example is Emmerich-Fritsche 2000.

nacy thesis is correct with regards the surface of the law, consisting of a set of written legal norms. 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.[39] Yet Dworkin and others do not think that in such cases a "right answer" is simply not available, i.e. one interpretation of the law that captures what the law "really" says does not exist. They hold that a legal system will provide unequivocal answers, if judges do what they ought to do. To them, the law sets forth clearly what rights individuals have. Dworkin demonstrates this by inventing judge Hercules, a judge endowed with super-human capacities in all relevant judicial disciplines.[40] When faced with a hard case, judge Hercules will initiate a process of theoretical reconstruction of the existing legal system. In this process, judge Hercules will consider the principles underlying the existing legal rules, institutions as well as prior case law. Judge Hercules' reconstruction will allow identifying the interpretation that fits best into the existing legal system as a whole, among the different legal interpretations that are defensible from a linguistic point of view. Dworkin insists that a judge does – and should[41] – not make new law according to his or her own preferences, but is able and bound to detect a solution already present in the existing law.[42] Dworkin still accepts, however, the idea that identity of a judicial decision-maker in a given case may be of relevance.[43] His thesis is softer than it seems to be at first sight. Dworkin acknowledges that the "judgement" of the individual judge who endeavours to "detect" the right solution within the existing legal system is needed for deciding the case. He does not deny, though, that two judges may come to different conclusions in a given case.[44]

Alexy draws a similar conclusion; he shares Dworkin's idea that a legal system does not consist only of rules, but also of principles.[45] Concurring with Dworkin, Alexy holds that what distinguishes rules and principles is how they function in a collision case: Rules have a clear "if … then" struc-

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39 The "hard case" terminology is the one of Dworkin 1981, 81–130.

40 See ibid., 101–125 for the following.

41 There is some ambiguity as to whether Dworkin's model is a normative ideal or an empirical description, see Soper 1983, 13–14.

42 Dworkin 1981, 117–118, 127.

43 Ibid., 123–129.

44 Another possible way of reconciling the idea that law is ultimately determinate with the idea that it does matter who is the judge, would be to argue that principles do not narrow, but enlarge the space for judicial decisions. This is what Raz 1983, 76 seeks to demonstrate.

45 Alexy 1995, 177–212.

ture. Consequently, when two rules mandate different consequences in a certain factual situation, one of those rules must be invalid or inapplicable.[46] By way of contrast, principles define certain points or interest that must necessarily be taken into account when a legal decision is taken. When two principles contradict each other, judicial decisions-makers have to decide which principle is more important and take the decision accordingly; this does not mean, however, that the underlying principle is invalid, just that it is less "weighty" in the specific case.[47] Rules are specified in advance of the conduct that they apply to, while principles are not.[48] Reacting to criticism, Alexy states that the principles model of legal systems does not mean that there is always one solution to a case. The reason is that it is impossible for law-makers to pre-establish a hierarchy between all principles applicable to all cases ever.[49] Rather, principles help to considerably reduce the *prima facie* indeterminacy of the law.[50]

Historically, the strand of legal theory competing with legal formalism was (legal) realism,[51] on which later strands like Critical Legal Studies have built. A core assumption of legal realism is that the written law allows, and in many cases even requires, judges to consider what is a morally just or politically appropriate solution in light of the wider economic, political and social context of the case at hand. Furthermore, judges are not primarily or exclusively judges, but human beings.[52] They bring a human factor to their judgements, in the form of individual convictions, preferences, attitudes and even stereotypes. Some authors, who do not belong to the

46 Of course, the difference between rules and principles is sometimes also described in different terms, see for example Lydgate 2012, 624ff.

47 Alexy 1995, 216–219; Dworkin 1981, 24–28.

48 Trachtman 2003, 140; Trachtman speaks of standards rather than principles, but appears to mean the same.

49 Alexy 1995, 224–255; this is also the point that Dworkin seems to have in mind when he calls his model judge "Hercules" and emphasizes that he must be superhuman.

50 Many authors build on the distinction between rules and principles by Dworkin and Alexy, also in the context of WTO law. See for example Andenas and Zleptnig 2007, 376f.

51 On US-American legal realism see Bechtler 1978, 5-48, and for the realist concept of the legal process especially 23-30. It should be noted that US American legal realists focused mainly on common law, much less on statutory interpretation.

52 This formulation is borrowed from a 2010 lecture by Frederick Schauer "Do lawyers think and if so how?", video online at http://www.youtube.com/watch?feature=player_embedded&v=_l7FcYzvl7k#!.

school of (US) legal realism, share these basic ideas about the indeterminacy of the law and their implications for judicial decision-making.[53]

There are several obvious objections as well as potential qualifications to the assumption that the law is indeterminate, which may require its restatement in a less far-reaching manner.[54] An obvious objection to the indeterminacy thesis is the following: Are there not accepted tools of legal interpretation, recognized methods of legal interpretation – textual interpretation of the norm, interpretation of a 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* as well as analogies that judges may use to find out what the law says? Can indeterminacy not be eliminated by using them? Does a judicial decision reached in line with established rules of legal interpretation not have to be considered acceptable? In this sense, methods of interpretation help judges (and other lawyers) cope with the indeterminacy of the law. However, how judges use them and which rule of interpretation they prefer, is largely left to them. Canons of legal interpretation are themselves general rules and give rise to ambiguities of their own, which can only be resolved through interpretation.[55] There is usually no pre-established hierarchy among the methods of interpretation in domestic law, once textual interpretation does not deliver.[56] Much the same has been observed for the rules of interpretation in public international law.[57] Hence, the canons of legal interpretation do not fully eliminate the indeterminacy of the law.[58]

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53 For example, Kelsen appears to have shared this idea as well, see Zarbiyev 2012, 5.

54 See for a criticism of the indeterminacy thesis and different responses to it also Habermas 1992, 246ff.

55 See Enderlein 1992, 329f; Hart 1994, 126; Pauwelyn and Elsig 2012, 448 specifically with regards to the rules of interpretation for international treaties contained in the VCLT; Habermas 1992, 276 also notes the circularity of an argument that relies on the established methods of legal interpretation to reduce the indeterminacy of the law.

56 See Rafi 2004, 19–24.

57 Alvarez 2008, 620ff; Cartland, Depayre, and Woznowski 2012, 987; Foltea 2012, 92; Mavroidis 2006, 352; Steinberg 2004, 258; van den Bossche 2006, 308.

58 Beck 2012, 6, 134f therefore differentiates between "primary uncertainty", i.e. indeterminacy of legal rules, and "secondary uncertainty", i.e. indeterminacy of rules of interpretation. He also discusses some of the reasons for secondary uncertainty.

Even when using them, judges can still arrive at a number of divergent interpretations on the same matter.[59]

Model solutions to the case at hand are a second tool that judges may use to reduce indeterminacy; these model solutions exist in the form of precedents[60] and, less importantly, scholarly writing. Precedents can obviously help reduce legal indeterminacy from the perspective of a judge. In common law systems precedents perform the very function of legal rules.[61] However, as long as there is no formal rule requiring judges to take into account a decision by a different court, they are free to do or not do so.[62] Even judges are legally bound by certain precedents, they need to decide whether both cases are similar enough for a precedent to apply. It has been observed that "a multitude of legal positions can be wriggled out of precedents if only one is willing to argue accordingly"[63], irrespective of whether there are formal rules on precedents in a given legal system. Similarly, when resorting to the opinions of legal scholars, judges must take a decision on whether these opinions are relevant to the case at hand. To complicate matters, the legal discourse rarely offers monolithic conclusions about how specific legal norms ought to be interpreted.[64] Thus, judges still have to decide which suggested interpretation is sounder. Altogether, the indeterminacy dilemma is not resolved through either legal-interpretive tools or precedents,[65] although both may help mitigate it.

The idea that the law is indeterminate and that where determinacy ends the judge decides a case on non-legal grounds[66] can be found in stronger and weaker versions. The strong version, which has most prominently

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59 With regard to WTO dispute settlement Ruiz Fabri 2006, 132; Cartland, Depayre, and Woznowski 2012, 987.

60 Precedents are, of course, only an *additional* potential tool for reducing the initial indeterminacy of legal norms, where there are such legal norms. Where there is no such legal norm in first place, precedents fulfill the very role of legal norms.

61 But even with regard to codified systems, it has been observed that sometimes a legal norm is nothing but the codification of established case law Hector 1992, 195.

62 See Rafi 2004, 56.

63 Jacob 2012, 49.

64 An illustrative example is provided by German legal textbooks. There is a series of books in the fields of civil and penal law whose exclusive content is to point out to long-standing doctrinal controversies, enumerating the arguments that are put forward in support of each of the differing interpretative views. See for example Hillenkamp 2006.

65 Bourdieu 1987, 826.

66 See below section 2 for a discussion of these non-legal grounds.

been propounded by legal realism and subsequent strands like Critical Legal Studies (CLS),[67] assumes that indeterminacy is the normal case. Hence, judges routinely do not interpret, but rather make law when deciding a case. Others propose a weaker version of the thesis. To H. L. A. Hart, a prominent representative of this line of thinking, the cases, in which judges make law, are only the tip of a legal iceberg. To a larger part, the iceberg is made of clear legal rules, open to application by the judge. The indeterminate cases are only a minor part;[68] there are shades of indeterminacy.[69]

In conclusion, major thinkers in contemporary legal theory, representing different theoretical strands, concur that judges will be faced, at least sometimes, with legal norms that do not mandate a specific outcome and thus have a space of their own for influencing the outcome of the cases they decide. It is a widely accepted assumption that some norms are – as one author has put it – "clear, self-executing, fully specified in advance and not in need of interpretation"[70] and others are not.[71] Disagreement seems to be mainly about how deeply indeterminacy is entrenched in the law and whether it can be remedied by resorting to the more fundamental principles of a legal order.

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67 See for a recent CLS contribution holding such conception of adjudication Kennedy 1997; Bourdieu 1987, 827 probably also comes in this category when referring to the "extraordinary elasticity of texts, which can go as far as complete indeterminacy or ambiguity".

68 See Hart 1994, 35–136, 152–154. Moreover, Hart stresses that formalism, i.e., 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, 128-136; on the differences between US American legal realism and Hart see Bechtler 1978, 46–47.

69 For a WTO scholar subscribing to this account of legal indeterminacy, see Trachtman 1999, 351.

70 Ibid., 338 who draws on the distinction between rules and standards developed in the law and economics literature.

71 This basic starting point is shared by some of the eminent authorities in current legal theory, even though they put it differently. Hart 1994, 124–135 describes at some length the "open texture" of law; Dworkin 1981, 83 speaks of "hard cases", in which "no settled rule dictates a decision either way"; Habermas 1992, 266 writes that all legal norms with the exception of few highly specified ones, are originally (von Haus aus) indeterminate. This insight, which initially belonged to the disciplines of law in general and legal theory in particular, has through the recent debate on legalization also gained some prominence in international relations theory. One of the criteria used for measuring how legalized a certain regime is, is the precision of its norms, see Abbott et al. 2000, 401.

There are different reasons why legal provisions are indeterminate.[72] The first reason, which I am tempted to call an ontological one, is that the law *qua lege* is and must be abstract and general.[73] The law provides for categories of future factual situations that are to be treated in a certain way. When the legal categories are applied, it is frequently unclear whether a specific factual situation belongs to one legal category or the other. In other words, indeterminacy 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. Language is no precision tool and misunderstandings and ambiguities occur frequently. The indeterminacy of the law, as language, reflects the indeterminacy of language itself.[74] The third reason for the indeterminacy of the law is more empirical. Law is written by human beings and they may either be unwilling to or incapable of making the law more precise.[75] Non-intended indeterminacy occurs, for example, when law-writers fail to see conflicts between a draft law and existing legal norms or when a formulation in a legal provision is accidentally more ambiguous than necessary (in the light of the indeterminacy of language as such). For example, the Uruguay Round negotiators may not have had much legal expertise, contributing to WTO law being indeterminate.[76] Indeterminate legal norms may also be attributable to a lack of imagination on part of the law-writers, who simply do not envisage certain future factual constellations and therefore do not cater for them.[77] By way of contrast, intended indeterminacy reflects a lack of political will to make the law more precise, in the absence of a political consensus.[78] In international law, countries sometimes deliberately agree on indeterminate legal norms, since this enables them to conclude an agreement despite prevailing politi-

72 For a brief discussion of these reasons with regard to WTO law, see Picciotto 2005, 4ff.
73 Hart 1994, 1; 20–21.
74 Some, for example ibid., 26, do not distinguish between the two reasons, but instead hold that it is only language that causes the problems when the more concrete situation is matched with the abstract rule. This implies that concepts do not "exist" beyond language.
75 See for example Feteris 1999, 7.
76 Bartels 2004, 871.
77 This point is emphasized by Hart 1994, 128–135.
78 For international law see Alter 2003, 793.

cal controversies.[79] Finally, indeterminacy also serves to delegate decision-making to a lower governance level or a judicial body.[80]

Indeterminacy takes different forms in written law. A brief typology of the sources of legal indeterminacy[81] a judge may be faced with in the course of judicial proceedings has to include at least the following ones:[82]

One source of indeterminacy is the language used to formulate the law. Scholars have described this phenomenon in different ways: sometimes the wording of the law is considered to be a mere *topos*, one aspect to be taken into account among others when interpreting legal text.[83] Others describe the wording of legal provisions as the outer, sometimes blurred borderline of what is still a valid interpretation.[84] Obviously, this also depends on the specific terms used in legal provisions. For example, a term like "a person" is less ambiguous and open to interpretation than words like "reasonable" or "good faith".[85]

A situation sometimes distinguished from the indeterminacy of a legal provision is when no legal provision is *prima facie* applicable to a concrete situation, i.e. a *lacuna* or gap in the law exists.[86] Again, a distinction can be made between questions left open deliberately and questions left open un-

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79 See Pauwelyn 2003a, 93; Daku and Pelc 2017, 235, 237.

80 This has been observed both for domestic law and international law. For national law see Hubmann 1977, 51; for international law see Trachtman 1999, 336, 351; for the ICC see Wessel 2006, 386.

81 Obviously, apart from legal indeterminacy (or uncertainty), factual uncertainty, i.e. the question what actually happened and which part of that can be proven by the admissible procedural means, is also of great practical relevance in court proceedings, but is not discussed here.

82 The model of a legal order underlying this typology is one of codified law, i.e. a civil law system or statutory law in common law systems. A similar model developed with respect to common law would have to include the rules of precedential effect while some of the other types on indeterminacy presented here might be less important. International law, which WTO law is a part of, is a system of codified law and does not follow a common law model. This justifies basing this typology on the former type of legal system.

83 Rafi 2004, 41; Trachtman 1999, 337f.

84 See Barak 2005, xiii: "Semantic meaning sets the limits of interpretation.".

85 Alexy 1995, 24 describes the kind of indeterminacy inherent to the last kind of expressions as „evaluative openness" and distinguishes it from semantic vagueness.

86 Steinberg 2004, 251 noting also that the distinction between indeterminacy and a "real" lacuna is ultimately fragile.

intentionally by law-makers.[87] Yet it may be difficult to distinguish between the non-applicability of legal provisions and their non-existence, i.e. whether a provision covers a certain factual situation, but does not support a specific claim, or whether no provision applies to the type of factual situation in dispute and hence a *lacuna* exists.[88]

The opposite of a situation where too little law exists, i.e. a *lacuna*, is a conflict or collision of several provisions[89] applicable to the same factual situation. This is a situation of too much law and represents a third type of legal indeterminacy. Conflicts or collisions occur in different forms.[90] A conflict may stem from the fact that legal rules governing a certain matter exist at different governance levels, e.g. at EU and Member State level.[91] In such cases, there are typically rules on the hierarchy between legal provisions at different governance levels. Examples are the supremacy of Euro-

87 See for international law Hector 1992, 183–185; whether a question was left open deliberately or unintentionally is important from a legal point of view, because judges may legitimately "fill" a gap left open by the law-makers unintentionally, for example by creating analogies, while the same is not true for a deliberate lacuna.

88 On this and other "lacuna problems" in international law, see Fastenrath 1991, 213–251.

89 When precisely one should speak of a conflict of norms, i.e. a collision is not entirely clear. In a narrow understanding a conflict exists where one norm mandates what a second norm forbids. But sometimes one norm only permits what a second norm forbids – which would effectively render the first norm meaningless and could thus also be described as a collision. For an in-depth discussion of the notion of conflict see Vranes 2009, 10ff who subscribes himself to a broad notion of conflict. Pauwelyn 2003a, 164ff also discusses the notion of conflict in international law extensively and suggests a broad understanding of conflict: "Essentially, two norms are [...] in a relationship of conflict if one constitutes, has led to, or may lead to, a breach of the other.", at 175f; the ILC report on the matter subscribes to a broad notion of conflict according to which a conflict is "a situation where two rules or principles suggest different ways of dealing with a problem", see Study Group of the International Law Commission 2006, para. 25. For different notions of conflict in WTO law see also Neumann 2002, 60–63 on the one hand; Marceau and Trachtman 2002, 868 on the other. Marceau 2006, 345 and Pauwelyn 2003a, 188ff provide different accounts of how conflict is defined in WTO case law.

90 The ILC report on the fragmentation of international law distinguishes the following relationships that underlie legal conflicts: between special and general law, between prior and subsequent law, between law at different hierarchical levels and relations of law to its "normative environment" more generally, see Study Group of the International Law Commission 2006, para. 18.

91 For an example of a case involving a clash between Art. 103 UN Charta and European rule of law principles in ECJ and ECtHR jurisprudence, see Nickel 2010, 3.

pean law over national law or the supremacy of constitutional norms over "simple" legal rules within national legal systems. In addition, conflicts between two legal norms or sets of legal norms belonging to the same legal system also occur, for example between different international treaties or between two laws at the national level. The more complex a legal system is, the greater is the likelihood of frictions and tensions between laws protecting different values, rights and interests.[92] Conflicts within a legal system can be solved through specific collision norms, e.g. one treaty sets forth that it is not applicable where a second one is) or general collisions norms, most notably the *lex specialis* and *lex posterior* rules.

More than one of these types of indeterminacy may be present in a given situation. For example, the conclusion that there is a *lacuna* sometimes depends on prior interpretations of the law – for which linguistic indeterminacy plays a role. Another example is when two colliding provisions are each vaguely phrased. The latter example also shows that the presence of more than one type of indeterminacy does not necessarily increase indeterminacy overall. If two conflicting norms both use indeterminate language, a judge may arrive at the finding that the *prima facie* conflict can (and some would argue: must) be solved through an interpretation which brings both norms into accord, i.e. harmonious interpretation.[93]

All this is, of course, a very rough sketch. Indeterminacy can undoubtedly also be described by a different kind of typology; the categories above are different aspects of the same phenomenon rather than radically separate.[94]

While the above discussion has probably revealed my own preference for a non-formalist understanding of the law, the nuances of the debate do not matter for purposes of the present work. Here, the key insight of the literature review above is that law is indeterminate and it matters who the judges are, at least in some or many situations. By implication judicial lawmaking is an integral part of adjudicatory decision-making; judges do more than merely applying the law. There will nonetheless also be cases in which it is absolutely clear what the law mandates (e.g. the above parking example); the written law does have a constraining function upon those in-

92 See Leisner 1997, 12.

93 See Pauwelyn 2003a, 247 who also points to the existence of a presumption against conflict in international law, at 240ff; Study Group of the International Law Commission 2006, para. 412.

94 For other "checklists" of situations of indeterminacy in the law and the steps of judicial decision-making see Beck 2012, chaps 2–4; Fastenrath 1991, 213–235; Rafi 2004, 18; Hubmann 1977, 55; Trachtman 1999, 337.

terpreting it at least to a certain extent. As will be discussed at greater length below,[95] indeterminacy is also inherent in WTO law and the WTO judicial decision-makers will have to come to terms with it.

2. *Factors determining the outcome of cases in the face of the indeterminacy of the law*

If the law is indeed indeterminate, then it cannot be its wording alone that determines the outcome of a court case. Researchers from a number of disciplines, including sociology, psychology and political science have investigated, which factors, besides the wording of the law, play a role for the outcome of cases. In this section, some of this research is presented, focusing on international, and to a lesser degree, national courts. However, it should be noted upfront that studies on judicial decision-making at the international level are much fewer in number than those focusing on the national level.[96]

Researchers have identified several types of factors: First, some hold the view that courts are strategic actors and their judgements are a reaction to external pressures and events, for example the threat of a reversal of judicial decisions by political bodies or public opinion on a certain matter (section 2.1). Others consider judgements to be deliberately or unconsciously influenced by given preferences and attitudes of judges (section 2.2). Moreover, the institutional set-up of a court and its rules of procedures are also mentioned as factors influencing the outcome of judicial cases (section 2.3). While some contributions only focus on some of the factors, others look at all three of them, maintaining that only all of the factors together can sufficiently explain what courts do.[97]

As a *caveat*, it should be stated that the following discussion of non-legal factors motivating judicial decisions does not mean that the wording of the law does not matter at all. Indeed, some of the works on judicial decision-making summarized further below in this section have been criticized for underestimating the normative power of the law and the particularities

95 See section 4.1.2.

96 Ginsburg 2006, 2; Maton and Maton 2007, 322; Zarbiyev 2012, 4 observes that the concept of judicial activism has not received much attention in international law; Wessel 2006, 380.

97 An example is Wessel 2006.

of judicial institutions.[98] Other studies hold that non-legal factors partially explain certain judicial outcome, but also take account of the degree of (in)determinacy of the law as another factor.[99] Thus, the existence of non-legal factors that influence judicial decisions does not mean that the wording of the law never matters. Rather, the perspective underlying my work is that the wording of the law does matter in the world of professional judges, and the more determinate the law is the more it matters. At the same time, the law is unlikely to be the only factor influencing the outcome of a judicial case. This starting point is shared by many other researchers.[100]

2.1. Courts as strategic actors

One important factor influencing the acceptance of a certain judgement is the substantive outcome of individual cases and the aggregated outcome of the decision-making of a court over a period of time.[101] A judge may give very good legal reasons for her decision and support it by excellent legal arguments – when the decision is perceived as unjust or biased or as not resulting from the law, it is unlikely to be accepted as legitimate by the parties to the dispute, the general public, and political actors.[102] If a court produces such decisions regularly, this is likely to fundamentally undermine its legitimacy. Equally, if an international court departs too often from what states thought they had agreed on, this may undermine the legitimacy of the respective court.[103]

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98 Beach 2001.

99 Garrett and McCall Smith 2002, 7; Kelemen 2001; McCall Smith 2003, 67.

100 See Wessel 2006, 384f with further references.

101 See for example Glennon and Strother 2019, 243 with various references. By contrast, Benvenisti and Downs 2012, 101 maintain that the "most important determinant of political legitimacy [...] is [...] the extent to which a given court is perceived to be sufficiently independent of the powerful actors that dominate the political sphere to take less powerful and minority interests into consideration". I would maintain that this aspect is a subdimension both of what I call here style, i.e. how a decision is justified, and substance, i.e. the actual, material outcome of cases.

102 Indeed, it has even been observed that the criticism of a certain judicial style may become silent once observers are re-assured that it leads to outcomes that are at opposing ends of the political spectrum, i.e. the result is sometimes politically "liberal", sometimes "conservative", see Aleinikoff 1987, 944.

103 Du 2011, 646.

Anticipated reactions from relevant actors could, in turn, influence the judges when taking a decision. Indeed, in existing research, mainly by political scientists, courts are perceived as rational and strategic actors that work to maintain and enhance their own legitimacy, authority and power.[104] A court, it is argued, should not be expected to take decisions that would lead to a legislative backlash, i.e. a legislative overturn of certain decisions or a permanent clipping of the court's wings by changing its mandate or cutting its funding.[105] In other cases, a court might be motivated by fear that the parties might not comply with a ruling. This is the case for international courts, in particular.[106] Frequent non-compliance would also weaken a court.

Indeed, some international judges have "admitted" (if that is something requiring a confession) that strategic, political considerations are not absent from their deliberations when deciding a case.[107] Similar considerations are also likely to motivate the decisions of lower-level courts that seek to prevent their decisions from being amended or nullified by higher level courts.[108] Political or public preferences that judges respond to will not necessarily and probably not normally take the form of direct pressure being put on judges outside of the court-room – at least this has been observed to be rarely the case by former judges at international courts.[109] Instead, the question is what reactions and countermeasures judges *expect* when taking a certain decision.

In political science, there are two ways[110] of describing the relationship between international courts and the states that can resort to the respective

104 Busch and Pelc 2019, 464; Cooter and Ginsburg 1996; Daku and Pelc 2017, 240; Dunoff and Pollack 2017; Glennon and Strother 2019, 243; Stone Sweet 2004, 20; Zarbiyev 2012, 9f, 17ff.

105 As Wessel 2006, 382 puts it: "[...] states influence international adjudication through their consent, financial backing, and ability to limit the effects of decisions through changes in the law and through non-compliance".

106 Sweet and Brunell 2013, 67.

107 Terris, Romano, and Swigart 2007, 157.

108 Zarbiyev 2012, 9.

109 Terris, Romano, and Swigart 2007, 156. However, some examples have even made it into the news; for an example from the ICTY, see "Hague court was pressured in recent verdicts, judge says", International Herald Tribune, 15/16 June 2013, 1.

110 It is not entirely clear whether these are simply ways of placing different courts on a continuum or conflicting theories about the same courts. The first position seems to be held by Sweet and Brunell 2013, 62.

court.[111] One strand in the literature describes the relationship as one between principals and agents. The states are the principals that delegate certain decision-making power to courts as their agents, providing them with a certain degree of discretion and autonomy. As a result, the court-agents are independent from their principals, but only to a degree; the principals still have ways to influence a court's decisions after its establishment.[112] Others view courts not as "agents", but as "trustees".[113] They maintain that courts, once established, are largely beyond the influence of the states they work for; their judicial behaviour is seen as being guided "primarily by rhetorical and legitimacy politics"[114]. Hence both theories differ with regards the degree of autonomy the court is considered to have.

One court that has been studied rather intensively is the ECJ, in particular with regard to its far-reaching early judgements on the supremacy and direct effect of EU law.[115] Scholars have come up with different theories why the political sphere, i.e. the Member States and/or the EU's political bodies, let the ECJ get away with it. Some have argued that the ECJ in some cases decided the way it did, because the Member States did not pay enough attention to the ECJ's decisions or were unlikely to agree on a coordinated reaction against the ECJ or its specific decisions.[116] Another explanation is that many ECJ decisions were in line with what the majority of the EU Member States or important Member States favoured, at least in cases where no clear rules or precedents existed that would have made such

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111 See for the following Elsig and Pollack 2012, 2ff.

112 Such a model is supported, for example, by Wessel 2006, 383.

113 See for example Sweet and Brunell 2013.

114 This is a description by Elsig and Pollack 2012, 2; however these authors themselves favour the principal-agent approach.

115 See for example Alter 1998, 129ff.

116 Ibid., 136ff observes that policy-makers act on a different rationale than courts. They are concerned with the immediate material impact of court decisions. As the ECJ in its landmark decisions established long-term legal principles, but did not bring them to immediate application, policy-makers were not concerned regarding the ECJ judgments. Later, according to her argument, Member States' governments were unable to reverse a legal development they had not wanted. Moreover, she holds that the ECJ managed to turn national courts into its allies; Weiler 1991, 2428 holds that being a supreme court, the ECJ had an inherent legitimacy that was difficult to politically contest; Burley and Mattli 1993, 72f argue that it was the non-political veneer of judicial decisions that made them hard for politicians to contest. They acknowledge that this veneer is more myth than reality, but the judicial use of nominally neutral legal principles "masks" the politics of judicial decisions, gives judges legitimacy, and "shields" judges from political criticism.

a judicial decision difficult.[117] Others consider a weakly developed EU legislature[118] to be one of the reasons behind the ECJ's early bold judicial decisions.[119] On the other hand, instances have been observed where the ECJ "back-pedalled" in reaction to "strong political signals that it had gone too far"[120]. It does not matter for the present purpose which of the different accounts of the ECJ's decision-making is correct; however, the fact is important that a court, in this case the ECJ, is found to behave as a political and strategic actor and its actions are influenced by the anticipated reaction of other actors. The other European court, the European Court of Human Rights (ECtHR), has also been described as taking into account the "degree of consensus or harmony among the national laws of signatory states"[121], when deciding how much deference – or in the language of the ECtHR how large a margin of appreciation – to afford the defendant state in the case at hand.

Similar insights were produced for courts at the national level. For example, a 1996 comparative study on judicial discretion in several countries concludes that courts are "more daring" in countries where the legislative bodies are unlikely to enact new legislation.[122] Several other studies have shown similar effects for US constitutional review.[123] Stone Sweet concludes that the strategic "zone of discretion" enjoyed by any court is determined by a combination of the power delegated to the court and the possibility of a non-judicial authority to shape or annul outcomes. He argues that constitutional courts operate in an unusually permissive strategic environment, because changing the constitution is difficult in most countries.[124]

Apart from the studies on the ECJ, there are few ones on factors influencing judicial decisions at the international level. One such study is the one by Wessel on the ICC. Concerning external pressure factors relevant for the ICC, he investigates the threat of states to withdraw from the ICC

117 Garrett, Kelemen, and Schulz 1998; for a criticism of this theory, see Stone Sweet 2004, 253ff.
118 This obviously relates to the early years of the European Union, which was then called the European Community.
119 Poiares Maduro 1998, 11 with reference to the absence of a strong parliamentary body; Pollicino 2004, 284.
120 Slaughter and Helfer 1997, 315.
121 Ibid., 316f.
122 Cooter and Ginsburg 1996.
123 Whittington 2003.
124 Stone Sweet 2004.

regime ("exit"), the need to attract new signatories ("entry"), far-reaching revisions of the relevant legal texts, lack of financial support, and lack of support from states in providing evidence and enforcement.[125] Zarbiyev also points to mechanisms of political control as one factor influencing whether an international court is activist or restrained.[126] Ginsburg identifies three possible reactions of states that do not like the jurisprudence of a certain court: exit (i.e. leaving a certain organization and by implication the jurisdiction of the respective court), willy-nilly compliance, and compliance combined with efforts to modify relevant rules (including budgetary cuts for the respective court).[127] It has also been pointed out that international courts have more independent decision-making space when they serve several powerful states that have diverging positions on certain matters than when there is a more limited number of dominant actors.[128]

Yet it is not only the preferences of political actors that matter, but also public opinion.[129] At the national level, evidence has been found on judges being influenced by public opinion. For example, German criminal judges are significantly influenced by media reports on the cases they have to decide.[130] In the US context, a change in courts' attitude towards the legal effect of international treaties in the US legal order was prompted by a (failed) constitutional amendment proposal dealing with this issue.[131] At the international level, public pressure is generally likely to play a somewhat lesser role given that not each and every case actually receives a lot of media and public attention. Indeed, some opine that international courts get rather too little public attention.[132] Still, there are exceptions. For example, Wessel describes the area of international humanitarian law as one where the respective courts are faced with quite intensive advocacy efforts by NGOs.[133]

There are other factors that may influence how a court acts. Gaining acceptance for judgements may be of more importance to courts at some stages of their existence than at others. For example, international courts

125 Wessel 2006, 423ff.
126 Zarbiyev 2012, 7ff.
127 Ginsburg 2006, 33ff.
128 See Pauwelyn and Elsig 2012, 463.
129 Beck 2012, 35f.
130 See Kepplinger and Zerback 2009. Their finding resulted from a survey among judges and prosecutors.
131 Hathaway, McElroy, and Solow 2011, 69.
132 Terris, Romano, and Swigart 2007, 170.
133 Wessel 2006, 390.

have been described as particularly vulnerable to external pressure when the treaty they supervise is under re-negotiation.[134] The openness of courts to political pressure or public opinion may vary over time. A court that is controversial at the time of its creation and hence has a weak institutional legitimacy is likely to tread more carefully. Whether a court is controversial may depend, among other factors, on the authority of the legal source that a tribunal has to interpret.[135] Moreover, permanent courts have been described as less "politicized" than *ad hoc* tribunals.[136]

Altogether, there is substantial evidence that courts are not left untouched by their surroundings.

2.2. Fostering judges' legal or non-legal preferences and attitudes

Judges act strategically in the sense of taking into account political or other preferences of actors outside the court. Yet it is, of course, also conceivable that a judge or a group of judges are guided by their *own* political or moral preferences and attitudes, possibly even unconsciously. Such preferences can be of a legal or non-legal nature, they can relate to what a judge considers a desirable outcome of a case, but also to what a judge sees an appropriate role for a court or as acceptable professional behaviour.[137]

Many studies demonstrate the impact judges' preferences on judicial decisions taken at the national level; research has focused on countries such as the US or Israel that have a relatively heterogeneous population. Moreover, such research also seems to be more prevalent in common law jurisdictions, probably due to the more central role that judicial decisions play in these legal systems.[138] Several studies have investigated the influence of liberal versus conservative policy preferences of US Supreme Court judges on the outcome of cases[139] and there are similar studies for other coun-

134 Kelemen 2001, 625.
135 Slaughter and Helfer 1997, 304; Foltea 2012, 26.
136 See Tumonis 2013, 44f for references; the author only seems to share this view to a certain extent.
137 On the latter see from a sociological perspective Bourdieu 1987, 833; see also the "internal" factors that Wessel 2006, 385f mentions.
138 For a brief overview of the role of precedents in civil, common and international law, see Blackmore 2004, 495ff.
139 See for example Lindquist and Cross 2009 with further references.

tries[140]. For non-constitutional courts, a number of studies on different countries has shown that the ethnic bias of judges has influenced the outcome of court cases.[141] Similarly, there are studies on how the gender, racial or ethnic identity of judges influences the outcome of cases.[142] Also, in a study on how German labour courts handle law suits on dismissals, the authors find that

> "courts are more likely to rule in favor of employees in regions with depressed labor markets even after controlling for a host of individual characteristics of the claimants, defendants and judges involved in a particular case".[143]

So sometimes a sentiment akin to compassion may motivate a judge's decision. In general, one observer has concluded, that "there can be no doubt […] that factors such as age, ethnicity, and gender play a role in how a judge will operate".[144]

At the international level, there seem to be fewer studies by comparison. This may be reflective of the lower overall number of cases decided by international courts as well as the fact that in international court proceedings individual preferences and attitudes relating to factors such as the gender or ethnicity of the individuals involved in a court case are likely to play a smaller role; judges in international cases are mostly not required to decide about an individual's behaviour.[145]

While racist, sexist etc. attitudes of judges are unlikely to matter in international court cases, this limitation does not necessarily apply to political or macro-economic preferences or ideas on what constitutes proper judicial decision-making. Indeed, a few studies have investigated international courts and the influence of individual judges' legal, political or other opinions on outcomes. When several judges are involved in taking a decision, it has been shown that rulings are sometimes the results of negotiations and compromises among judges that go beyond legal-interpretive questions in

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140 On the Portuguese Constitutional Court, see Coroado, Garoupa, and Magalhães 2017.

141 See for an example from Israel Gazal-Ayal and Sulitzeanu-Kenan 2010; and for a study on the US Morrison Piehl and Bushway 2001.

142 See for example Peresie 2005; Harris and Sen 2019.

143 Berger and Neugart 2012, 57.

144 Dickson 2007, 8.

145 The ICC is an important exception of course; moreover, human rights tribunals, while not judging an individual's behaviour, deal with claims brought by individuals.

a narrow sense.[146] Thus, it is not necessarily and only individual preferences that matter for the outcome of a case, but it could also be a collectively agreed version of such preferences.

Related to the ICJ, McWhinney[147] maintains that throughout the different phases of the ICJ's existence, the composition of the ICJ bench of judges, with their origin in certain legal traditions and preconceived ideas on the appropriate role of the ICJ, did influence the outcomes of individual cases. Smith[148] finds only weak links between the decisions of ICJ judges and their nationality and finds these links to become even weaker in recent years, as concepts of nationality have changed. The same author also observes that in different international courts and tribunals states more and more often support the nomination of judges from another state.[149] By contrast, Posner et al. conclude on the basis of a statistical analysis that ICJ judges have sided with their home states "about 90 percent of the time"; in cases where their home states were not involved, judges supported states similar to their home states concerning wealth, culture, and political regime.[150] Generally, the influence of an international judge's nationality on his/her decisions is contested.[151] A hypothesis has also been formulated that whether a judge is experienced or new to a tribunal may matter for the way he decides.[152] In a study on the ICJ, Wessel observes that judges are likely to follow their own preferences in situations where the text of the law is indeterminate and not strongly constraining and where there are no credible external constraints (in the form of potential counter-measures by other actors). In the case of the ICC he expects decisions that tend to expand the scope and reach of international humanitarian provisions, given the demonstrated concern of many judges for humanitarian and human rights issues and the absence of judges with a military background on the bench.[153] In conclusion, personal political ideas and attitudes of judges

146 Alvarez-Jiménez 2009a, 295ff investigating the US Supreme Court, the ICJ and GATT Panels.
147 McWhinney 2006.
148 Smith 2004.
149 Ibid., 229ff.
150 Posner and de Figueiredo 2005, 624.
151 See Terris, Romano, and Swigart 2007, 153f for an overview.
152 Busch and Pelc 2010, 269.
153 Wessel 2006, 383, 434ff; he also points to one case where the political preferences of a certain judge allegedly quite clearly influenced the jurisprudence of the ICC, at 391f, as well as a shift in the degree to which the ICTY embraced a

cannot be dismissed as factors influencing an international court's judgements.

Altogether, there is substantial evidence that individual preferences and attitudes of judges matter in deciding cases, even when they should be legally irrelevant.[154] Yet most of the studies are not uncontroversial given that it is difficult to control for all factors that could influence the outcome of cases other than the attitudes and preferences of individual judges.[155] And, again, the influence of individual preferences is likely to be more limited at the international level compared to the national level.

2.3. Mandate and procedural rules

Finally, a third set of factors having an influence on the outcome of judicial decisions are the mandate of a court and the procedural rules it needs to observe. Wessel refers to "creational constraints" in this regard, i.e. constraints created by the state parties to an international treaty when establishing the respective judicial institution.[156]

The mandate given to a court matters for what it can and cannot decide. For example, Art. 22 of the Rome Statute governing the ICC mandates that the definitions of crime contained in the Statute "shall be strictly construed and shall not be extended by analogy". Moreover, "[i]n case of am-

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more restrictive stance following the appointment of an individual as President of the Tribunal who was critical of the Tribunal's earlier expansionist tendencies, at 395.

154 Who the individual is that decides a case does not only matter in terms of political preferences or stereotypes that judges hold. It may matter in even more mundane terms: A 2011 study took the common mis-portrayal of legal realism as saying that the outcome of court cases is influenced by "what judges ate for breakfast" as starting point for an investigation on how experienced Jewish-Israeli judges on parole boards decided their cases. Based on a statistical analysis of a significant number of cases, the study found that the likelihood of a ruling in favour of the prisoner was greater at the beginning of the work day or after a food break than later in the sequence of cases. While the authors of the study do not claim to be able to fully demonstrate the mental/psychological mechanisms behind this trend, they conclude that their "results do indicate that extraneous variables can influence judicial decisions, which bolsters the growing body of evidence that points to the susceptibility of experienced judges to psychological biases", Danziger, Levav, and Avnaim-Pesso 2011, 4.

155 For a discussion on different studies on the Israeli judicial system see Gazal-Ayal and Sulitzeanu-Kenan 2010, 7ff.

156 Wessel 2006, 384.

biguity, the definition shall be interpreted in favour of the person being investigated, prosecuted or convicted". Given these rather clear instructions, it will arguably be difficult for the ICC to interpret the definitions of crime contained in the Rome Statute in a manner that would bring more types of behaviour within their purview. In addition, the Rome Statute also contains a clear guidance for the judges on the hierarchy of applicable law in Art. 21.[157] Again, it is likely quite difficult for judges to go against this hierarchy. The universe of legally defensive interpretations is limited in these regards.

Another factor mentioned as potentially influencing the outcome of court cases is how judges are appointed. Wessel observes that when many actors are directly or indirectly involved in the selection of judges, courts are more likely to be activist.[158] Actors indirectly involved in a selection process can be NGOs advocating for certain candidates or lawyers' associations. It is argued that when many such actors are involved and judges "owe" their appointment to many actors, the power of the political branch is "diluted" and so is the need for judges to adhere to preferences of the political establishment.[159] Moreover, the ease with which judges can be removed from office may also influence how willing international judges are to honour the actual or assumed preferences of states.[160]

There may be a more indirect link between procedural and institutional features of a certain court and the substance of its decisions. Institutional aspects such as the composition of a court[161] and its procedural rules[162] also influence whether a court is perceived as legitimate actor by relevant constituencies. As argued above, the degree to which a court rests on a firm "legitimacy fundament" may in turn also influence how it acts and what substantive decisions it takes.

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157 These norms are mentioned by ibid., 400f in his analysis of ICC judicial law-making; Wessel himself argues that they do not put any significant constraints on expansionist judicial law-making by the ICC.

158 Ibid., 417f.

159 Ibid.

160 For the ICC, see ibid., 422.

161 Helfer and Slaughter have developed a list of criteria for the effectiveness of supranational/international courts; effectiveness for them is closely related to legitimacy, see Slaughter and Helfer 1997, 299ff; their list of factors includes the composition of the court.

162 Jetzlsperger 2003, 27.

3. Judicial styles in the face of the indeterminacy of the law

Until here, I have discussed the indeterminacy of the law and theoretical reconstructions of how judicial decision-makers decide a case. I have then discussed what factors are likely to influence the substantial outcome of a case, if not the law alone. What is missing, is an account of what reasons judicial decision-makers may be expected to give for their decisions, which are taken sometimes or regularly in the face of the indeterminacy of the law and at least partially or sometimes for non-legal reasons. This is the question I turn to next. I will first discuss more general insights on judicial modes of reasoning and styles (section 3.1), and then present the comparative analysis Lasser[163] has conducted on the judicial styles of different courts (section 3.2).

I use the term "judicial style" to refer to more or less consistent patterns of reasoning, discernible from the decisions of an individual court or even judge. Sub-aspects of judicial style include the methods of interpretation used, the length and tone of judgements, the intensity of dealing with the arguments of the parties and evidence, and the types of arguments used (e.g. references to considerations of justice or policy objectives, use of precedents).[164] While judicial style can also refer to the general writing style or quality of writing in judicial decisions (e.g. whether sentences are long or short, whether humour is used), this is not an aspect of the WTO's judicial style investigated in this work.

3.1. Judicial styles in the face of the indeterminacy of the law – general insights

If the law is, at least sometimes and to a degree, indeterminate and judges therefore need to choose between competing interpretations, the justifica-

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163 Lasser 2004; Lasser 2003.

164 Prott 1970, 75 uses the term "style of judgment" to depict "not only those canons of good style which one considers in literature, such as language, sentence structure, tone and so on, but also such things as the method of argument used and the subject matter which it is thought proper to include". Zarbiyev 2012, 12 uses the terms "organizational identity" or "center of narrative gravity". Van Damme 2010, 606 and passim uses the term "hermeneutics" in what I take to be a similar intention. By contrast, Posner 1995, 1422 seems to use a narrower definition when defining style as the "specific written form in which a writer encodes an idea".

tion of such choices becomes important. Indeed, in some jurisdictions there is a statutory obligation to justify and give reasons for judicial decisions.[165] In other jurisdictions there may not be such a legal requirement, but it is clear that a judicial decision will always come with an at least short explanation on what has motivated it. Explaining a judgment is how courts try to convince the addressees of a decision and the wider audience of its correctness and legitimacy as well as the need to follow it.[166] In particular, judges must explain their decision to the losing party.[167] As described above, if judicial decisions are not perceived as legitimate, political opponents of a court may seek to abolish or weaken it through institutional reforms.[168] Judges have been described as using a "strategy of impression management" for this reason[169]. All of this is true, in particular, for judges of international courts, which lack effective enforcement mechanisms.[170]

However, the fact that judges (must) explain their decisions does not mean that they will necessarily give all or the "real" reasons for a decision.[171] For example, many of us would – I hope – be appalled by a judge writing into his or her judgement that, as the accused is a person of colour, he or she is more likely than a white person to commit further crimes if not punished severely. Today, such a statement would also be legally prohibited as racist discrimination in many countries of the world. This does not, however, mean that such stereotypes never influence a judge's decision. As discussed above[172], a significant number of studies do show how such biases influence the outcome of judicial deliberations. Nevertheless, and leaving aside formal prohibitions of racist behaviour for a moment, such (racist) considerations cannot be written explicitly into a judgement, because they would not be considered proper legal reasoning. They are not a relevant, recognized basis for a legal argument. Judicial decisions are con-

165 Feteris 1999, 6; von Bogdandy and Venzke 2013, 56 even maintain that justifying a judicial decision is always a legal requirement.

166 See Meagher 2020, 143ff for a summary of why judges routinely provide written and reasoned decisions even in cases where they are not legally compelled to do so.

167 Ibid., 161f.

168 See above, section 2.1.

169 Venzke 2016, 241.

170 Busch and Pelc 2019, 465ff; Henckels 2006, 281; Krüger 2013, 55; Lovric 2010, 60; Meagher 2020, 148; Slaughter and Helfer 1997, 318f observe for the ECJ that the court in its early years successfully established its own legitimacy mainly due to the quality of reasoning of its judgments.

171 Charlotin 2017, 281f; Pauwelyn and Elsig 2012, 449.

172 See above section 2.2.

sidered legitimate if they are supported by the right[173] kind of arguments. Providing these arguments is thus an important strategy for judges to with a view to legitimising their decisions and thus avoiding opposition to their judgements and a lack of acceptance.

Engaging in reasoning that is legal in character means that the speaker (or in most legal practice: the writer) is faced with certain constraints. At the most general level, the "legitimacy of judicial pronouncements depends on their rationality and soundness"[174]. There is a perception that "the more fully a point is argued the more likely it will be successful"[175]. A minimum standard that judicial decisions need to satisfy in order to be accepted as sound legal decisions is that they are coherent[176], i.e. free of internal contradictions. Moreover, they should normally not stray too far from the ordinary meaning of language (unless it can be shown that a term has a specific technical-legal content).[177] The degree to which a judicial decision will be considered persuasive and create the kind of legal normativity it is aimed at also depends on the degree to which it is rational, its methods of interpretation can be reproduced, and its findings generalized.[178] Arguments must not be phrased in terms of purely private interests.[179] Judges may not be seen as succumbing to political pressures or interests[180] or deciding a case in line with their own policy preferences[181]. Or, as another author has put it, "judges cannot decide cases in a legally unrecognizable way and continue […] to claim to be doing law"[182]. Or, to re-iterate the same thought in yet another way:

> "the judge must situate the case and the judgment within the boundaries of the law, lest the decision be illegitimate and even unlawful"[183].

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173 Obviously, what is considered a "right" argument varies across societies and is subject to changes over time, see below and sections 3.2 and 3.3 of this chapter.
174 Kleinlein 2012, 254.
175 The quote is by Jacob 2012, 60.
176 Henckels 2006, 281; Slaughter and Helfer 1997, 319 observe that most commentators concur that coherence is a central element of good legal reasoning.
177 Beck 2012, 32.
178 Kleinlein 2012, 254.
179 Neyer 2010, 40f.
180 With reference to the Appellate Body, see Krüger 2013, 55; more generally Slaughter and Helfer 1997, 312f.
181 Greenwald 2003, 115.
182 Zarbiyev 2012, 5.
183 Terris, Romano, and Swigart 2007, 102.

The arguments that a judge can give, the way he or she can speak in a judicial decision, are part of what Bourdieu calls a "field". A field is structured by the "internal logic of juridical functioning, which […] constrains the range of possible actions"[184]. Hence, judicial decisions

> "can be distinguished from naked exercises of power only to the extent that they can be represented as the necessary result of principled interpretation of unanimously accepted texts".[185]

> By implication, judges have been said to "always aim to generate a particular rhetorical effect […]: that of legal necessity of their solutions without regard to ideology"[186]. Bogdandy and Venzke write:

> "Judges apply the law, this is the source of their authority, and whenever the impression gains currency that this is not what they are actually doing, they are usually in trouble."[187] [footnote omitted]

Beck also comments:

> "Judges themselves probably go further than anyone else in claiming, though not necessarily believing in, methodological or quasi-scientific certainty for their own judgments."[188]

Other authors have offered similar observations.[189]

There are different views on what a good or acceptable legal argument and justification is, above and beyond the above minimum standards for acceptable judicial reasoning.[190] When comparing the arguments used by functionally comparable courts in different jurisdictions it is possible to empirically identify a common set of arguments used by most of the courts, albeit with different frequency.[191] In other words, while there are competing theories on what a good and acceptable legal argument is, there

184 Bourdieu 1987, 816.
185 Ibid., 818.
186 Kennedy 1997, 2.
187 Bogdandy and Venzke 2012, 10.
188 Beck 2012, 19.
189 See D'Aspremont and Mbengue 2014, 243; Venzke 2016, 240; Zarbiyev 2012, 29.
190 For an overview of different theories, see Feteris 1999.
191 This is the conclusion from a comparative study on the arguments used by the highest courts in nine different countries, see Summers and Taruffo 1991, 462ff.

seems to be, factually, a basic consensus transcending individual jurisdictions.

The observed constraints on the arguments that judges can use are related to the fact that there is, at least in democracies, but potentially also in other political systems, a role that judges are expected and allowed to fulfil. The term "allowed" in the previous sentence refers to both what the respective legal (constitutional) rules set forth and to what is considered to be socially, politically and/or professionally permissible, with a view to not endangering a court's legitimacy and the acceptance of its judgements. Classically, the role of judges is opposed to that of law-makers.[192] Judges must avoid appearing as making the law; courts are not supposed to be political decision-makers.[193] In international law, a principle has also been identified that "judges cannot legislate".[194] A court that oversteps the boundaries of what is considered the judicial realm is vulnerable to being criticized as activist[195] and not exercising enough judicial self-restraint. International courts crossing the line between interpreting law and making law have been observed to "put at risk the future of the court itself, if not the whole edifice of international law"[196].

This risk of decisions or a court being perceived as illegitimate has implications for the judicial style that judges are likely to use in their decisions. The table below illustrates differences in the reasoning or rhetoric of different, but functionally similar courts and clarifies what are, hence, constitutive elements of the judicial style of various courts. It was originally compiled by Summers and Taruffo as the result of an empirical analysis of the

192 See Kulovesi 2011, 181ff.

193 Or, as formulated concisely by Iancu 2009, 1: "Public law, albeit 'political', must not be politics"; see also Ginsburg 2006, 5.

194 Van Damme 2009, 161 with references to several PCIJ and ICJ judgments; conversely von Bogdandy and Venzke 2013, 56 point out that it is "inevitable that statements about what international law requires also, to varying degrees, contribute to its making". While this is true, there is, of course, still a difference between creating a general legal rule (adopted by law-makers) and interpretive decisions on very specific questions (taken by courts).

195 For a discussion of the term judicial activism, see below section 5.3.2. It should be noted that the discussion on judicial activism and judicial law-making is heavily US dominated, both in terms of who contributes and what is researched. However, for the European context it has been observed that charges of "judicial activism" have recently been more frequently voiced in the academic and wider public realm, see Nickel 2010, 4ff.

196 Terris, Romano, and Swigart 2007, 130.