Studies in International Economics

The World Trade Forum, Volume 4

The Role of the Judge in International Trade Regulation

Experience and Lessons for the WTO

Thomas Cottier and Petros C. Mavroidis, *Editors*

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MICHIGAN

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THE UNIVERSITY OF MICHIGAN PRESS

Ann Arbor

Published in the United States of America by
The University of Michigan Press
Manufactured in the United States of America
♾ Printed on acid-free paper

2006 2005 2004 2003 4 3 2 1

A CIP catalog record for this book is available from the British Library.

Library of Congress Cataloging-in-Publication Data

World Trade Forum (4th : 2000 : Neuchâtel, Switzerland)
The Role of the Judge in International Trade Regulation : Experience and Lessons for the WTO / Thomas Cottier and Petros C. Mavroidis, editors ; Patrick Blatter, associate editor.
p. cm. — (World Trade Forum ; v. 4) (Studies in international economics)
Papers presented at the fourth annual World Trade Forum Conference held in Neuchâtel, Switzerland, on August 21–22, 2000.
ISBN 0-472-11319-4 (cloth : alk. paper)
1. World Trade Organization. Appellate Body—Congresses. 2. Foreign trade regulation—Congresses. 3. Judges. 4. Arbitration, International. I. Cottier, Thomas. II. Mavroidis, Petros C. III. Blatter, Patrick. IV. Title V. World Trade Forum (Series) ; v. 4. VI. Studies in international economics (Ann Arbor, Mich.)

K4603.W67 2003
382'.92—dc21 2003040228

The World Trade Forum

The World Trade Forum was founded in 1997 to offer an opportunity for an international in-depth discussion of issues facing the world trading system. The Forum is organized through the cooperation of the Universities of Berne and Neuchâtel (Switzerland). Since the year 2000, it has been held at the newly-founded World Trade Institute in Berne. Forum participants include academics, practitioners, and professionals from government and from international non-governmental organizations. Representing both the legal and economic communities, the participants bring a wide variety of perspectives to the issues of debate.

Each year, one particular topic is chosen as the focus of that year's forum. The participants invited to the conference are requested to prepare a paper on that topic, and then to present the paper for discussion. Question-and-answer sessions follow each presentation, and a short analysis by an appointed discussant following the presentation of each group of papers allows for a synthesis of the ideas. At the end of all sessions, a roundtable discussion takes place, in which participants may either make comments on the overall problems of the topic or address questions and suggestions to the other participants in light of the entire series of papers presented.

Following the conference, the authors of the papers revise their submissions for publication in the series of books that accompany the World Trade Forum conferences. An introduction and conclusory analysis by the editors further the synthesis of the topic at hand and aid the reader in determining the overall results of the scholarship.

We are most grateful to the Silva Casa Foundation in Berne for its generous financial support that allows the conferences to take place as well as for its encouragement to pursue the idea of the World Trade Forum, and to the Universities of Berne and Neuchâtel.

The World Trade Forum series was founded in order to help spread the ideas that arise from the careful consideration of the issue presented to interested persons throughout the world. We sincerely hope that this volume achieves this goal.

Abbreviations and Acronyms

AB	Appellate Body (WTO)
ACTPN	Advisory Committee for Trade Policy and Negotiations (U.S.)
AD	Antidumping
APEC	Asia-Pacific Economic Cooperation
BISD	Basic Instruments and Selected Documents (GATT/WTO)
BOP	Balance-of-Payment
BSE	Bovine Spongiform Encephalopathy
BTAs	Border Tax Adjustments
CAP	Common Agricultural Policy
CEC	Central European Countries
CIT	Court of International Trade
CJD	Creutzfeld Jakob Disease
CRS	Computer Reservation System
CVD	Countervailing Duty
DCC	Dormant Commerce Clause
DCS	Directly Competitive or Substitutable Products
DDD	Dumb Duck Disease (see Appendix)
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes (WTO)
EAC	European Accreditation of Certification Bodies
EAL	European Accreditation of Laboratories
EC	European Community
ECJ	European Court of Justice
ECR	European Court Reports
ECSC	European Community of Steel and Coal
ECT	European Community Treaty
EEA	European Economic Area
EEC	European Economic Community
EFTA	European Free Trade Association
Ens	European standards
ESBs	European Standards Bodies
ETSI	European Telecommunications Standards Institute
EU	European Union
FAO	Food and Agriculture Organization
FDA	Food and Drug Administration
FTA	Free Trade Agreement
GATS	General Agreement on Trade in Services (WTO)
GATT	General Agreement on Tariffs and Trade (WTO)
GMO	Genetically Modified Organism

GPA	Agreement on Government Procurement (WTO)
IARC	International Agency for Research on Cancer
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Dispute
IMF	International Monetary Fund
IPCC	Intergovernmental Panel on Climate Change
ISO	International Standard Organization
ITC	International Trade Commission (U.S.)
MCM	Monetary Compensatory Amount
MFN	Most-Favored Nation
MNCs	Multinational Corporations
MRA	Mutual Recognition Agreement
MSOs	Market Surveillance Operators
MSSBs	Member State Standards Bodies
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organization
OECD	Organization for Economic Cooperation and Development
OIE	Office International des Epizooties
PPMs	Production and Process Methods
QR(s)	Quantitative Restriction(s)
RBP	Restrictive Business Practice
SCM	Subsidies and Countervailing Measures
SPS	Agreement on Sanitary and Phytosanitary Measures
TED	Turtle Excluder Device
TABD	Transatlantic Business Dialogue
TBT	Technical Barriers to Trade
TEP	Transatlantic Economic Partnership
TRIMs	Agreement on Trade-Related Investment Measures (WTO)
TRIPs	Agreement on Trade-Related Aspects of Intellectual Property Rights (WTO)
TRIS	Technical Regulations and Industry Standards
UNCTAD	United Nations Conference on Trade and Development
UN-ECE	United Nations Economic Commission for Europe
USDA	U.S. Department of Agriculture
VAT	Value Added Tax
VCLT	Vienna Convention on the Law of Treaties
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

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Preface

On August 21 and 22, 2000, over thirty trade professionals met at the World Trade Institute in Berne, Switzerland, for the fourth annual World Trade Forum. The topic established for the 2000 Conference was the evolution of the role of the judge in the World Trade system, mainly focusing on the work of the Appellate Body during its first five years of operation. Inquiries went along three lines, the first trying to determine whether we could find cases submitted to the WTO after 1995 where the judge would have exceeded its authority, the second comparing the WTO with operations of national judicial systems, specifically from the U.S. and the EC, and the third trying to show directions for the future.

To favor the debate, contributors coming from divergent backgrounds (economics, political science, and law) were confronted with a simulation case, designed to serve as a benchmark and reproduced in the Appendix. They engaged in a series of discussions on the role of the judicial branch of the WTO, notably regarding the level of deference to be granted to national authorities of Member States, with references to particular problems such as the obstruction of trade for health or environmental purposes, the place to be granted to the civic society and various captivating issues.

Debating does not mean reaching unanimity, and thus the result of the conference was a mix of overlaps and divergences. What is important is that progress was made, everybody agreeing the WTO is in need of some form of evolution, the present state being unsatisfactory. In that perspective, the cross-fertilization of ideas occurring in such meetings shows our modest—but hopefully important—involvement in that evolutionary process.

This volume constitutes our contribution to an existing dialogue that has been taking place for some time now in various fora. Our aim was to provide added impetus to continue this dialogue. The fourth World Trade Forum convinced its participants that a multi-disciplinary approach in this context is highly recommended.

The World Trade Forum could not have taken place without the active involvement and support of the participants. Once again, we want to thank the participants and especially the Silva Casa Foundation, which very generously has been supporting our conferences and largely contributing to their success. Last but not least, we would like to thank our associate editor Patrick Blatter for all his work, Wulfhard Stahl, the WTI librarian, and the people at the University of Michigan Press for their commitment to our project.

Papers and discussions reflect the state of play by the end of 2000. Later developments—beyond the first five years of the Appellate Body and the new system—are only referred to incrementally. – The Editors

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The Role of the Judge in International Trade Regulation: An Overview

Petros C. Mavroidis and Thomas Cottier

The coming-into-being of the WTO Appellate Body in 1995 itself was not met with enthusiasm in all corners. Expert commentators cast doubt as to the need to have a second look at the same case and there was a feeling that the establishment of the Appellate Body corresponded more to the political need to have a counter-weight against the loss of sovereignty resulting from the passage to negative consensus, implying that the WTO is now the only truly multilateral system where disputes will always be resolved through third party adjudication.

On the other hand, proponents of a two-instances system pointed to the fact that the Appellate Body would be the essential permanent feature in WTO adjudication thereby contributing to more coherence in jurisprudence. It is undeniable that before the Appellate Body came into the picture, the GATT Legal Affairs Division was the only permanent feature in the adjudication process, since the composition of Panels varied over time and over case depending on the preferences of the parties to a dispute. Generally, the most successful, and only a handful of, Panelists were selected four or five times (sometimes more often) in a total of over a hundred and twenty disputes brought before a Panel. With the advent of the Appellate Body, the prospects of continuity and coherence increased.

By August 2000, the Appellate Body had already issued 34 reports (54 by April 2003). The members of the Forum felt that this was a critical mass that now allows commentators to pronounce on the quality of the work done in Geneva. Although contributions focused on both Panel and Appellate Body reports, it is true that the main focus of the discussions evolved around the work of the Appellate Body.

This approach seems warranted for two reasons: first, with very few exceptions, Panel reports were appealed in the first five years; second, the Appellate Body is the last word, the *ultima ratio* in the WTO adjudication process. And since the Appellate Body's review is confined to legal issues only, although its reports bind only their addressees, they inherently carry a message for a wider public.

Having said so, we should quickly point out that there is nothing like binding precedent or *stare decisis* in WTO law. It is, however, an incentive-compatible structure for the Appellate Body to ensure, through its

jurisprudence, that it applies the same law to the same issues independently of the parties to the dispute.

One of the rather surprising features of the WTO Dispute Settlement Understanding (DSU) is that, whereas there exists a specific provision (Art. 11 DSU) obliging Panels to always ensure that they make an objective assessment of the matter before them, there is nothing like a corresponding Article to the same effect obliging the Appellate Body to respect a standard of review.

This omission is of hardly any importance, though, for even if the Art. 11 DSU-equivalent were foreseen in the DSU and imposed on the Appellate Body, the question to ask would be what does objective assessment actually amount to and which body will judge whether the Appellate Body has adhered to this standard?

The Appellate Body has already developed a noteworthy jurisprudence in the context of Art. 11 DSU. Referring to the dispute between the European Community and the United States on *Wheat Gluten,* the Appellate Body for the first time found that a Panel had not respected the Art. 11 DSU standard: in the case at hand, the Panel had erroneously accepted that a declaration by a U.S. attorney before the Panel amounted to a finding by the U.S. government authority which was attacked before the Panel.

Who would judge the Appellate Body, though? There is nothing like a formal multilateral control of its performance. There is, however, an informal control. Evidence of this is provided by the upheaval in Geneva following the Appellate Body's initiative to invite *amicus curiae* briefs in the context of the *Asbestos* litigation. The overwhelming majority of the WTO Membership put into question the well-foundedness of the Appellate Body's initiative arguing that the frontier between the judiciary and the legislative function had, as a result, been blurred. This was perhaps the most polite way to formulate a series of interventions the crux of which was a message that the Appellate Body had trespassed its authority.

This is neither the time nor the place to pronounce on this issue. It is clear, however, that from a strictly legal perspective, it is the Membership which through its appointments will *ex ante* ensure that the quality of Appellate Body reports will be preserved.

Ex post, the civic community discusses the activities of the WTO adjudicating bodies and through its writings gives or denies its vote of confidence.

The participants of the Forum this year were requested to tackle the role of the judge in international trade regulation. To this effect a simulation case (see Appendix) was designed to serve as the benchmark. The reasons why such a benchmark was preferred to the actual panel and Appellate Body's case law could be synopsized as follows: it was felt that by using a simulation case, the case law of Panels and the Appellate Body could in any way serve

as the basis for the various reactions; the question of the standard of review is more relevant in cases where trade is obstructed for non-economic motives (health, environment, etc.). In such cases, where the stakes are really high, it is important to see whether the international trade judge adopts a more deferential attitude or whether the standard of review applied is the same as in any other case brought before the WTO: The simulation case, accordingly, focused on a health-based trade-obstructing measure. Moreover, this is the area where most of the criticism against the WTO comes from: the jurisprudence in the field of trade and health and/or trade and environment.

The problem, of course, is what is the appropriate benchmark according to which we should assess whether the WTO judge (Panelist or member of the Appellate Body) has honored his/her commitment. And this in itself is a crucial issue: Should we pay more attention to the reactions of the addressees? To the reactions of the civic community? To the intellectual integrity of the argument put forward by the judge independently of the reactions?

The Forum tried to respond to all of the above questions. To do that, the first category of papers placed the simulation case before a different level of integration and each time requested responses according to the applicable positive law: the federal level (the United States), the quasi-federal level (the European Union) and the international level (the WTO). Then, the second category of papers asked the question whether the different level of integration in itself argues in favor of a different standard of review to be followed by the judge depending on whether he/she is sitting on the bench of a national or an international court.

In the first category of papers, *in concreto,* Robert Howse and William Davey aimed, through their papers, at responding to the question whether, in all cases submitted to the WTO since January 1, 1995, the WTO judge has exceeded his/her authority. The first paper focused more on the Appellate Body case law, the second on the Panels' record. They both reached the same conclusion, namely that the WTO judge has operated within the limits imposed by Art. 3.2 DSU: judges are agents who have to respect the legislative mandate as defined by the principals, the WTO Members. Howse argued that the debate should rather focus on the conception of the judicial process and its relationship with the interpretation of WTO law. For Davey, the WTO dispute settlement system could make a greater use of what he termed "issue-avoidance" techniques to dispose of certain specific cases, provided that clear standards be used in order to avoid inequalities of treatment among members.

In his comments to the paper, Ernst-Ulrich Petersmann, on the one hand shared the conclusions reached by Davey, but on the other urged the WTO judge to adopt a more human rights-oriented and inspired attitude. In his mind, it is crucial for the legitimacy of the WTO adjudicating bodies as such

to recognize the increasing role that the civic society is playing. Frieder Roessler's oral comments revolved around the institutional equilibrium that was struck by the Uruguay round agreements and put into question by the recent case law of the Appellate Body in the *India - Balance-of-payments* and *Turkey - Textiles* cases. On both occasions, the Appellate Body affirmed the competence of WTO adjudicating bodies to adjudicated disputes that were also pending before WTO Committees. In Roessler's mind, such judicial activism can put into question the function of the whole WTO edifice since the judiciary requests a share larger than forecasted in the Uruguay Round Agreements.

We then moved to papers that examined the simulation case under the prism of a particular body of law. The first set of papers was the U.S. response to the simulation case. Donald Regan advanced the point that, independently of the eventual formulation of a U.S. court's decision, the U.S. judge will invariably ask the question whether the intention of the competent authority was indeed to promote a health goal or conversely, whether the intent was to simply protect the local producer. He took the stand that in whatever context, national or international, the judicial review should concentrate on purpose, and not on balancing. Diane Wood took a more nuanced approach. In her view, the U.S. judge will focus on the effects of a particular measure and work with procedural requirements. She thought that the WTO would be well-inspired to emulate with the best of member-states judicial systems, particularly on procedural issues.

Gary Horlick, in his comments, stated that the questions of deference would be linked to the legitimacy of the WTO itself. He also asked the question how it is possible to detect intentions especially since preparatory work of legislation is often impenetrable or difficult to clarify. Joel Trachtman added to this problematic by arguing that it is frequently the case that multiple objectives are sought through the very same piece of legislation. Contrarily to Professor Regan's opinion, he defended judicial balancing as a possibly efficient solution in the U.S. federal, European Union, or WTO context.

Piet Eeckhout provided the response by the EC judge to the simulation case. His main points focused on the proportionality-test as applied by the EC courts. In his view, albeit with minor exceptions, the EC judge will apply a necessity-test, that is, he/she will ask whether a less restrictive measure exists which can reach the objective sought, and not a *stricto sensu* proportionality-test, that is, he/she will not strike down the least restrictive measure in light of the fact that other objectives will be negatively influenced as a result. In Michel Waelbroeck's view, the authority of the EC judge as accurately described by Eeckhout is the direct consequence of the quasi-federal structure of the European Community. Jacques Bourgeois' oral comment added that the EC judge's powers evolve indeed as the European Community itself

evolves. In his mind, there is an undeniable dynamic aspect in this discussion, in the sense that as the European Community progresses towards more integration so will the EC judge's powers increase.

Two papers examined the response to the simulation case in light of the current WTO law. Joost Pauwelyn first acknowledged the fact that, contrary to the WTO Antidumping Agreement, where a deferential standard of review was explicitly inserted in the Agreement (Art. 17.6), the WTO SPS Agreement knows of no explicit standard of review. Hence, the judge had to create a standard for health cases, and Article 5.5 SPS is where the focus should be, as some of its elements need clarification. Mitsuo Matsushita, a former member of the Appellate Body himself, focused on the fact that the Appellate Body is mindful of the specificities of health cases. This, the absence of an explicit deferential standard notwithstanding, led it to adopt a *in dubio pro mitius* standard, although its *Hormones* decision, for example, was criticized for being too deferential.

Steve Charnovitz offered comments to the effect that the Appellate Body, through its recent case law, has corrected the approach that Panels used to take in the first trade and environment cases. In his mind, regulatory diversity obliges that the right of individual WTO Members to protect environment or health should not as such be put into question as long as the letter of the WTO Agreement is observed. David Palmeter insisted on the fact, already mentioned by Pauwelyn, that WTO negotiators showed considerable deference towards antidumping and not towards health. While not putting into question the fact that health issues deserve a more cautious approach by the judge, he expressed his uneasiness with a series of imprecise responses provided by the Appellate Body in its case law.

Natalie McNelis provided a comparative analysis of all papers presented above. She first examined in her paper whether there is an overlap in the legislative mandate in the U.S.-, the EC-, and the WTO-legal order. She then asked the question whether the judicial review standard adopted in each of the three legal standards is the same or not. And she finally responded to the question how the different standards of review influence the outcome of each legal order. Three commentators reacted to her paper. Merit Janow focused on the comparison between the U.S. and the WTO law. In her view, the different levels of integration *per se* legitimize the variance in the response. A very similar response was provided by George Bermann, who focused on the comparison between the EC and the WTO law. Without assimilating the European Community to a full-fledged federal state, Bermann still made the point that the Community is an ever-integrating process and insisted on the political willingness widespread among EC Member states' governments to continue the process. André Sapir (oral comment) offered a similar perspective. In his view, the level of integration should be reflected in the

attitude of the judge. Other concerns, however, count as well: the expertise of the judge, the role of expert witnesses, etc.

Henrik Horn and Petros C. Mavroidis had a different task: to provide an overview of the panel and Appellate Body case law in the field of the SPS Agreement and then give their assessment as to its well-foundedness. In their view, all breakthroughs in modern economic analysis relating to detecting intentions are heavily influenced if the assumptions on which outcomes are based change. Hence, in the absence of a generic standard to be employed in all health cases, a certain amount of political protectionism is needed for the institution as such to avoid moving into unwarranted adventures. For them, the Appellate Body case law with respect to Art. 5.5 SPS for example, is too daring. Richard Baldwin, orally commenting on the paper, felt more confident about the insights of economic theory in this respect and requested a more daring approach. In his view, modern economic theory can offer solutions even to a thorny issue like trade and health.

Thomas Cottier and Matthias Oesch addressed what they called the paradox of judicial review. They detected standards of deference in national or regional courts in administrative, but not civil, matters relating to external economic relations, while the WTO Panels and the Appellate Body are called upon for fully and *de novo* legal assessment under the rules of the Vienna Convention on the Law of Treaties. This can be explained by structural differences between national, regional, and international law, and the absence of a constitutional doctrine on the international level. Separation of powers, allocating appropriate functions of the judiciary, need to be discussed in a comprehensive manner, including the international and global level. This will entail a process of constitutionalization of WTO law and jurisprudence, allowing to determine in a more nuanced manner the proper role and province of the judicial branch. The authors argued that the current WTO architecture suffers from the fact that it scarcely resembles a constitution. In their view, a constitutional approach is warranted. This would imply not only changes in substantive law, in terms of a new enlarged WTO mandate, but also in the procedural aspects as to who participates in the meetings, etc.

Robert Howse and Kalypso Nicolaidis discussed the optimal standard of review for trade and health cases. Their papers were a look into the future, unconstrained by the existing legislative mandate given to the judge. They asked the question of the political legitimacy of the WTO. In their view, the WTO is a mere intergovernmental contract aiming to promote trade liberalization. Hence, the treaty should not be light-heartedly putting into question democratic choices reached at the domestic level.

Marco Bronckers, in his oral comments, insisted on the fact that a more enlarged WTO mandate requires a more serious discussion on the criteria under which new items should be brought under the WTO auspices. He cast doubt, however, as to the validity of the proposition that an enlarged mandate