

vis-à-vis the “legislative” branch.⁴⁰ For example, decisions of panels and the Appellate Body are adopted automatically by the DSB, yet the WTO legislative body (the General Council) can only remedy DSB rulings by making decisions pursuant to the procedures for making interpretations or amendments under Articles IX or X of the *Marrakesh Agreement Establishing the World Trade Organization*.

In the view of some critics, this imbalance represents a fundamental “constitutional defect”,⁴¹ prompting suggestions that the “automaticity” in adoption of panel and Appellate Body reports be undone, so that legal findings and conclusions of a panel or the Appellate Body could be rejected by a vote of one-third of WTO Members.⁴²

Some critics maintain that the Appellate Body has “overreached” its constitutional authority under the DSU in several cases, arguing that its decisions have filled gaps in the legal framework left by the political bodies of the WTO. The result, pursuant to this argument, is that the Appellate Body is “legislating” and thereby modifying the rights and obligations of Members as negotiated under the WTO Agreement.

Are these commentators correct? Has the Appellate Body exceeded its authority and created difficulties for the internal legitimacy of the WTO dispute settlement system? Has it contributed to, or detracted from, the external legitimacy of the WTO dispute settlement system?

To get at these questions we turn to Franck’s indicators of legitimacy, taking as our starting point the stated purpose of the WTO dispute settlement system:

⁴⁰ See Frieder Roessler, “Are the Judicial Organs of the World Trade Organization Overburdened?”, in Porter, Sauve, Subramanian, & Zampetti (eds.), *Efficiency, Equity, Legitimacy: The Multilateral Trading System at the Millennium*, Brookings, 2001, 308-328; Frieder Roessler, “The Institutional Balance Between the Judicial and the Political Organs of the WTO”, in M. Bronckers and R. Quick (eds.), *New Directions in International Economic Law: Essays in Honour of John H. Jackson*, Kluwer, 2000, 325-345.

⁴¹ Claude E. Barfield, note 4, at page 7.

⁴² *Ibid.*, at 127.