

Is the WTO constitutionally flawed? Have the judicial bodies exceeded their authority under the WTO Agreement and “legislated”, thereby creating new rights and obligations for Members and, by the same token, threatening its legitimacy? I will argue that panels and the Appellate Body have not been “legislating” contrary to the intent of negotiators, but rather have been “clarifying” the existing provisions of the WTO Agreement in accordance with the customary rules of interpretation of public international law as they are required to do.⁶ In other words, they have simply been doing their jobs as any international or domestic judicial body would do.

WTO dispute settlement has two tracks, diplomatic and judicial. The diplomatic track includes consultation, mediation, conciliation and arbitration mechanisms, including the good offices of the Director-General. A significant percentage of WTO cases settle early in this diplomatic phase.⁷ When a case is referred to a panel, it moves into the judicial track.⁸

The current panel and Appellate Body process in the WTO is thus a hybrid between the “diplomatic” and the “judicial” models. Rather than injecting more “flexibility and Member

favoured a judicialized system with short timeframes, compulsory jurisdiction, binding rulings and “automatic” recourse to retaliation for non-compliance. In the Doha Round, the tables have turned, with the European Communities proposing further professionalization of the system by creating a permanent standing panel body while the United States advocates more “flexibility and Member control”.

⁶ Under Article 3.2 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (the “DSU”) and Article 17.6 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (the “Antidumping Agreement”).

⁷ Marc L. Busch and Eric Reinhardt, “The Evolution of GATT/WTO Dispute Settlement”, Chapter 5 in this volume, pg 143.

⁸ Interestingly, Busch and Reinhardt maintain that, after a panel has been established and a case has moved into the formal judicial process, the chances for settlement are greatly diminished. This is not surprising. In fact, it demonstrates that the parties realize that, at that point, they have entrusted the dispute to an independent, impartial tribunal to be determined on the basis of the law. *Ibid.*