

# Articles

## MEASURING THE EFFECTIVENESS OF THE WTO DISPUTE SETTLEMENT SYSTEM

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### ABSTRACT

*Is WTO dispute settlement a success story? Most scholars hold a positive opinion. However, the author has tried to move beyond the general Western consensus and focus on some areas where the effectiveness of WTO dispute settlement can be questioned—the areas of remedies and sanctions, the question of access to dispute settlement and the treatment of complex factual, economic and scientific evidence.*

*The author proposes to look at how the effectiveness of dispute settlement might be measured in the light of the objectives of WTO dispute settlement. The WTO dispute settlement system provides not only punishing, but also bringing the measure into conformity. Since the WTO dispute settlement fits more closely to the civil remedy model, sanctioning would arise only if there was a failure to cease the wrongful conduct or failure to pay the required compensation. But “compensation” under the WTO is designed only to provide an incentive for a Member to remove any offending measure and bring its laws into compliance.*

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*Making an assessment, the WTO dispute settlement has limited effectiveness in respect of remedies because it does not provide any remedy for the complaining Member other than removal of the offending measure and the forms of sanctioning that are provided, compensation and retaliation, are largely ineffective.*

*There is reluctance for some members to engage in WTO dispute settlement because the process takes too long or lacks an effective remedy at the end of the process, cost, cultural differences, the strength of these factors depends on what the available alternatives are and the political implications of bringing another WTO Member to dispute settlement.*

*Therefore, in order to understand the reasons why WTO Members are not using the system, we need information on what issues they face. Sometimes it is a problem of the WTO rules themselves, this is not appropriate for dispute settlement.*

*Finally the author assesses as well the capacity of panels to assess both factual and expert evidence.*

**KEYWORDS:** *WTO dispute settlement, WTO, DSU, effectiveness, sanction, remedy, compensation, panel*

## I. INTRODUCTION

The general perception of the WTO dispute settlement process is that it works well. At least that is a widely held view in the countries of North America – Canada, the United States and Mexico. And that position is, I think, generally accepted in European and in most if not all developed countries. The assessment of WTO dispute settlement by Western scholars has been positive.<sup>1</sup> There has been some reaction by scholars in the United States against what they view as judicial activism by the WTO Appellate Body,<sup>2</sup> and while this resonates in some political quarters in Washington,

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<sup>1</sup> The literature on WTO dispute settlement is vast; for a review of the first 10 years of WTO dispute settlement *see, e.g.*, William J. Davey, *The WTO Dispute Settlement System: The First Ten Years*, 8 J. INT'L ECON. L. 17, 50 (2005) (concluding that "since its inception in 1995, the system has worked reasonably well in providing an effective mechanism through which WTO Members are able to resolve disputes").

<sup>2</sup> John Greenwald, *WTO Dispute Settlement: An Exercise in Trade Law Legislation?*, 6 J. INT'L ECON. L. 113 (2003). For a broader perspective, see also Richard H. Steinberg, *Judicial Lawmaking at the WTO: Discursive, Constitutional and Political Constraints*, 98 AM. J. INT'L L. 247, 247 (2004).