*Council Resolution 1343 (2001), Paragraph 19, Concerning Liberia*, S/2001/1015, New York, 26 October 2001, par. 6, 7, 11, 12, and 85.

19 United Nations Security Council, *Report of the Panel of Experts Appointed Pursuant to Security Council Resolution 1306 (2000), Paragraph 19, in Relation to Sierra Leone*, S/2000/1195, New York, 20 December 2000, par. 41 and 239.

20 United Nations Security Council, *Report of the Panel of Experts Appointed Pursuant to Security Council Resolution 1343 (2001), Paragraph 19, Concerning Liberia*, S/2001/1015, New York, par. 85.

21 United Nations Department of Public Information, *Conflict Diamonds: Sanctions and War*. Online. 21 March 2001. Security Council Affairs Division, Department of Political Affairs. Available: http://www.un.org/peace/africa/Diamond.html [29 June 2001].

22 United Nations Security Council, *Final Report of the Monitoring Mechanism on Angola Sanctions*, S/2000/1225, New York, 21 December 2000, par. 195.

23 United Nations Security Council, *Letter Dated 24 September 1996 from the Chairman of the Security Council Committee Established Pursuant to Resolution 724 (1991) Concerning Yugoslavia Addressed to the President of the Security Council, Report of the Copenhagen Roundtable on United Nations Sanctions in the Case of the Former Yugoslavia, Held at Copenhagen on 24 and 25 June 1996*, S/1996/776, New York, 24 September 1996, par. 17.

24 For a description and analysis of these measures, see A. W. de Vries, "E.U. Sanctions Against Yugoslavia, 1998–2000," in D. Cortright and G. A. Lopez (eds) *Smart Sanctions: Targeting Economic Statecraft* (Lanham, MD: Rowman & Littlefield, 2002), pp. 87–108.

25 *Report of the Panel of Experts Pursuant to Security Council Resolution 1343 (2001), Paragraph 19, Concerning Liberia*, S/2001/1015, New York, 26 October 2001, par. 25.

26 United Nations Security Council, *Report of the Panel of Experts Appointed Pursuant to Security Council Resolution 1306 (2000), Paragraph 19, in Relation to Sierra Leone*, S/2000/1195, New York, 20 December 2000, par. 36.

27 It is this lack of both institutional clout and commitment that has prompted some to call for more direct UN Security Council "power" in sanctions imposition and implementation, one form of which is the sanctions coordinator discussed in Chapter 5 in this volume.

28 United Nations Security Council, *Security Council Resolution 1295 (2000)*, S/RES/1295, New York, 18 April 2000.

29 United Nations Security Council, *Supplementary Report of the Monitoring Mechanism on Sanctions Against UNITA*, S/2001/966, New York, 12 October 2001, par. 108 and 253–256.

30 For a detailed account of these complexities see D. M. Malone, *Decision-Making in the UN Security Council: The Case of Haiti* (Oxford: Oxford University Press, 1998); D. Cortright and G. A. Lopez, *The Sanctions Decade: Assessing UN Strategies in the 1990s* (Boulder, CO: Lynne Rienner, 2000); and S. von Einsiedel and D. M. Malone, "Haiti," in D. M. Malone (ed.) *The UN Security Council: From the Cold War to the 21st Century* (Boulder, CO: Lynne Rienner, 2004), pp. 467–482.

31 See Cortright and Lopez, *The Sanctions Decade*, pp. 107–121.

32 D. Cortright and G. A. Lopez, "Reforming Sanctions," pp. 167–181; and S. Forman and A. Grene, "Collaborating With Regional Organizations," pp. 295–309, in David M. Malone (ed.) *The UN Security Council: From the Cold War to the 21st Century* (Boulder, CO: Lynne Rienner, 2004); S. Chesterman and B. Pouligny, "Are Sanctions Meant to Work? The Politics of Creating and Implementing Sanctions Through the United Nations," *Global Governance*, Vol. 9, No. 4 (October–December, 2003), pp. 503–518.



# 11

# THE WORLD TRADE ORGANIZATION

## Sanctions for non-compliance

*Steve Charnovitz*

The idea that a specialized international organization should have a compliance mechanism that would include the possibility of an economic sanction against a country judged to be in violation of international rules originated in the International Labour Organization (ILO) of 1919.[1] The ILO chose not to employ such sanctions however. Eight decades later, the notion of a judicial-like compliance system capped by the possibility of a multilaterally agreed trade sanction has flowered in only one international organization, the World Trade Organization (WTO). In some quarters, the WTO dispute system is perceived as a paragon of enforceability. Envy of the WTO armamentarium has led champions of various causes to try getting the WTO to deploy its compliance system in support of non-trade values.

The most noteworthy feature of the WTO judicial system is that the member governments have agreed to compulsory jurisdiction. The WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (known as the "DSU") provides that any member government can lodge a complaint against any other member government and secure an independent panel to consider the complaint and render a judgment. After a possible appeal to the WTO Appellate Body, a final decision is entered, and is automatically adopted by the WTO Dispute Settlement Body (DSB) which includes delegates from all member governments. The government found to be in default is then given a "reasonable period of time" to come into compliance, after which the complaining government(s) may seek authority to "suspend concessions or other obligations."[2] For shorthand, I have called that authority a "SCOO."[3] A SCOO enables the suspension of any concession or any obligation on a prospective (rather than retroactive) basis.

A scholarly debate is ongoing as to whether the SCOO is more properly viewed as an offensive act of sanctioning, or as a defensive act of rebalancing trade concessions. In fact, both features are present. The SCOO in the WTO reflects the traditional remedy of "Termination or suspension of the operation of a treaty as a

consequence of its breach," as provided in the Vienna Convention on the Law of Treaties.[4] In other words, the victim country counteracts the breach by suspending some of its obligations to the breaching countries. But viewing the SCOO merely as defensive misses the important evolution of WTO practice that recognizes the SCOO as a purposive act designed to change behavior in the defendant country.[5] Because the SCOO is authorized to induce compliance, the SCOO is being used as instrumentally as any trade sanction could be. The fact that the obligation to comply persists notwithstanding the SCOO reinforces this conclusion. Having appreciated this new reality, the WTO Secretariat now routinely designates SCOO actions as "sanctions."[6] Indeed, in a recent report, the Secretariat suggests that the lack of retroactivity in WTO remedies affords the possibility that governments "could go *unpunished* for acting inconsistently with their obligations, at least for the duration of the dispute."[7]

This chapter considers three questions about WTO trade sanctions: first, are WTO sanctions effective? Second, are they well targeted against the individuals who are causing WTO rules to be violated? Third, is the use of sanctions by the WTO transferable to other international organizations?

## Effectiveness of WTO trade sanctions

So far, only three SCOOs have been imposed – two by the United States against the European Communities (the *Bananas* and *Meat Hormones* cases), and one by Canada against the Community[8] (*Meat Hormones*). In all three instances, the sender government imposed a 100 percent *ad valorem* tariff on certain imports from the Community. None of the three episodes induced near-term compliance. The sanctions in the *Meat Hormones* dispute are still being imposed. The *Bananas* sanctions were removed as part of a settlement in which the Community will comply by 2006.

The inutility of WTO sanctions – in the only two disputes where they were used – seems to belie the mythology of a powerful WTO enforcement system with "teeth." Evaluating the effectiveness of a sanction mechanism is a complex endeavor, however, because of the counterfactual. Perhaps the prospect of a sanction is so effective a deterrent that the sanction itself rarely needs to be employed.

Here is the WTO record:[9] as of 1 August 2003, 69 disputes have been fully adjudicated in the WTO.[10] Of those, a violation was found in 59 cases (86 percent). In some instances, these violations were corrected. In others, the disputing parties settled, perhaps with less than full compliance. In many others, the complaining government continues to wait for compliance. In 11 of the 59 findings of violation (19 percent), the complaining government filed a follow-up (DSU Article 21.5) complaint that the defendant government did not comply during the prescribed period.[11] Of those 11 complaints, non-compliance was found in 9 (82 percent). Out of those 9 cases, the complaining parties have sought authority to SCOO in 4 (44 percent), but may do so in others in the future.[12] Seven authorizations to SCOO have been granted to governments in 5 separate disputes, and this authority





has been used three times.[13] Of the 7 instances in which authority to SCOO has been granted, none have ended with a determination of full compliance. Looking at the data another way, of the 59 cases where violations were originally found, the SCOO has been used in only 2 (twice in Meat *Hormones* and once in *Bananas*).

Based on these data, diverging conclusions are possible about the effectiveness of WTO dispute settlement, and about the utility of the SCOO. One conclusion might be that the SCOO plays only a marginal role, and its threatened use does not seem to induce compliance. A quite different conclusion is that the SCOO might work better if it were used more often. Another is that the overall compliance picture would be a lot worse without the SCOO. Eventually, analysts will perform sophisticated tests on these data and draw quantitative conclusions. The problem facing such studies is obtaining measurements of the degree of compliance in each dispute.

The most interesting result may be that the SCOO was not used in 57 percent of the cases in which it was authorized, and no sanction has been imposed since 1999. Governments are manifesting a queasiness about using trade sanctions, perhaps because they are harmful to the sending nation, or perhaps because their use seems to contradict the purpose of the WTO. Advocates of using trade sanctions to settle intergovernmental disputes are probably disappointed with this trend.

## Targetability of WTO trade sanctions

Targeting trade sanctions is not easy. Ideally they would be targeted against the perpetrators of policies that contradict the basic tenets of the international community. In the WTO context, this ideal raises a threshold question. Do WTO rules reflect such basic tenets? In general, WTO disputes are not about accepting the WTO rule; they are about the interpretation of an often ambiguous rule. After a claim has been adjudicated, a losing government does have an obligation to comply, but compliance will often take time as governments work through parliamentary processes to refit underlying policy into the four corners of WTO rules. Is a delay in coming into compliance with the rules of antidumping[14] really comparable to the violations of international law that draw sanctions by the UN Security Council? If not, then the idea of targeted WTO sanctions may not make much sense.

Suppose the WTO champion disagrees, and says that violating the antidumping rules may not be as bad as attacking a trading partner, but is still sufficiently serious that it warrants trade sanctions. This view would imply a targeting strategy that goes after the elites in the scofflaw country refusing to change its antidumping law. So elected officials, trade bureaucrats, and parliamentarians would be the most appropriate targets. The sending country could also target the private actors who sought the import protection in the first place, and who now may be lobbying to resist compliance with WTO rules.

Yet it is one thing to target dictators, warlords, rebels, etc., and quite another to target individuals in a democratic polity who are playing their roles of

representative, administrator, judge, or just plain rent-seeker. Would it be proper for the WTO to approve a proposed SCOO that targets the major employer in the constituency of the chair of the responsible parliamentary committee? That is a hard question, and one just beginning to be asked.

Under WTO rules, the Dispute Settlement Body cannot second-guess the hit list of products imported from the scofflaw country that the complaining government proposes to sanction. Thus, the sending government *can* aim to target the chair's district. So far, such tailored trade sanctions have not been employed, but they have been discussed.

In the three actual SCOOs, Canada and the United States used discriminatory, prohibitive tariffs, yet as noted above, a SCOO can assume other forms also. For example, in a dispute regarding the WTO's intellectual property rules, a complaining government could ask the WTO to authorize the abrogation of specific copyrights or trademarks. The guiding principle for the WTO seems to be "eye for eye, tooth for tooth."

Given the integration of modern economies, any SCOO is likely to cause collateral economic damage, and hurt innocent victims, such as workers, suppliers, and consumers. That is, unless one takes the view that every denizen in the European Communities is complicit when the European Commission does not comply with the WTO's *Hormones* decision. When innocent bystanders are receiving the same penalty as the intended victims, the sanctions employed can hardly be labeled "smart."

Another problem with WTO sanctions is that smaller countries would have a hard time using sanctions against bigger countries. Such asymmetries of economic power are common of course, but they cut deeper in the WTO than in, say, the Security Council. If the Security Council agrees to a trade sanction, then all UN member countries ought to take part, and together they have economic power. But in the WTO, the only country that can impose the sanction is one lodging the dispute (and any co-complainants).

## Transferability to other international organizations

The WTO is popularly credited with having dispute settlement with "teeth," and as a result, sanction-envy is commonly heard in international policy discourse. Commentators often suggest that the WTO dispute settlement system would be a good model for other treaties and international organizations. Leaving aside the doubts we have already considered as to whether WTO sanctions even work, could they be grafted on to other organizations?

Almost all of the features in the DSU that are valuable could be replicated in other treaties. The compulsory jurisdiction, the rapid timetable for decisions, the possibility of appeal, and the compliance review process are all features that ought to be copied.[15] The trade sanctions, too, are capable of being copied, and would probably be more morally justifiable in other regimes, especially those with weightier community value than exist in the trading system. Afterall, the only





current use of trade sanctions in the WTO is the *Hormones* case where the complaint is that exporters in Canada and the United States cannot ship meat produced with hormones to Europe. Even the most stolid supporters of treaty enforceability may be uneasy with the *Hormones* case as the archetype for when sanctions should be used.

Copying WTO-style enforcement into other organizations runs into a legal problem however. Implementing a trade sanction outside the WTO can violate WTO rules. The trade discrimination inherent in a WTO-approved sanction would violate WTO rules if done unilaterally,[16] yet avoids the violation because the DSU provides for multilateral enforcement of WTO obligations.[17] No similar dispensation exists for a noncompliance procedure in other specialized international organizations or treaties. The only trade sanction external to the WTO that is specifically permitted by WTO rules is an interruption of economic relations authorized by the UN Security Council.[18]

Whether some of the public policy exceptions in WTO rules could be used to justify trade sanctions imposed by other treaties or organizations has been a topic of international law research for several years.[19] No consensus is in sight. Any effort to follow the WTO's practice in another organization would surely meet the objection that such mimesis is illegal under WTO rules.

## Notes

1 Treaty of Versailles, 28 June 1919, art. 414, available at http://www.lib.byu.edu/~rdh/wwi/versailles.html

2 See WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), esp. arts. 21.3, 22.6.

3 "The WTO's Problematic 'Last Resort' Against Noncompliance," *Aussenwirtschaft. Swiss Review of International Economic Relations*, December 2002, pp. 409, 412, available at http://www.geocities.com/charnovitz

4 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, art. 60.

5 "Rethinking WTO Trade Sanctions," *American Journal of International Law*, Vol. 95, 2001, pp. 792, 803–805, available at http://www.asil.org/ajil/v95792.pdf

6 For example, see WTO, *WTO Policy Issues for Parliamentarians,* May 2001, p. 7, stating that:

> The long-term outcome of the dispute settlement process must be complete restoration of full compliance with WTO rules. However, if a country fails to implement a WTO ruling there are two temporary measures which can be taken. Either the offending member can offer "compensation" for the harm done to the trade interests of another member or the DSB can authorize a level of retaliatory sanctions.

7 WTO, World Trade Report 2003, p. 177, available at http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report_2003_e.pdf. See also DSU arts. 22–23.

8 The EU within the WTO is officially known as the European Communities; it is shortened here to the Community to conform to current usage.

9 Tabulations by the author.

10 This number does not include DSU Article 21.5 compliance panel reports and one case that was refiled after a procedural rejection. Parallel cases processed concurrently are counted as one.
11 This number does not include settled cases, unadopted Article 21.5 decisions, or complaints that were refiled after a procedural rejection.
12 Cases where the determination of the SCOO level has been halted for negotiations are not counted.
13 The 7 authorizations include 4 cases that had DSU Article 21.5 compliance decisions (Ecuador v. EC *Bananas*, Brazil *Aircraft*, US *Foreign Sales Corporations*, and Canada *Aircraft*), plus three cases that did not (US v. EC *Bananas*, US v. EC *Hormones*, and Canada v. EC *Hormones*).
14 The rules of antidumping prescribe when a government can impose tariffs on imported products that are priced low for export according to the WTO's parameters.
15 See J. Lacarte-Muró and P. Gappah, "Developing Countries and the WTO Legal and Dispute Settlement System: A View from the Bench," *Journal of International Economic Law*, Vol. 3, 2000, pp. 395, 401 (suggesting that the dispute settlement mechanism of the WTO is a significant achievement in the global impetus towards peace and prosperity).
16 Trade sanctions require discrimination, and discrimination against particular countries is prohibited by Article I of the General Agreement on Tariffs and Trade (GATT), Article II of the General Agreement on Trade in Services (GATS), and Article 4 of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). Whether any of these rules can be trumped by various exceptions in WTO law continues to be a topic of debate.
17 WTO, World Trade Report 2003, p. 173. See also DSU arts. 22–23.
18 GATT art. XXI(c), GATS art. XIV *bis* 1(c), TRIPS art. 73(c).
19 See, e.g., S. H. Cleveland, "Human Rights Sanctions and the World Trade Organisation," in F. Francioni (ed.) *Environment, Human Rights, and International Trade* (Oxford: Hart, 2001), pp. 199–261.



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# NEW TARGETING

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FRANK CASS
London and New York

First published 2005
by Frank Cass
2 Park Square, Milton Park, Abingdon, Oxon, OX14 4RN

Simultaneously published in the USA and Canada
by Frank Cass
270 Madison Ave, New York, NY 10016

*Frank Cass is an imprint of the Taylor & Francis Group*



Typeset in Times by Keystroke, Jacaranda Lodge, Wolverhampton
Printed and bound in Great Britain by
St Edmundsbury Press, Bury St Edmunds, Suffolk



*British Library Cataloguing in Publication Data*
A catalogue record for this book is available from the British Library

*Library of Congress Cataloging in Publication Data*
International sanctions : between words and wars in the global system / [edited by] Peter Wallensteen and Carina Staibano.–1st ed.
p. cm. – (The Cass series on peacekeeping ; 21)
Includes bibliographical references and index.
I. Sanctions (International law). I. Wallensteen, Peter 1945–. II. Staibano, Carina. III. Title. IV. Series.

KZ6373.I58 2005
341.5'82–dc22
2004018303

ISBN 0–415–35596–6 (hbk)
ISBN 0–415–35597–4 (pbk)



# CONTENTS