THE WTO SANCTIONS REGIME AND INTERNATIONAL CONSTITUTIONAL POLITICAL ECONOMY

A COMMENT ON *THE CASE AGAINST REFORMING THE WTO SANCTIONS REGIME*

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Jide Nzelibe's article in this Symposium is a powerful argument against any reform of the current rules on noncompliance with Dispute Settlement Body (DSB) decisions. The author persuasively argues that so-called third-party sanctions and a system of monetary damages will not be more efficient than the current legal system under Article 22 of the Dispute Settlement Understanding (DSU).

In order to make some comments on the analysis presented, Part I takes a short look at the actual record of WTO cases in which the DSB authorized a suspension of concessions. Part II clarifies the legal rationale of Article 22 of the DSU; Part III compares it with Nzelibe's theoretical approach and main arguments. This analysis will make it clear that Nzelibe's public choice approach concerning export group pressure in a WTO member is preferable to alternative sanction systems as it comprehensively fits into the rationale of Article 22 DSU in the way that provision has been set up by WTO members and as it currently operates. However, the problem is that the existing rationale of Article 22 DSU is largely inconsistent with the structure of primary obligations of WTO law. To make this point more concrete, WTO law is not simply a legal system based on an export-oriented exchange of concessions. Thus, a simple export pressure group-oriented public-choice analysis may not comprehensively explain the problems of Article 22 DSU. Instead, Part IV argues for application of a broader constitutional political economy approach.

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I. EMPIRICAL ASPECTS OF ART. 22 DSU CASES

As of January 2007, 356 complaints have been submitted to the WTO. Of these, 100 Appellate Body and Panel Reports have been adopted by the DSB. In fifteen of these cases the DSB authorized a suspension of concessions.[1] However, only a handful of authorizations to suspend concessions have actually been utilized; in the majority of cases the authorization has been granted but no actual suspension of concessions has occurred.[2]

By comparison, states comply with around eighty percent of the cases brought to the International Court of Justice (ICJ) by mutual consent, but only around fifty percent of the decisions have a positive compliance record in situations where the defending state opposed the proceeding.[3]

Moreover, it is important not only to take into account the actual number of cases of suspension of concessions, but also to briefly examine the substance of the respective cases in which an actual suspension of concessions occurred. The most important of these cases are EC Bananas (by the United States), EC Hormones (by the United States and Canada), and FSC (by the EC). All of these cases concerned very broad policy issues deeply rooted in the national legal, economic, political, and social sphere of the noncompliant WTO members. Part IV of this comment considers this aspect.

II. THE LEGAL RATIONALE OF ARTICLE 22 OF THE DSU

Article 22 of the DSU provides for the authorization of a suspension of concessions exclusively for the future. This means that the only concessions that may be suspended are those which are equivalent to the benefits to be expected by the suspending WTO member in the future because of noncompliance by another member. This concept is significantly different from general public international law on state responsibility that takes into account past as well as expected future injury.[4]

Moreover, as Article 22 DSU focuses exclusively on the suspension of concessions, it is important to ask what the actual rationale of such a suspension of concessions is. The notion of "concessions" is deeply rooted in the history of the world trading system, dating back to the nineteenth century. It essentially refers to a nonliberal, protectionist trading

1. For details, see Appellate Body, *Update of WTO Dispute Settlement Cases—New Developments Since Last Update (from 10 October 2006 Until 5 January 2007)*, WT/DS/OV/29 (Jan. 9, 2007).

2. William J. Davey, *Implementation in WTO Dispute Settlement: An Introduction to the Problems and Possible Solutions* 11–12 (Research Inst. of Econ., Trade, and Indus., Paper No. 05-E-013, 2005), *available at* http://www.reiti.go.jp/jp/publications/dp/05e013.pdf.

3. For details, see PATRICIA SCHNEIDER, INTERNATIONALE GERICHTSBARKEIT ALS INSTRUMENT FRIEDLICHER STREITBEILEGUNG 156 (2003).

4. Carlos M. Vazquez & John H. Jackson, *Some Reflections on Compliance with WTO Dispute Settlement Decisions,* 33 LAW & POL'Y INT'L BUS. 555, 559–60 (2002).

system based on the classical idea of mercantilism. Jan Tumlir made this point forcefully some twenty years ago: "The very notion of 'concessions' distorts understanding by assigning positive value to protection. In this way, a mercantilist residue was preserved in the foundations of the post–World War II trade regime."[5]

Based on the mercantilist rationale, the General Agreement on Tariffs and Trade was designed as a mechanism to exchange concessions, such as granting market access on a reciprocal basis. Long before public choice theory became prominent, trade diplomats had realized that domestic public support for opening up the market for foreign competitors would only be given by ensuring increased access to foreign markets for domestic exporters in exchange. Thus, the entire rationale of an exchange of concessions has always been concerned with exporters' interests. In this regard, Article 22 DSU is only the reverse side of an exclusively exporter-oriented perspective. Put simply, if the party to whom a nation grants concessions in exchange for increased market access for that nation's exporters fails to fulfill its legal obligation to reciprocate, the nation has no reason to unilaterally keep its markets open for the respective foreign exporters.

III. ART. 22 DSU IS THE MOST CONVINCING STRUCTURE OF THE WTO SANCTIONS REGIME IF ONE FOCUSES ON EXPORT GROUP PRESSURE

As Article 22 of the DSU thus exclusively follows an exporter's market access perspective, it follows that an analysis of the WTO sanctions regime from a public choice perspective of export group pressure must be convincing. Indeed, it may be argued that it is impossible *per se* to justify any other WTO sanctions regime if one exclusively follows an export group pressure approach. An alternative sanctions regime is impossible to justify, however, not because public choice theory is the most convincing theoretical approach in this regard, but because—as demonstrated—Article 22 DSU is designed to exclusively focus on exporters' interests.

Thus, a common problem of methodology and logic occurs if one applies public choice theory in order to justify an existing legal regime. Namely, if a specific legal regime has been designed in accordance with specific presumptions of public choice theory, this system can easily be justified by applying public choice theory. In this regard, however, the danger of a *petitio principii* or *circulus vitiosus* is given.

5. Jan Tumlir, *International Trade Regimes and Private Property Rights*, CONTEMP. ECON. POL'Y, Apr. 1987, at 1, 4.

IV. WTO SANCTIONS AND CONSTITUTIONAL POLITICAL ECONOMY

As indicated, in order to discuss any reform of the WTO sanctions regime, it is helpful to empirically analyze those cases in which noncompliance actually led to a suspension of concessions. In this regard, the few cases in which a suspension of concessions had been actually applied so far are all characterized by a multitude of domestic and international interests involved. Those are, to name just the most important, health concerns and a special social attitude towards "unnatural" methods of food production in EC-Hormones, a deeply rooted special relationship with the African, Caribbean, and Pacific countries in EC-Bananas, and a thirty-year-old political dispute representing almost all trade tensions that exist in U.S.-E.U. relations in US-FSC.

It is hardly possible to break down these cases to specific export group pressure as the main reason for noncompliance with WTO law. On the contrary, the existing cases of a suspension of concessions are evidence of the fact that WTO law is no longer mainly concerned with exporters' interests. Rather, as it is widely recognized, WTO law affects a wide range of domestic legal, cultural, social, and political interests. Moreover, one may argue that at least the core obligations of WTO law are no longer based on reciprocity, but instead constitute obligations *erga omnes*.[6] It is thus not possible to construe and explain WTO law exclusively from a public choice perspective of export group pressure.

Even from an exclusive public choice perspective, however, it is important to realize that in order to construe a convincing noncompliance regime of WTO law, one should start off with the basic insight that noncompliance causes externalities. Thus, the question must be how to internalize the external costs of noncompliance. On the level of sanctions as a means to internalize externalities, public choice theory calls for a mechanism of internalization aimed directly at the cause of the externalities. If the entire WTO sanctions system is construed at an intergovernmental level, however, this aim must miss the mark because the externalities of noncompliance with WTO also occur at the level of private economic actors. Thus, an intergovernmental approach will always be only second best. A better solution could only be realized by granting individual economic actors the right to directly rely on WTO law within the domestic legal system.

This implicates a broader approach of constitutional political economy in order to convincingly analyze countermeasures in WTO law. Taking the public choice analysis into account, one sees that a WTO sanctions regime can only be construed as the best solution if a public in-

6. For details on the discussion, see CHRISTIAN TIETJE, NORMATIVE GRUNDSTRUKTUREN DER BEHANDLUNG NICHTTARIFÄRER HANDELSHEMMNISSE IN DER WTO/GATT-RECHTSORDNUNG 172 (1998); Joost Pauwelyn, *A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, 14 EUR. J. INT'L L. 907, 925–30 (2003).

terest perspective is taken. Thus, just as with regard to national constitutions, the main question is, as James Buchanan asked it, "How Can Constitutions Be Designed so that Politicians Who Seek to Serve Public Interest Can Survive and Prosper."[7] Again, this necessarily requires ensuring legal rights of the individual. Moreover, it is important to think about a solution for the rent-seeking trap, or the collusion between agents and special interest groups that leads to an only second-best WTO compliance regime. This requires restraints on governments, namely restraints by procedural rules. Finally, as already indicated, the most important question is how to ensure equal treatment in order to reduce incentives for rent-seeking behaviour. As Buchanan has forcefully argued, equal treatment based on the rule of law is a central element in any system in order to ensure public interests.[8] These and other aspects that have been developed in the last years by the debate on constitutional political economy should be taken into account while discussing the pros and cons of a reform of the WTO sanctions regime.

7. James Buchanan, *How Can Constitutions Be Designed So That Politicians Who Seek to Serve "Public Interest" Can Survive and Prosper?*, 4 CONST. POL. ECON. 1 (1993).

8. *Id.* at 5–6.