

Essay

The Enforcement of WTO Judgments

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Inspiration for my Essay comes from an influential article written by Michael Reisman four decades ago titled *The Enforcement of International Judgments*.¹ His article presented a “model” for improving enforcement of international judicial decisions in cases between states.² The tribunal that Reisman referred to most often was the International Court of Justice (ICJ). Although there have been some developments in the ICJ since 1969 that benefited from his insights, the tribunal in which Reisman’s ideas have flowered the most is the dispute system of the World Trade Organization (WTO). The purpose of my Essay is to point out how the WTO Dispute Settlement Understanding (DSU) achieved much of what Reisman envisioned with respect to systematic enforcement of multilateral tribunal decisions.

My Essay begins by summarizing the institutional improvements Reisman recommended. Then this Essay demonstrates how the WTO’s DSU achieves many of those objectives in law and practice. Finally, this Essay takes note of continued confirmation of Reisman’s thesis in the Appellate Body decision in the new *United States—Continued Suspension* case, a dispute about how to judge compliance and when to lift trade sanctions.³

In his article, Reisman brought much-needed scholarly attention to international enforcement. Noting the approach taken in the ICJ that “simply presumes compliance,”⁴ Reisman proposed that the international community give explicit attention to developing better mechanisms to achieve enforcement. He defined enforcement as “the transformation, by community means, of authoritative pronouncement into controlling reality.”⁵ Two strategies for enforcement exist: (1) direct enforcement on the delinquent state (e.g., physical transfer of assets) and (2) indirect enforcement, which consists of “sanctions on the miscreant in order to persuade him to comply with community norms.”⁶ Reisman put forward a hypothesis that “the expectation of the effectiveness of enforcement mechanisms is a factor inducing compliance.”⁷

To show how a compliance expectation among governments can be fostered, Reisman laid out a “functional model of enforcement” with these

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1. W.M. Reisman, *The Enforcement of International Judgments*, 63 AM. J. INT’L L. 1 (1969).

2. *Id.* at 8-14.

3. Appellate Body Report, *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*, WT/DS320/AB/R (Oct. 16, 2008) (adopted Nov. 14, 2008) [hereinafter *U.S.—Continued Suspension Appellate Body Report*].

4. Reisman, *supra* note 1, at 2.

5. *Id.* at 6.

6. *Id.*

7. *Id.* at 7.

four elements: the target state that loses the judgment, the enforcers, the power bases of the enforcers, and the strategies employed.⁸ The potential enforcers include, among others, “functional agencies” and a state directed by an authoritative organization.⁹ Economic sanctions are one type of indirect enforcement, and Reisman explained that “[c]arefully planned sanctions may bring about compliance without the dysfunctional results of the total embargo.”¹⁰ Reisman noted that while enforcement directives in the United Nations Security Council can be blocked, directives from functional organizations have a higher probability of success.

Another contribution to enforcement theory are the principles Reisman put forward to secure compliance with international law and to generate expectations of effectiveness. First, he noted that international commerce can provide for a “scale of equivalence” so that “substitutes can be found in lieu of the original object of the dispute.”¹¹ Second, he proposed anticipatory enforcement whereby judgment funds are prepaid into court. Third, he called for enforcement strategies to be “launched promptly” and explained that dispatch can “prevent domestic politicization of compliance decisions.”¹² Fourth, he argued that an enforcement program “should draft as wide a participation as possible.”¹³

In addition to these conceptual contributions, Reisman’s article offered some specific policy recommendations for improving the ICJ Statute. Notably, he sought to give the ICJ an explicit role in “post-judicial” enforcement.¹⁴ For example, he would empower the ICJ to “specify principles to govern compliance” and to set a time limit for compliance.¹⁵ Once that time has expired or on the initiative of the winner, the “winning party could reapply unilaterally for a declaration of non-compliance.”¹⁶ Reisman anticipated that the losing party might “claim compliance” when in fact it has not complied.¹⁷ If so, he suggested that “[a] finding by the Court of non-compliance would tend to undermine the position of the loser, emphasize the finality of the judgment and expedite coercive enforcement.”¹⁸ Reisman also called for greater attention to the possibility of using the delinquent state’s own domestic courts to enforce the international judgment. This could be effectuated by a protocol to the ICJ Statute plus “appropriate internal implementing legislation by each contracting state.”¹⁹

Unfortunately, over the past forty years, the United Nations has not moved forward on any of these recommendations for strengthening the ICJ’s

8. *Id.* at 9. Reisman notes that his model may be applied to other international decisions beyond the ICJ. *Id.* at 9 n.26.

9. *Id.* at 9.

10. *Id.* at 14.

11. *Id.* at 22.

12. *Id.*

13. *Id.* at 23.

14. *Id.*

15. *Id.* at 26.

16. *Id.* at 24.

17. *Id.*

18. *Id.*

19. *Id.* at 25, 27.

role in enforcement. Political conditions, particularly in the United States, have not been conducive to strengthening judicial enforcement either in the ICJ or through the Security Council. Nevertheless, it should be said that the contemporary ICJ is a much more vibrant court than it was in the late 1960s, and is no longer guilty of the pathology diagnosed by Reisman of being "so incapable of effective decision that it must retreat from the most critical cases."²⁰ Moreover, for ICJ final judgments, the record of compliance by states has been strong in recent decades.

Although Reisman's *The Enforcement of International Judgments* focused mainly on the ICJ, he examined economic agencies (e.g., the International Monetary Fund) in an earlier article about international enforcement published in 1965 in *International Organization*.²¹ That article did not mention the General Agreement on Tariffs and Trade (GATT), the predecessor to the WTO. But it postulated a normative proposition that was relevant to the GATT and later to the WTO. Reisman's 1965 article stated: "No international organization is an island; the maximum effectiveness of the economic agencies is integral with an interdependent international community. It is important that the economic organizations view themselves as a part of that community and, when possible, accept the obligations which membership imports."²²

Unlike the ICJ Statute, the WTO treaty system does not presume governmental compliance with authoritative judgments. Instead, the system presupposes that governments will sometimes fail to comply. Indeed, the DSU takes note of the contingency that a WTO member government "fails to bring the measure found to be inconsistent with a covered agreement into compliance."²³ Because it is based on a realistic appreciation of how governments behave, the DSU contains a sophisticated postadjudication system of "Surveillance of Implementation of Recommendations and Rulings."²⁴ In addition, the DSU provides for a menu of ways that a WTO dispute can end (when a violation exists) besides withdrawal of the WTO-illegal measure. That menu includes a mutually acceptable solution, compensation to the complaining WTO member, and the "last resort" of temporarily suspending the application of concessions or other obligations vis-à-vis the noncomplying member.²⁵ I have used the acronym SCOO as the name of this ultimate remedy of suspension of concessions or other obligations.

In designing the DSU, the negotiators sought to construct a dispute system that would avoid the dysfunctions of the GATT system such as blocking the appointment of a panel, the adoption of its report, or the approval

20. *Id.* at 26.

21. William M. Reisman, *The Role of Economic Agencies in the Enforcement of International Judgments and Awards: A Functional Approach*, 19 INT'L ORG. 929 (1965).

22. *Id.* at 942.

23. Understanding on Rules and Procedures Governing the Settlement of Disputes art. 22.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994) [hereinafter DSU].

24. *Id.* art. 21.

25. *Id.* art. 3.7.

of a SCOO.²⁶ Reisman notes that enforcement directives from the Security Council could be blocked by one country, but such blocking is now impossible in the WTO Dispute Settlement Body (DSB), which has an automatic procedure for approving a SCOO following a failure to comply.²⁷

In line with Reisman's model providing for sanctions on the miscreant in order to persuade it to comply with community norms, the DSU utilizes the SCOO as indirect enforcement. Back in 2001, I put forward a thesis that the WTO had transformed the remedy that was prescribed under the GATT (but never used) into a true "sanction" that would be imposable upon a scofflaw country.²⁸ The WTO jurisprudence since 2001 has solidified the evidence for my thesis that the SCOO is recognized as a trade sanction aimed at inducing compliance.²⁹ Indeed, it is interesting to compare Reisman's statement that the expectations of the effectiveness of enforcement measures is a factor inducing compliance to the Appellate Body's holding in *U.S.—Continued Suspension*; having to remove the SCOO simply because an offending government declares that it has complied "would undermine the important function of the suspension of concessions in inducing compliance" and "would significantly weaken the effectiveness of the WTO dispute settlement system and its ability to provide security and predictability to the multilateral trading system."³⁰

Several other points should be noted in which Reisman's model is predictive of key features of the WTO machinery developed twenty-five years later. First, Reisman said that effective enforcement requires a time limit for compliance and that "[a] lag between judgment and enforcement tends to diminish th[e] expectation" that the system works and "to increase resistance to voluntary compliance."³¹ The DSU provides for arbitration to set a compliance timetable. Furthermore, the enforcement procedure is launched promptly because the DSU gives the complaining government only thirty days following the conclusion of the period of compliance to take advantage of the automatic SCOO approval.³² Second, Reisman recognized that after a violation of law is found, the losing party might "claim compliance" and the winning party could "reapply unilaterally for a declaration of non-compliance" by the court.³³ The DSU works in this suggestion for compliance review in Article 21.5 which states: "Where there is disagreement as to the existence or consistency with a [WTO] covered agreement of measures taken

26. In my view, the negotiators for the DSU did not understand themselves to be constructing an international trade court, and therefore they may not have reflected on how they were making improvements to the ICJ model.

27. DSU, *supra* note 23, arts. 22.2, 22.6, 22.7.

28. Steve Charnovitz, *Rethinking WTO Trade Sanctions*, 95 AM. J. INT'L L. 792 (2001).

29. See, e.g., Panel Report, *U.S.—Continued Suspension*, paras. 7.234, 7.343 n.480, WT/DS320/R (Mar. 31, 2008) [hereinafter *U.S.—Continued Suspension Panel Report*] (terming as "sanctions" the use of the SCOO); Arbitration Decision, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, para. 3.71, WT/DS285/ARB (Dec. 21, 2007) (recourse to Arbitration by the United States under DSU Article 22.6) ("[T]he very reason for the existence of countermeasures under the DSU is to induce compliance with the covered agreement that has not taken place within the period foreseen in the DSU.")

30. *U.S.—Continued Suspension* Appellate Body Report, *supra* note 3, para. 381.

31. Reisman, *supra* note 1, at 22.

32. DSU, *supra* note 23, art. 22.6.

33. Reisman, *supra* note 1, at 24.

to comply with the recommendations and rulings such dispute shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original panel.”³⁴ Third, Reisman suggested that international commerce would enable the adjudicator to utilize a scale of equivalence in fashioning a sanction and that a substitute sanction “should be sought insofar as it reflects the subjective valuation of the litigants.”³⁵ The DSU implements this suggestion by providing a principle that the level of SCOOP should be equivalent to the “nullification or impairment” and in providing for the possibility of so-called cross-retaliation, where the complaining country can choose to seek a SCOOP through an unrelated WTO agreement (e.g., requesting a SCOOP on intellectual property even though the underlying litigation was not about intellectual property).³⁶ Fourth, Reisman called on the ICJ to specify “general principles of compliance or any other directive which the Court may deem appropriate.”³⁷ The DSU authorizes the Appellate Body and panels to “suggest ways in which the Member concerned could implement the recommendations.”³⁸

The concern that Reisman expressed in the 1965 *International Organization* article about fragmentation in international economic law proved prescient.³⁹ During the first four decades of the postwar trading system, the GATT sometimes viewed itself as a self-contained system separate from the rest of international law. That narrow-mindedness was put to bed in the first decision handed down by the Appellate Body, which stated that the DSU reflects a recognition that the GATT “is not to be read in clinical isolation from public international law.”⁴⁰ This holding contributed enormously to assuring that the WTO is not “incapable of effective decision”⁴¹ by widening the law to be applied—for example, by intensively importing principles from international law.⁴²

Perhaps more so than the ICJ, the WTO dispute system has been effective because there is an expectation that decisions will ultimately be complied with. In Reisman’s words, effective law “depends upon predispositions among an effective majority of participants towards

34. DSU, *supra* note 23, art. 21.5.

35. Reisman, *supra* note 1, at 22.

36. DSU, *supra* note 23, arts. 22.3 to -4.

37. Reisman, *supra* note 1, at 26.

38. DSU, *supra* note 23, art. 19.1.

39. See Reisman, *supra* note 21 and accompanying text.

40. Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline* 16, WT/DS2/AB/R (Apr. 29, 1996). The presiding member of the Appellate Body division in the *Gasoline* case was Florentino Feliciano. See W. Michael Reisman, *A Judge’s Judge: Justice Florentino P. Feliciano’s Philosophy of the Judicial Function*, in *LAW IN THE SERVICE OF HUMAN DIGNITY* 3, 8-9 (Steve Charnovitz, Debra P. Steger & Peter Van den Bossche eds., 2005) (discussing the role of judicial choice and noting that “the judge may be obliged to consult more general community values”).

41. Reisman, *supra* note 1, at 26.

42. See Petros C. Mavroidis, *No Outsourcing of Law? WTO Law as Practiced by WTO Courts*, 102 AM. J. INT’L L. 421 (2008).

compliance with authority.”⁴³ A recent empirical study of compliance in the WTO found a generally positive record of compliance.⁴⁴

A full appreciation of Reisman’s article requires that one mention, if only briefly, a few of his proposals that remain too visionary for incorporation into the WTO system. As noted above, he calls for anticipatory judgment funding, community participation of sanction senders, and the use of domestic courts to enforce international judgments. Of those three, the idea of collective enforcement of WTO judgments is the only one that has been discussed by WTO negotiators.⁴⁵

The recent Appellate Body decision provides new confirmation of Reisman’s model and his thesis that law requires an “expectation of effectiveness” and that “[c]reating and sustaining that expectation is a basic legal function.”⁴⁶ The *U.S.—Continued Suspension* decision was a constitutional decision wherein the Appellate Body filled in gaps in DSU law that threatened to undermine WTO enforcement. The constitutional dimension in *Continued Suspension* was who would decide whether to lift a WTO-authorized SCOO against a defendant country when that country claimed that it had finally taken measures to correct its earlier violation. Although the DSU has rules for how to seek and approve a SCOO, there are no explicit rules for how to get a SCOO removed. This lacuna in WTO law has been long recognized, and there have been several proposals by governments for an amendment to the DSU to create such procedures.⁴⁷ Because they are tethered to the failing Doha Round, these DSU reform negotiations have not generated any legislative change.

The *Continued Suspension* case is complicated, and the Appellate Body decision was over three hundred pages long. Given space limitation, I can provide only a brief summary. In the original case, the United States brought a complaint to the WTO about a European Community (EC) directive in 1996 banning the importation of meat produced with growth-promoting hormones.⁴⁸ The panel found numerous violations. In 1998, the Appellate Body, while narrowing the lower panel’s decision, ruled that the import ban violated the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement)⁴⁹ because the European measure

43. Reisman, *supra* note 1, at 26.

44. Gary Horlick & Judith Coleman, *A Comment on Compliance with WTO Dispute Settlement Decisions*, in *THE WTO: GOVERNANCE, DISPUTE SETTLEMENT & DEVELOPING COUNTRIES* 771, 772 (Merit E. Janow, Victoria Donaldson & Alan Yanovich eds., 2008) (finding rates of 67% for compliance, 24% for partial compliance, and 9% for unabashed noncompliance).

45. See, e.g., Sayera J. Iqbal Qasim, *Collective Action in the WTO: A “Developing” Movement Toward Free Trade*, 39 U. MEM. L. REV. 153 (2008).

46. Reisman, *supra* note 1, at 26.

47. Negotiations on Improvements and Clarification of the Dispute Settlement Understanding, Proposal by Japan, at 9, TN/DS/W/22 (Oct. 28, 2002); see also Suzanne Bermann, *EC-Hormones and the Case for an Express WTO Postretaliation Procedure*, 107 COLUM. L. REV. 131, 154 (2007) (arguing that no DSU article is capable of resolving postretaliation complaints).

48. Appellate Body Report, *EC Measures Concerning Meat and Meat Products*, paras. 1, 5, WT/DS26/AB/R (adopted Feb. 13, 1998) [hereinafter *EC-Hormones* Appellate Body Report].

49. Agreement on the Application of Sanitary and Phytosanitary Measures, Dec. 15, 1993, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Legal Instruments—Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

was not based on a risk assessment.⁵⁰ After arbitration to determine the appropriate level of SCOO, the DSU in 1999 authorized the U.S. government to impose a SCOO against the EC of \$116.8 million a year, and the U.S. government immediately did so.⁵¹ In 2003, the EC withdrew its 1996 directive and replaced it with a new directive seeking to strengthen the justification for its continuing ban.⁵² At the same time, the EC asserted to the DSB that the EC had come into compliance and that the continuing suspension of concessions by the United States was no longer justified. After the U.S. government refused to acknowledge the claimed compliance or to lift the SCOO, the EC brought a complaint against the United States and obtained a new panel in 2005. This panel issued an odd, split ruling. On the one hand, it found that the EC had not established that it had removed the measure violating the SPS Agreement.⁵³ On the other hand, the panel found that the United States was violating DSU Articles 23.1 and 23.2(a) by making a determination that an EC violation had occurred without recourse to DSU procedures.⁵⁴ In addition, the panel suggested that an action by the EC to withdraw the measure would supersede the DSU authorization for the SCOO obtained by the United States.⁵⁵ The EC appealed and the United States cross-appealed. In October 2008, the Appellate Body reversed the panel on numerous holdings. On the SPS matter, the Appellate Body reversed the panel's holding and made no finding as to whether the EC was now in compliance with the SPS Agreement.⁵⁶ On the DSU matter, the Appellate Body reversed the holding against the United States.⁵⁷ As of March 2009, settlement talks are ongoing.

Although the Appellate Body did not settle the *Hormones* dispute, it did clarify some disputed DSU provisions. Given the limited progress in the ongoing Doha Round negotiations on improvements and clarifications of the DSU, the Appellate Body exercised the full extent of its authority to interpret the DSU, and thus to improve its effectiveness. The Appellate Body's activist stance leads me to recall Reisman's suggestion that the ICJ take a more active role in the postadjudicative phase, and that such action was "permitted by general judicial practice and not prohibited by the language of the Statute."⁵⁸

A key legal development in the case is that the Appellate Body put the kibosh on the EC's scheme to feign compliance with the SPS agreement and then to demand that the United States remove the SCOO. The EC argued that even though its longtime import ban remained intact, the United States had an obligation to eliminate its SCOO merely because the EC had withdrawn the 1996 directive and replaced it with a new directive in 2003.⁵⁹ In response, the Appellate Body ruled that a DSB-authorized SCOO "may continue until the

50. U.S.—*Continued Suspension* Appellate Body Report, *supra* note 3, para. 253.

51. *Id.* paras. 8-9.

52. *Id.* paras. 11-12.

53. U.S.—*Continued Suspension* Panel Report, *supra* note 29, para. 7.847.

54. *Id.* para. 7.251.

55. *Id.* para. 7.343.

56. U.S.—*Continued Suspension* Appellate Body Report, *supra* note 3, paras. 619-20, 734-35.

57. *Id.* para. 408.

58. Reisman, *supra* note 1, at 24 (footnote omitted).

59. U.S.—*Continued Suspension* Appellate Body Report, *supra* note 3, para. 286.

removal of the measure found by the DSB to be inconsistent results in substantive compliance.”⁶⁰ The term “substantive compliance” does not exist in the text of the DSU. Rather, it was invented by the Appellate Body in this case to distinguish true compliance with only “formal removal of the inconsistent measure.”⁶¹ The Appellators further explained that “[r]equiring termination of the suspension of concessions simply because a Member declares that it has removed the inconsistent measure, without a multilateral determination that substantive compliance has been achieved, would undermine the important function of the suspension of concessions in inducing compliance.”⁶²

Another key Appellate Body holding is that both complaining and defending parties may use the Article 21.5 procedure to determine whether a new measure achieves compliance.⁶³ Indeed, the Appellate Body went even further and held that both parties *must* invoke Article 21.5 in the case of a disagreement about the reality of substantive compliance.⁶⁴ The EC had made an end-run around the Article 21.5 process because it wanted to avoid the judges on the original 1998 panel. The justification the EC put forward was that the DSU did not allow it to invoke Article 21.5 to verify its own compliance.⁶⁵ Its supposed inability to ask for an Article 21.5 panel was the EC’s excuse for invoking a new panel against the United States for continuing the SCOO. The Appellate Body saw the end-run and recognized the threat to the effectiveness of compliance review if a defendant could go around Article 21.5 by bringing a new cause of action against the SCOO. The Appellate Body buttressed its holding that the Article 21.5 procedure was “the proper course of action” by noting that a return to the original panel would bring expertise and prompt resolution.⁶⁶

The last exercise of gap-filling power is the Appellate Body’s holding that once an Article 21.5 panel finds compliance and its report is adopted by the DSB, such DSB action serves to repeal the previous action that authorized the SCOO. In the words of the Appellate Body, the SCOO “lapses by operation of law (*ipso jure*).”⁶⁷ This is one of the most remarkable holdings of the Appellate Body during its thirteen-year history. Faced with a deficient legal text, a flailing Doha negotiation, and a possible ruling by a future Article 21.5 panel that the EC has complied in *Hormones*, the Appellate Body

60. *Id.* para. 306.

61. *Id.* para. 308. The Appellate Body apparently liked its phrase and used it over 50 times. The term is employed again in the recent DSU Article 21.5 decision in the *EC—Bananas* litigation. Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, paras. 272-73, 322-23, WT/DS27/AB/RW/USA (Nov. 26, 2008).

62. *U.S.—Continued Suspension* Appellate Body Report, *supra* note 3, para. 381.

63. *Id.* paras. 345, 348, 358, 368. This conclusion was anticipated in Jason E. Kearns & Steve Chamovitz, *Adjudicating Compliance in the WTO: A Review of DSU Article 21.5*, 5 J. INT’L ECON. L. 331, 341-43 (2002).

64. *U.S.—Continued Suspension* Appellate Body Report, *supra* note 3, paras. 336, 340, 354-55, 737.

65. *Id.* para. 349.

66. *Id.* paras. 344-45.

67. *Id.* para. 310; *see also id.* paras. 321, 367 (seeing an obligation to cease the SCOO); *id.* para. 355 (saying that this situation renders the SCOO without legal basis); *id.* para. 384 (seeing a cause of action if the SCOO is not immediately terminated).

clarified that WTO adjudicators will decide when governments are in compliance with WTO rules and when a SCOO may be used to enforce a WTO judgment.

In conclusion, Reisman's vision of a more effective world court has been realized sooner in the arena of world trade than it has in the ICJ. No one in 1969 would have predicted the DSU, and I am unaware of anyone today predicting a much stronger ICJ by 2019. Yet some day that will eventuate, and those who design it will be inspired by the model put forward by Reisman.