

CHAPTER 15

UNILATERAL MEASURES

1. BACKGROUND OF RULES

(1) DEFINITION

In this chapter, a unilateral measure is defined as a retaliatory measure which is imposed by a country without invoking the WTO dispute settlement procedures or other international rules and procedures and is imposed based solely upon the invoking country's own criteria.

(2) HISTORY OF UNILATERAL MEASURES

To date, the United States is the most frequent user of unilateral measures, and its application of them also tends to cause most problems. While the EU and Canada also have procedures for imposing unilateral measures similar to those of the United States, these procedures were introduced to provide a means of retaliating against unilateral measures imposed by the United States. Moreover, the EU and Canada have applied these measures only with extreme caution. A review of post-war US trade policy shows two main streams of thought that diverged after passage of the Trade Act of 1974.

Prior to the 1970s, the Trade Expansion Act of 1962 gave the president wide-ranging trade authority. The Kennedy Administration used substantial tariff reductions to pursue trade liberalization and brought new rigor to the application of the escape clause (provisions on safeguard measures). The goal was to maintain the principles of trade liberalization and only apply remedy measures for damages incurred as a result of liberalization. Therefore, remedy measures were treated as the “exception” rather than the “rule.” However, domestic interests were dissatisfied with the Kennedy Administration trade negotiating process because the Department of State was responsible for conducting trade negotiations and did not necessarily represent the interests of domestic parties. This resulted in the establishment of the Special Trade Representative (STR), the predecessor of the USTR, and laid the groundwork for the system later established with the passage of the Trade Act of 1974.

The increasing US trade deficit and oil crisis of the nineteen-seventies combined to increase protectionist pressure on Congress to relax the conditions for invoking trade remedy measures. In 1971, the United States recorded its first trade deficit of the 20th century. It was against this economic backdrop that the Trade Act of 1974 was passed, relaxing the requirements for relief under the escape clause measures and introducing a new “Super 301” provision (lapsed in 2001) that authorized retaliatory measures against unfair trade policies in foreign countries.

In the Reagan Administration of the late 1980s, the United States incurred enormous trade deficits, and Congress' dissatisfaction (symbolized by the “Gephardt Amendment”) eventually led to the passage of the Omnibus Trade and Competitiveness Act of 1988. This law reduced presidential discretion to invoke unilateral trade measures against foreign practices, policies, and customs deemed by the United States to be unfair and, instead, granted wide-ranging authority to the USTR to administer these cases. It also introduced a new “Super 301” provision that automated procedures in unfair trade investigations and made it significantly easier for the United States to impose unilateral measures.

The United States has repeatedly imposed or threatened unilateral measures under Section 301 as a means for settling trade disputes to its advantage. Section 301 allows the United States to unilaterally determine that a trade-related policy or measure of another country is “unfair” without following the procedures provided by the relevant international agreements. In the name of rectifying “unfair” practices, the United States has often threatened to use unilateral measures, and occasionally implements such measures to coerce the target country into changing the trade laws or practices at issue.

(3) WHY ARE UNILATERAL MEASURES PROBLEMATIC?

First, unilateral measures are inconsistent with the letter and the spirit of the WTO, which is founded on the principle of multilateralism and the consensus and cooperation that flow from it. Article 23 of the Dispute Settlement Understanding (“DSU”) explicitly prohibits Members from invoking unilateral measures that are not authorized under WTO dispute settlement procedures. The multilateral trading system is marked by countries observing international rules, including those provided by the WTO Agreement and its dispute settlement procedures. Disputes occurring within the system should be resolved through the available dispute settlement procedures, not by threatening or imposing unilateral measures.

Second, where agreements are reached through the threat or use of unilateral measures, the multilateral system may suffer. In particular, bilateral agreements secured under the threat or use of unilateral measures tend to deviate from the MFN principle, which is the most fundamental component of the multilateral framework under the WTO.

(4) UNILATERAL MEASURES CANNOT BE JUSTIFIED

There are two popular rationales for unilateral measures. The first is that, since international rules are incomplete, both substantively and procedurally, defiance of these rules is justified to make existing rules function more effectively. The other rationale, based on economic or political theory, argues that credible threats of unilateral measures are effective in maintaining a free trading system from a strategic viewpoint.

Neither rationale, however, is persuasive. First, as we discuss in more detail below, the WTO Agreement covers a broader spectrum and maintains a stronger dispute settlement process than previous trade agreements. These enhancements destroy whatever rationale there may have once been for “justified” defiance. After all, such way of thinking may result in vicious circles of unilateral measures and allow arbitrariness by major states. The second rationale of “strategic justification” also is meaningless with the development of dispute settlement procedures that allow for WTO-controlled retaliatory measures.

Furthermore, unilateral measures are necessarily exercised on the basis of the “unilateral” decision of invoking states which play both roles of plaintiff and judge. Since their decisions tend to be made arbitrarily, solely from the perspective of interests in the invoking states, there is no guarantee that neutrality and fairness are secured when they take unilateral measures.

2. LEGAL FRAMEWORK

The WTO dispute settlement mechanism is the only forum for WTO-related disputes. Unilateral measures that are not consistent with WTO obligations, such as unilateral tariff increases and quantitative restrictions, are prohibited. Such measures violate several provisions of the WTO Agreement: Article I (General MFN Treatment), Article II (Schedules of Concessions), Article XI

(General Elimination of Quantitative Restrictions) and Article XIII (Non-Discriminatory Administration of Quantitative Restrictions). In addition, the threat of unilateral tariff increases may have an immediate impact on trade, nullifying and impairing benefits accruing to the injured country under the WTO Agreement.

In the past, the United States has rationalized its need to use unilateral measures by arguing that the GATT dispute settlement procedures were not effective. Inefficiency, however, can no longer be used as a justification for departing from dispute settlement procedures, because the DSU provides for a strict timeframe and greater automation to ensure quick dispute settlement.

(1) RULES ON THE WTO DISPUTE SETTLEMENT PROCEDURES

The WTO dispute settlement procedures provides two rules, which go beyond previous dispute settlement systems by clearly prohibiting the use of unilateral measures concerning issues within the scope of the WTO rules.

(2) CLEAR OBLIGATION TO USE THE WTO DISPUTE SETTLEMENT PROCEDURES

The WTO Agreement states clearly that all disputes must follow the WTO dispute settlement procedures and explicitly bans unilateral measures not conforming to these procedures. The use of unilateral measures in contravention of these procedures is itself a violation of the WTO Agreement. Article 23 of the DSU, which is a part of the WTO Agreement, stipulates that when a WTO Member seeks redress for a breach of obligations, nullification or impairment of benefits under the covered agreements, or for an impediment to attaining any objective under the covered agreements, the WTO Member shall follow the rules and procedures set forth in the DSU.

Although it was also obvious that the settlement of GATT-related disputes should be governed by the GATT dispute settlement procedures, the fact that this principle has been explicitly stated at the establishment of WTO represents a significant step forward.

(3) EXPANDED COVERAGE OF THE AGREEMENT

As a result of the implementation of the WTO Agreement, compared with the GATT, wider coverage has been provided that includes not only goods but also trade in services and intellectual property rights. In line with this, imposition of unilateral measures has been prohibited in a broad range of fields. As explained later, the United States expanded the scope of application of Section 301 to include services market liberalization and intellectual property rights, in addition to trade in goods. However, it is not allowed under the WTO system for the United States to take unilateral measures against violation of the TRIPS Agreement and GATS outside WTO procedures.

In light of the two considerations above, we have categorized unilateral measures based on the combination of: (1) the causes of imposition of measures (whether it is due to the counter party violating the WTO Agreement or impairing benefits under the WTO Agreement, or the cause is nullification or impairment of benefits in areas not covered by the WTO, such as violation of human rights); and (2) the nature of the measures imposed (whether the measures violate the WTO Agreement or do not violate the WTO Agreement as in the case of, for example, tariff increases within bound rates). Figure II-15, below, shows the results of the categorization and regulations related to each category. As indicated in the chart, the measures in question, except for Field D, may violate Article 23 of the DSU and/or be inconsistent with the WTO Agreement.

In the case of Field D, a unilateral measure would not violate DSU Article 23 and would not itself constitute a violation of the WTO Agreement. For this reason, it is also assumed that the

country imposing a unilateral measure claims that the measure is not due to the counterparty violating the WTO Agreement or impairing benefits under the WTO Agreement, when in reality it is (Field A or Field B). Accepting such a claim would give rise to an unfair situation where the country imposing a unilateral claim can always evade the accusation of violating Article 23 of the DSU by claiming that the measure was not due to the issue in the scope of the WTO Agreement. Therefore, whether the cause of a unilateral measure is an issue covered by the WTO Agreement should be judged objectively according to the rules of the dispute settlement system.

Figure II-15

		Unilateral Measures	
		In violation of the WTO Agreement	Not in violation of the WTO Agreement
Contents of disputes	WTO-related disputes	A Violation of DSU Art. 23.1/Violation of Measure as such	B Violation of DSU Art. 23.1

- (i) Disputes falling under Fields A and B, which are due to either the counterparty violating the WTO Agreement or impairing benefits under the WTO Agreement, must be brought to the WTO dispute settlement system in accordance with Article 23 of the DSU. A unilateral measure in such disputes would constitute a violation of Article 23 of the DSU. Moreover, violation of the Agreement by the measure itself would also be a problem, as a matter of course.
- (ii) Any unilateral measures taken against cases falling under Field C would themselves constitute violation of the WTO Agreement.
- (iii) Although disputes falling under Field D do not involve the issue of violation of Article 23 of the DSU or the issue of violation of the WTO Agreement by measures themselves (even in such cases, a non-violation claim may be filed if the measure has impaired benefits of the counterparty under the WTO Agreement), the scope of Field D has been significantly narrowed due to the expansion of scope covered under the WTO Agreement in terms of both content of disputes (related to (2) above) and content of measures.

3. ECONOMIC ASPECTS AND SIGNIFICANCE

Retaliatory measures that are not based on WTO dispute settlement procedures have enormous potential to distort trade. Tariff hikes and the like are themselves trade distortive measures; their unilateral application is likely to provoke retaliation from the trading partner, leading to a competitive escalation of retaliatory tariffs. Unilateral measures are often based on domestic interests (i.e., protection of domestic industries and profits for exporters), and once procedures are initiated it may be extremely difficult domestically to suspend or terminate them.

It should be clear that unilateral measures reduce trade both for the country imposing them and the country against which they are imposed. They are detrimental to the domestic welfare and economic interests of both countries, and impair the development of world trade. One need only recall the competitive hikes in retaliatory tariffs during the 1930s and the vast reductions in trade and the worldwide economic stagnation that they produced.

MAJOR CASES

(1) The Japan-US Auto Dispute (DS6)

The *Japan-US Auto Dispute* was the first case in which a US Section 301 action was challenged under WTO dispute settlement procedures. The United States initiated a Section 301 investigation against the Japanese aftermarket for auto parts on 1 October 1994, and announced sanctions on 10

May 1995. The United States proposed unilateral measures that would impose 100-percent import duties on Japanese luxury automobiles. In response to this unilateral threat, Japan immediately requested consultations pursuant to GATT Article XXII with the United States.

In these consultations, Japan protested that retaliatory import duties imposed only on Japanese luxury automobiles by the United States violated the WTO provisions of most-favored-nation treatment (GATT Article I), schedules of concessions (GATT Article II) and general elimination of quantitative restrictions (GATT Article XI), and that this measure also violated DSU Article 23, which prohibits resolving disputes covered by the WTO Agreements by unilateral measures such as Section 301 action rather than through the WTO. The United States insisted that through Section 301 procedures they determined Japanese restrictions to be “unreasonable and discriminatory” under their domestic laws, but not as inconsistent with the WTO Agreements. They insisted that Section 301 and the DSU were conceptually different and their decision raised no problems of consistency. However, by this line of argument, even though countries resort to unilateral measures, it would not be a violation of DSU Article 23 unless they clearly refer to “WTO Agreement violation” as a reason for their measures. In this case, the US government sent a letter dated 9 May 1995 to the WTO Director-General, requesting WTO dispute settlement against Japan. In this letter, the US government stated that “Due to (Japan’s) excessive and complicated restrictions, most automobile services are awarded to designated maintenance factories closely connected to domestic auto parts makers.” Furthermore, directly quoting the WTO and TBT Agreements (Article 2 Clause 2 and Article 5 Clause 1), they mentioned that these restrictions had caused unnecessary barriers to international trade. These facts showed that the United States clearly recognized that Japan’s restrictions in the aftermarket should be covered under the WTO Agreements. In any case, it is not interested countries but international adjudicators such as panels that should determine whether cases causing unilateral measures should be covered under the WTO Agreements or not.

Ultimately, the dispute was settled through bilateral negotiations outside the WTO process, but the fact that the matter was referred to WTO dispute settlement procedures and that negotiations took place before the international community was integral to achieving a resolution in conformity with international norms and to preventing a trade war. In particular, at the DSB meeting on this case in May 1995, approximately 30 member countries criticized the unilateral notification of tariff hikes by the United States and urged the utilization of WTO dispute settlement procedures. International opinion at these multinational meetings played a significant role in solving this case. (As for US requests for Japanese companies to buy foreign products, which brought about the Japan-US Auto dispute, refer to “Data: ‘When Foreign Governments Directly Request Japanese Companies to Buy Foreign products’ (1995 Report on the WTO Inconsistency of Trade Policies by Major Trading Partners, Appendix III)”.)

(2) The Japan-US Film Dispute (DS44)

The United States requested bilateral negotiations with Japan in this case under Section 301, but Japan’s adamant opposition to engage in negotiations under this provision resulted in the case being brought before a WTO dispute settlement panel. The thrust of the US claim was that the actions of the government of Japan in relation to consumer photographic film and photographic paper were in violation of GATT Article XXIII: 1(b). Rather than arguing that the measures taken were themselves violations of the WTO Agreement, the United States argued that the measures nullified and impaired the interests of other countries under the Agreement. The panel, however, rejected all US claims.

In this dispute, the United States announced that statements made in the government of Japan’s legal submissions to the WTO dispute settlement panel are “commitments” subject to monitoring to

ensure their implementation. Based on this position, the United States released its first “Monitoring Report” in August 1998. The US position is untenable. Like all submissions to WTO dispute settlement panels, Japan’s submissions in the Film Dispute presented historic factual circumstances and legal principles at issue in the particular case. The US characterization of these factual representations about the past as future “commitments” represents a unilateral attempt to create new future obligations. Such an approach is unreasonable and could be viewed as a derivative of Section 301. Although the United States intends to issue reports biannually, Japan should not accept such an approach.

(3) The EU-Banana Dispute (DS27)

(Please see pages 618-621 in the 2016 Report on Compliance by Major Trading Partners with Trade Agreements–WTO, FTA/EPA and IIA-)

(4) US - Section 301 Trade Act (DS27)

See Part I Chapter 2 (United States), “Unilateral Measures” 1. Section 301 of the Trade Act of 1974 and Related Provisions.