

## *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.

## ***2. Economic Analysis and Purpose of Disciplines on Unilateral Measures***

### **(1) ADVERSE EFFECT OF UNILATERAL MEASURES**

Implementing such retaliatory measures does not only by themselves distort trade by way of increasing tariffs, etc., but also tend to provoke retaliation from the target countries, leading to an escalation of retaliatory tariffs.

Unilateral measures are often based on domestic interests (i.e., protection of domestic industries and benefit of exporters), and then once procedures are initiated it may be extremely difficult domestically to suspend or terminate them.

Furthermore, 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 may impair the development of high-efficiency and low cost free trade system targeted by the WTO.

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.

### **(2) UNILATERAL MEASURES IS UNJUSTIFIABLE**

There are two popular rationales for unilateral measures. The first is that, if 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. The multilateral trading system is dependent on countries’ compliance with international rules, including those provided by the WTO Agreements. Disputes occurring within the system should be resolved through the dispute settlement procedures under the international rules, not by threatening or imposing unilateral measures.

## ***3. SUMMARY OF LEGAL DISCIPLINES***

First, unilateral measures are inconsistent with the spirit of the WTO, which is founded on the principle of multilateral trading system. The WTO agreements provide the following disciplines, which prohibit the use of unilateral measures concerning issues within the scope of the WTO agreements.

- **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. In the past, the United States has tried to justify its need to use unilateral measures by arguing that the GATT dispute settlement procedures were not effective but in the WTO Agreement. The time limit and the automatic nature of the procedure have been stipulated by “The Dispute Settlement Understanding (DSU)”, etc., and a prompt resolution has been guaranteed. As a result, it can no longer be justified to deviate from the dispute resolution process in the name of its inefficiency.

- **Expanded Coverage of the Agreement**

With respect to any issues within the scope of the WTO Agreements, the imposition of retaliatory measures such as unilateral tariff increases and quantitative restrictions, violates GATT 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), etc., irrespective of its procedural background. In addition, the threat of unilateral tariff increases may have an immediate impact on trade, which can be recognized as nullification and impairment of benefits under the GATT. Especially, after the enforcement of the WTO Agreements, compared with the GATT, the WTO Agreements has a wider coverage including not only trade in goods but also trade in services and intellectual property rights. In line with this, the imposition of unilateral measures has been prohibited in a broad range of fields. 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 or GATS, etc. without the WTO dispute settlement procedures.

In light of the two considerations above, we have categorized unilateral measures based on the criteria of: (1) the causes of imposition of measures (whether it is due to the target country’s violation of the WTO Agreements or impairing benefits under the WTO Agreements, 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.

In the figure 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, regarding Field (a),

violation of the Agreement by the contents of measures would also be another issue. Also, any unilateral measures taken against cases falling under field (c) would themselves constitute violation of the WTO Agreement. 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 (even in such cases, a non-violation claim may be filed if the measure has impaired benefits of the counterparty under the WTO Agreements), the scope of Field (d) has been significantly narrowed due to the expansion of scope covered under the WTO Agreements in terms of both content of disputes and content of measures. It is also expected that the country imposing a unilateral measure alleges that the measure is not in response 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 alleging 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
	Others	(c) Violation of Measure as such	(d)

#### 4. *Recent Developments and Problems*

The policy of the United States after the inauguration of the Trump administration is apparently returning to some approaches that make use of unilateral measures. Typically, there are measures under Section 301 of the Trade Act, and investigations and measures under Section 232 of the Trade Expansion Act (See Part I Chapter 2 (United States), “Unilateral Measures”, 1. Section 301 of the Trade Act of 1974 and Related Provisions <Problems under international rules>” for details). The justification for measures by the United States is almost in line with its traditional view that the dispute is outside the WTO framework, and then is not covered by the prohibition of the unilateral measures under the WTO Agreements. However, one of the recent features is that they have insisted on invoking the security exceptions (GATT Article 21), which have been rarely discussed in the WTO system (see the column for details).

These recent policies can be attributed to a variety of factors. One is the political orientation of the key personnel in the Trump administration. Also the traditional trade policy approach in the US that has allowed unilateral measures (see above) may be revived by the recent changes in economic situations. Considering the targets of the US measures, industrial policies in some developing countries

including China (subsidies lacking transparency (see column) and discriminatory intellectual property laws (see Part I, Chapter 1)), and the resulting trade distortion effect may be considered to be at the root of the problems. In addition, the WTO rules that cannot solve these problems quickly and the delays and malfunctions in dispute resolution procedures (see Chapter 17) can be one of the causes that make the United States to again jump into the unilateral measures.

However, we need to recall the historical lessons such as the shrink of world trade due to the competitive hikes in retaliatory tariffs during the 1930s, and the worldwide economic stagnation as a consequence. We must reconfirm the problems of unilateral measures and return to the long-term viewpoint to defend the free trade system based on international rules.

---

## 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-favoured-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 discriminative” 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 (DS152)***

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