

State of Multilateral Governance in Times of Increasing Unilateralism

Remarks of

Alan Wm. Wolff
Peterson Institute for International Economics (PIIE)

World Trade Institute

Bern

23 September 2022

Summary

- Unilateral measures, in exceptional cases, can be positive if they are action-forcing.

Examples:

- 1971 U.S. import surcharge
 - 1980s – Section 301 Japan
 - EU CBAM? – Time will tell
 - U.S.-China exchanges – also a question for the future
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- To curb unilateralism that is not positive, there must be binding dispute settlement acceptable to all.
 - To have binding dispute settlement, the coverage of the rules must move towards universality – covering all major issues of possible disputes – at a minimum permitting the defense and prosecution of core national interests.
 - To assure that coverage of the rules can meet this standard of universality, there must be a ready means to adopt new rules and modify existing ones. The negotiating function of the WTO must be made effective.
 - To achieve negotiated outcomes more readily, there can be no veto by some over the ability of others to improve the trading system as it applies to them.
 - To maintain an effective world trading system there must be complete transparency including through enhanced capability of the WTO Secretariat for independent intelligence gathering and analysis.
 - All aspects of the system, including dispute settlement, compliance generally, and intelligence gathering, require a rethinking and strengthening the functions of the Director-General and Secretariat.

- None of this can occur without a very substantial investment of all Members, especially the major trading partners, in the multilateral trading system.
- None of these conditions are currently met.
- All of the above conditions can be met if the major trading countries have the will to accomplish what is needed.

Discussion

There was a time when unilateralism was clear-cut. In the eyes of most, it was the use by the United States of Section 301 of the Trade Act of 1974 to impose retaliatory trade restrictions against foreign countries for what the United States government took to be their unreasonable or unjustifiable acts. The outcomes of American actions were not entirely negative.

The most noteworthy use of Section 301 measures occurred in the 1980s. It was the harder form of “*gaiatsu*”, the foreign pressure that the government of Japan needed - and to a degree welcomed - in its efforts to transform the country into a market economy that was being further integrated into the world economy. *Gaiatsu* was arguably far more effective than GATT or WTO dispute settlement in achieving this goal, and therefore useful for both Japan and the world economy. Unilateralism was more: according to GATT Director-General Arthur Dunkel, were it not for the use by the United States of Section 301, there would not have been a Uruguay Round. And, of course, if there were no Uruguay Round, there would be no WTO. The statute was used for leverage, and the end result, in a more congenial age, was positive, whether this was planned or not.

Something similar occurred in some respects with the US imposition of an import surcharge in 1971. The domestic legal authority in that case was not Section 301 but the Trading with the Enemy Act, a World War I statute (Act of Oct. 5, 1917). In 1971, the United States was in an unsustainable balance of payments difficulty. It imposed a 10% surcharge on imports. The surcharge was not a measure that was at the time permitted under the GATT rules. The result of the imposition of the surcharge for four months was not only positive changes in the international exchange rate system away from the gold standard and eventually to floating exchange rates, but also, along with other US unilateral demands, the launch of the Tokyo Round of Multilateral Trade Negotiations which delivered the first major plurilateral agreements under the GATT.

If the EU applies carbon border adjustment measures that upset their trading partners and were considered unilateral, could they lead to more than friction in international relations, but ultimately to the acceptance of the need for aggressive measures to counter global warming? That can only be determined in retrospect later on.

This is not to say that unilateral measures, which are always disruptive, are uniformly positive in effect, at least when viewed in retrospect. Wisely used, unilateral measures have had a place in systemic reform. But as the Greek physician Paracelsus told us, poisons in small quantities can be medicines, but in larger doses, they are just fatal.

At present, one can assume that unilateralism refers to, for example, the exchange of steep additional tariffs by the United States and China without any claim being made that their measures were clearly within the rules of the multilateral trading system. To assume that some good will come of the U.S.–China exchanges of increased tariffs does not seem a good bet. But there could be a modification of behavior that will allow a less fraught relationship between the two.

Observers who do not accept the validity of the US import restrictions on steel and aluminum, prior to restraint agreements, would similarly have labeled those measures as unilateral, although the US claimed WTO “cover” for the measures as being justified by its national security interests. The United States likewise would readily characterize the EU’s “safeguard” measures used as retaliation for these US measures as also being unilateral and outside the rules.

Unilateral measures can take many forms. In fact, there are at least 50 shades of grey. Here are some:

- Preemptive purchasing of vaccines or medical equipment and supplies needed to deal with the pandemic, with the result that domestic demand is served to a far greater extent than foreign needs,
- A WTO Member deciding that it will exercise a veto over an action that many others seek, whether it is the United States blocking appointments to the Appellate Body, or Members seeking to prevent the inclusion of Joint Statement Initiative agreements as a recognized part of the WTO *acquis*,
- Adoption of a product standard that is not in line with international standards and promotes national industrial policy, in a discriminatory manner,
- Imposition of a countervailing duty or an anti-dumping duty not in accordance with the WTO’s rules, and
- Various forms of trade coercion – newly emerging as a phenomenon that is extensively being resorted to. Examples include:
 - Past Russian restrictions on imports of Moldovan vegetables,
 - Japanese export restrictions on semiconductor manufacturing chemicals needed by Korea,
 - China’s trade restrictive actions vis-a-vis Australian wine or Lithuanian products generally.

To be a manageable subject, the phylum¹ of unilateral trade measures will not, for our purposes, encompass all trade measures. A rule of thumb is that the measure being imposed would generally not be considered legitimate by any five or ten WTO Ambassadors representing a broad spectrum of trade interests, irrespective of any claim made by the Member country imposing the measure of its WTO consistency. One could also extend the definition of “unilateral” to cover measures that can be condemned as reprehensible but where the WTO rules

¹ A primary category in biological taxonomy especially of animals that rank above the class and below the kingdom. In this case, the animals are trade measures.

do not yet cover the kind of conduct – for example, very large input subsidies that lead to overfishing.

Is the trading system headed for more unilateralism, about the same, or less?

The following are my initial conclusions:

- Foreign government actions considered egregious will continue to be met by sanctions. This was the case with respect to South Africa’s apartheid policies and occurred with respect to Russian incursions into Ukraine. Trade sanctions are applied where it is deemed that no other acceptable measures would be effective.

Beyond these extreme cases, the conditions for the use of unilateral measures will continue in the following circumstances:

- Either the multilateral trading system must bring about the convergence of differing economies or the system will have to manage divergence. If it fails to take either of these steps, then the two strategic competitors will resort to bilateral solutions when they can, but far more often to unilateral measures. The likelihood is that the system will be too slow to adapt and provide a multilateral or even plurilateral means to avoid the resort too often to unilateral measures.
- Strategic competition exists to a degree between more than just the United States and China. The EU has announced about half a dozen measures designed to defend against worrisome foreign competition (not just from China) under an umbrella policy of “open strategic autonomy”. The measures include dealing with foreign subsidies to incoming foreign direct investment, and increased screening of foreign direct investment for security purposes.
- Trade coercion is unlikely to disappear. It is like a habit-forming substance that is hard to resist once sampled.
 - Trade coercion is something like corruption, where it exists, it would take a very serious international response to limit its appearance in the future. The parallels between corruption and coercion are that both are habit forming and they are very difficult to regulate. Corruption was tackled in government procurement by transparency and by an OECD code of ending the tax deductibility of bribes (also the Foreign Corrupt Practices Act was a response, with penalties for paying bribes, at least if the payor were subject to US jurisdiction). Coercion is state behavior. State behavior is not readily regulated when the conduct is denied or is promulgated under the guise of a legitimate measure (such as enforcing a food safety standard).
- As long as the system does not adequately accommodate trade remedies, there will be conflict over the legitimacy of these measures. They will be considered by those on the receiving end as being unilateral decisions beyond the pale of what is internationally

acceptable. The WTO dispute settlement system, during the era when it was binding on all Members, limited the use of trade remedies. The outlet has been the increasing use of unilateral measures.

- Similarly, the lack of response to subsidies in non-market settings has created pressures for unilateral actions.
- Arbitrary foreign market closures will likely be met by future US administrations with unilateral measures. The Congressional mandate to do so has not been repealed.

What is the state of multilateral governance in the presence of increasing unilateralism?

To date, there has been no adequate response. Trade intelligence gathering of a more effective kind would be needed as a start to understanding the conditions that give rise to unilateral measures in order to contain them within agreed rules. The rules would have to extend to industrial and agricultural trade-distorting subsidies and to the other challenges of non-market behavior. The WTO would need to have binding dispute settlement again. Its Members would have to be able to negotiate agreements more readily. The WTO would need to have a functioning and effective executive branch to which more of a mandate is given to administer the trading system. These are all tall orders – but achievable, with much effort and good will.