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UNILATERAL TRADE MEASURES BY STATES

Communication from India

The following communication, dated 15 December 1998, has been received from the Permanent Mission of India.

I. BACKGROUND

Unilateral Trade Measures are normally measures taken by stronger trading nations against weaker ones with a view to influencing the latter. Though it is usually couched in language such as "fair trade" or "level-playing field", the real reasons usually have to do with either protection of the domestic industry of the stronger nation or gaining market access through pressure on the weaker trading nation. Unilateral trade measures do not make economic sense because they go fundamentally against the theory of free trade and comparative advantage. As will be shown in this paper, unilateral trade measure do not find any sanction or justification either in international law or indeed in GATT/WTO law.

II. INTERNATIONAL LAW

1. The regulation of unilateral measures in international relations is one of the important areas of international law. Most obligations created through such unilateral measures are formulated not in terms of a definite result, but seeking only compliance with a certain pattern of conduct. The issues arising out of unilateral measures need to be addressed within the framework of existing international legal principles. In general, a unilateral measure or a threat thereof could take either of the following forms : a) threat to withhold some benefit or b) to withdraw a benefit previously given in the general framework of international law. It is argued that any threat and/or initiation of a unilateral measure could be violative of Article 2 paragraph 4 of the United Nations Charter, which prohibits use of force or the threat thereof against the political independence or territorial integrity of any state or in any other way inconsistent with the purposes of United Nations. Current practice of international relations outlaws any form of threat or coercion that seriously threatens fundamental national interests and also allows states to defend those interests.

2. The issues relating to the unilateral measures are also addressed in the context of legal regimes governing so-called "self-contained regimes". As noted by the International Law Commission, the self-contained regimes are characterized by the fact that the substantive obligations they set forth are accompanied by a prescribed legal response for alleged violations of these obligations. It is further argued that the Members of such "regimes" are

obliged to invoke those legal measures as are prescribed within the regime itself and are not entitled to initiate broad counter measures which are the subject of general international law.

3. Any unilateral measure based on national law brings into sharp focus the issues concerning the extra-territorial effects of such acts. The basic principle in international law is that all national legislations are prima facie, territorial in character. State practice and doctrinal evolution in international law reflect an almost unanimous rejection of the extra territorial application of internal legislation for the purpose of creating obligations for third States. For instance, the Heads of State belonging to countries of the Permanent Mechanism for Consultations and concerted Political Action met in Asunicion in August 1997 and adopted a declaration on unilateral measures, in which they clearly consider the unilateral and extraterritorial application of national laws as actions violating the legal equality of States and the principles of respect for and dignity of national sovereignty and non-intervention in the internal affairs of other States.

III. GATT 1947

The General Agreement on Tariffs and Trade, 1947 was , as is well known, a contract between States. As the name indicated in regulated trade in goods and created a set of obligations based on commitments undertaken by countries in the area of tariffs. GATT 1947 did not sanction unilateral trade measures, it allowed for General Exceptions (Article XX). Security Exceptions (XXI) and Non-application (XXXV) for political reasons. But these exceptions had to be taken under carefully defined parameters and were subject to scrutiny in the GATT. GATT being a self-contained regime, its contracting parties are obliged to invoke only prescribed measures and to refrain from initiating broad counter measures, which may be the subject of general international law. The commitments undertaken under GATT are in the form of Schedules of Concessions (Article II) and their security and predictability is assured through Articles I (MFM) and III (National Treatment). Unilateral trade measures would seriously erode the security and predictability of the commitments undertaken by countries with each other. Clearly, this was not the intention of the drafters of GATT, nor does it meet the chief objectives of GATT as it evolved till the conclusion of the Uruguay Round.

IV. WTO

1. The Uruguay Round was launched with the explicit objective of strengthening an open, equitable and non-discriminatory multilateral trading system. Besides, the dispute settlement mechanism was to be strengthened and made automatically binding on Parties. Both these features were specifically aimed at reducing, if not eliminating altogether, the threat of unilateral trade measures. After all, for the weaker countries there would be the multilateral trading system which would offer them security and assurance: for the stronger countries, a strengthened dispute settlement mechanism would guarantee that rulings and findings by Panels/Appellate Body would be implemented, hence obviating the need for unilateral trade measures.

2. Thus, in the preamble to the WTO Agreement the last para stipulates-"Determined to preserve the basic principles and to further the objectives underlying this multilateral trading system". More significantly, in Article XVI para 4 it is enjoined on each Member to ensure the conformity of its laws, regulations and administrative procedures with its obligations as provided in the annexed Agreements. While negotiating this Article in the Legal Drafting Group, it was the clear understanding of the negotiators that laws, which authorize unilateral trade measures with extra-territorial jurisdiction, are clearly inconsistent with the provisions of the WTO Agreement. So, those countries, which maintain national laws authorising unilateral trade measures, are in clear violation of their obligations under the WTO Agreement. In fact, when the strengthened dispute settlement mechanism was sought to be "sold" to developing countries, the argument was used that this was a quid pro quo so that their stronger trading partners would henceforth deal with all their legal claims within the WTO and not resort to unilateral trade measures. Indeed, para 1 of Article 23 clearly provides that when Members seek the redress of a violation of obligations or other nullification or impairment of benefits under the covered agreements or an impediment to the attainment of any objective of the covered agreement, they shall have recourse to, and abide by, the rules and procedures of this Understanding.

V. ILLEGALITY OF UNILATERAL TRADE MEASURES

1. Unilateral trade measures, clearly, are legally indefensible. In the case of unilateral measures authorised through domestic laws, negotiation is set entirely by the party taking measures, based on which foreign practices it considers to be "unfair". An what is an "unfair" practice is essentially a subjective and an arbitrary judgement. Furthermore, negotiations are designed to unilaterally force changes in the respondent nations' policies. Finally, negotiations proceed under the threat of denial of otherwise available trade benefits and restrictions of market access for products or services of the foreign nation should the desired changes not be accepted.

2. The above is in clear violation of the Dispute Settlement Mechanism which first asks Members to try a mutually agreed solution before resorting to the Panel/Appellate Body.

3. The entry into force of the WTO and the operation of the strengthened dispute settlement mechanism does not seem to have ended the era of resort to unilateral trade measures. The multilateral trading system, therefore, appears to be under permanent threat from the actions of some Members who resort to unilateral trade measures. Very recently, the United States instituted measures prohibiting imports of shrimps from some countries if they were not caught in vessels using Turtle Excluder Devices. The Panel and the Appellate Body ruled that the measure was illegal under WTO law and recommended that the US bring the measure into conformity with its obligations under the WTO Agreement. The Panel Report also said that if GATT were interpreted to permit countries to deviate from their obligations by taking trade measures to implement policies, including conservation policies, within their own jurisdiction, the basic objectives of the General Agreement would be maintained. If, however, GATT were interpreted to permit countries to take trade measures so as to force other countries to change their policies within their jurisdiction, the balance of rights and obligations among member countries, in particular the right of access to markets would be seriously impaired. If this were carried forward to its logical conclusion, the GATT/WTO could no longer serve as a multilateral framework for trade among contracting parties. That would then be the end of the multilateral trading system, as we know it. It is obvious that the viability of the multilateral trading system depends on parties to it avoiding recourse to unilateral action damaging to the WTO dispute settlement system which is at the heart of this trading system.

VI. FUTURE

1. The above case referred to the controversial relationship between trade and environment. But attempts are also on to base unilateral trade measures on other issues. Whatever the subject matter, the essential objective is the same; use trading advantage and market power to unjustly change an other country's policies/behaviour. For example, there is an attempt to give concessions under their GSP scheme subject to recipient governments committing to comply with certain environmental/labour standard norms. This is in violation of the "enabling clause" of GATT relating to GSP which clearly sets out that GSP must be non-discriminatory, non-reciprocal and generalised. But, by making the GSP selective in its application as mentioned above, it will be rendered both discriminatory and reciprocal. This falls foul of GATT.

2. Despite the establishment of the WTO and the operation of the strengthened dispute settlement mechanism under it, the chances of strong trade powers resorting to unilateral measures cannot be ruled out. Indeed, recent examples indicate that these may increase in the future so as to put enormous strain on the multilateral trading system. The lack of a strong and unambiguous rejection of unilateral trade measures is also leaving scope for injudicious and 'activist' interpretation of rules. Already, reservations of some members have been placed on record in the Dispute Settlement Body regarding the Panel/Appellate Body process usurping the rights of Members by the so-called 'evolutionary interpretation' of rules. This trend may undo the delicate balance between rights and obligations being constantly negotiated in the WTO. Hence, the WTO community needs to treat the issue of unilateral measures with the sense of urgency it deserves.

3. Unilateral trade measures, as has been shown by this paper, make little economic sense since they go against the fundamental tenet of any multilateral trading system – i.e. theory of comparative advantage and of trade liberalization. More significantly, they are fundamentally illegal under the WTO Agreement and the Dispute Settlement Understanding, which entered into force on 1st January 1995. The question therefore is, if unilateral trade measures are both violative of international law and of WTO law, then should they not be banned forthwith. If so, there would also be no justification for national laws authorizing such action in the first place. Full and faithful implementation of WTO Agreement would require that, not only must WTO Members undertake never to resort to unilateral trade measures, but also they must take immediate steps to modify national legislation that implicitly or explicitly authorizes such action.

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