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The Limits of Unilateralism from a European Perspective

Bernhard Jansen*

Abstract

'Unilateralism' is a sensitive issue in Europe. However, it is ill-defined and a serious effort is required to define this term of art. It needs to be contrasted to terms such as 'multilateralism', 'bilateralism', and 'international cooperation'. Moreover, the term 'unilateralism' is closely tied to the territorial limitations of state jurisdiction. This article focuses on the limits of unilateralism without denying that there may be exceptional instances where unilateral action in the above sense cannot be avoided. One of the most problematic categories of state action in terms of 'unilateralism' and 'extra-territoriality' appears to be that where a state (ab)uses a trade measure in order to exercise coercion or pressure on another state or its citizens with the purpose of 'convincing' that state or its citizens to take action outside the territorial jurisdiction of the former state. The European approach to unilateralism is characterized by extreme prudence and limited flexibility with regard to attempts by individual states to usurp the role of 'world policeman'.

There can be no doubt that the issue of 'unilateralism' has recently gained increasing attention in international relations, specifically though not exclusively between the United States and Europe. A symposium bringing together legal experts from the United States and Europe is thus a welcome opportunity to set the record straight on a number of concepts and potential misunderstandings that have led to tensions and irritations which we would hope to be able to reduce in the future. The multiple contact points between Europe and the United States, for instance in the context of the New Transatlantic Agenda and the Transatlantic Economic Partnership, provide ample opportunity to discuss and, hopefully, prevent irritations about each other's policy and concepts on a broad basis, but must be accompanied and stimulated by a thorough debate between experts in international law and international relations.

When talking about 'unilateralism', it is crucial to understand clearly what this is all about. I am aware that there is no internationally agreed definition of this somewhat provocative term, and I will thus attempt to clarify the debate in suggesting

* The author is a Legal Adviser in the Legal Service of the European Commission, Rue de la Loi 200, B-1049 Brussels. This contribution is written in his personal capacity and does not in any way represent the position of the European Commission.

some elements that could help to develop a clearer definition of 'unilateralism'. In my view, the term 'unilateralism' must be understood for present purposes by contrasting it with terms such as 'multilateralism', 'bilateralism', and 'international cooperation'. Since I do not expect anybody here or in Europe to contest that states are generally empowered to legislate and to enforce their legislation 'unilaterally' within their own territorial jurisdiction, the term 'unilateralism' is only meaningful where it relates to situations which are not clearly within the territorial jurisdiction of the state which takes legislative or enforcement action. Thus, the term 'unilateralism' is closely tied to the territorial limitations of state jurisdiction, or — to express it in a different way — the term 'unilateralism' can be associated with the term 'extra-territoriality'. Since states are not normally in a position to enforce their legislation outside their territorial jurisdiction, except by military action, 'unilateralism' and 'extra-territoriality' are also closely related to international 'sanctions'.

This discussion already shows that the area to be covered is vast, and I will not even attempt to look into the subject in detail in this short comment. Since I am a practitioner dealing mainly with the law of the World Trade Organization, I will address the subject matter before us from that angle. The relation between international trade law and 'unilateralism' finds its basis specifically in trade sanctions applied by individual states when they enforce legislation on other states or on private persons or corporations that are not within their jurisdiction. In practice, what we are talking about here has materialized in disputes concerning the application of the US Cuban Liberty and Solidarity Act of 1998, better known as the Helms/Burton Act. Other relevant cases include the dispute submitted to the WTO by India, Malaysia, Pakistan and Thailand on the US measures concerning the import of shrimp and shrimp products harvested in a manner endangering the survival of sea turtles. In Europe, we would tend not to include the *Hormones* dispute between the US and Europe, the *Salmon* dispute between Canada and Australia and the dispute between Brazil, Venezuela and the US on reformulated and conventional gasoline in the basket of 'unilateral' measures, because in these cases the measures at issue were taken in order to protect the population, the animals or the environment from health hazards or pollution that could occur *within* the territorial jurisdiction of the WTO member whose measure was contested.

In an article that I wrote together with my colleague Maurits Lugard, recently published in the *Journal of International Economic Law*,¹ we have attempted to develop several categories of measures that erect barriers to international trade for non-economic reasons. The most problematic category among these measures under the aspect of 'unilateralism' and 'extra-territoriality' appears to be the one where a state uses a trade measure in order to exercise coercion or pressure on another state or its citizens with the purpose of 'convincing' that state or its citizens to take action outside the jurisdiction of the former state. An example falling in that category is, in the European view, the Helms/Burton legislation, which exercises pressure on foreign citizens and corporations to act in a manner that would negatively affect their trade

¹ *JIEL* (1999) 530.

relations with Cuba. It is not possible to go into the complex details of that case in this brief comment, particularly since the case remains at present partly unresolved. However, it is clear that the mechanism put in place by the Helms/Burton legislation basically means that European and other foreign trade operators must choose either to refrain from trading with Cuba or to refrain from trading with the United States. In Europe, this is generally perceived as an unacceptable US interference with the trade relations between Europe and a third state, namely Cuba.

A lesser degree of 'unilateralism', but a measure still in conflict with WTO law, can be seen in the *Shrimp/Turtles* dispute. In this case, the sea turtles that the US legislation intended to protect are listed in CITES as 'endangered species'. Moreover, these sea turtles are a highly migratory species and are present in the territorial waters of the US as well as those of the complaining WTO members. They are internationally recognized as being under threat of extinction, and an internationally recognized conservation method (import prohibition for the sea turtles themselves) was agreed under CITES. The argument that the measure at issue is 'unilateral' in character finds its basis thus exclusively in the circumstance that the United States had imposed on imported shrimp caught outside its jurisdiction harvesting methods protecting sea turtles that had not been internationally agreed. Not least for reasons of efficiency of turtle protection and in order to protect international relations from unilaterally imposed measures, I believe that the Appellate Body was right to decide that under the circumstances of the case the US was not entitled to enforce the measures *vis-à-vis* the complaining WTO members. However, this assessment could change if the complaining WTO members were obstinately refusing to enter into an international agreement on a conservation measure that could in the final analysis be the only way to protect the sea turtles from extinction. In such a situation, it is conceivable, also from a European perspective, that individual states are entitled to take the necessary measures in order to protect the 'global commons' from irreversible damage.

I am intrigued by the article by Robert Howse and Don Regan, which leaves me with a lot of questions and doubts. Since I am a practitioner, I will illustrate my doubts by referring to some examples where in my view the process/product distinction is the decisive factor for a correct legal assessment.

If the product/process distinction were abandoned, how would a Panel adjudicate the *Belgian Family Allowances* case,² where Belgium taxed imported products from certain origins more heavily than domestic and other imported products because the products subject to the additional tax were imported from countries with a less generous family allowance scheme than Belgium had put in place?

Why is it not justified to draw a distinction between an import ban on cars that do not respect a statutory maximum pollution level imposed by the importing country and an import ban on cars that do respect this statutory maximum pollution level but are produced in a car factory that pollutes more than would be permissible for a car factory established in the importing country? It appears quite obvious to me that a state's concern to protect the environment within its territory, for instance by not

² *Basic Instruments and Selected Documents (BISD)*, First Supplement, at 59–62.

allowing the importation of cars that do not meet its statutory maximum pollution level, is quite different in nature from a state's concern that the production process in foreign car factories should not be more polluting than the level permitted for car factories established in its own territory. A state is always justified in taking measures aiming at the protection of its own territory and its own population. By contrast, a state is not similarly justified in requiring imported cars to be produced in factories that meet the statutory standards for car factories established in the importing state. It is quite obvious that there is a serious danger of conflict of jurisdiction with the exporting state and other importing states in the latter situation, which could put the car manufacturer into double jeopardy if the car manufacturing standards applied by the country of establishment and by the countries to which the cars are shipped are incompatible. It is one thing to have different production lines for cars to be exported to different export markets. It is a different thing to run a car factory in such a way as to fulfil simultaneously the requirements imposed on car manufacturers in the country of establishment and all the export markets. This might prove to be impossible if the standards do not use similar benchmarks.

To develop an internationally acceptable rule with regard to extra-territoriality, I believe that it is necessary to anticipate what would happen if other states took the action that is considered permissible under international law in one state. Would it be justified, for example, for country A to ban imports of, say, citrus fruit from country B because that country has not adopted legislation protecting sea turtles from shrimp trawling in the same way as country A? What if citrus fruit is the only product exported from country B to country A, while all the 'turtle-unfriendly' shrimp is sent to country C where it is consumed? Could country A justify the import ban on citrus fruit from country B because both countries are in competition for shrimp on the market of country C, which does not distinguish between 'turtle-friendly' and 'turtle-unfriendly' shrimp? The answer to all these questions under the presently prevailing reading of the GATT is undoubtedly no, but the logic of Howse and Regan would require that that should change. I believe that the link between an import ban on shrimp harvested with a 'turtle-unfriendly' technology and turtle protection is by itself not sufficiently strong as to suggest that a clear distinction between the case of an import ban on shrimp and an import ban on citrus fruit under the circumstances discussed above can be drawn, since the justification in both cases is turtle protection and the competitive relationship between shrimp harvested by shrimp trawlers of country A and of country B. An import ban on citrus fruit would however most evidently be nothing else than a sanction applied to imports from country A for reasons completely unrelated to the trade in that product.

There may, however, be situations where it would be justified to take trade measures to pursue non-economic objectives, even in the absence of any evident attachment to the territorial jurisdiction of the importing state. Suppose that a rare or endangered species is not migratory and is confined to the territory of a single state. Suppose, moreover, that this state takes action which threatens the survival of the rare or endangered species and that the state is not prepared to negotiate with the international community on something which it considers to be an 'internal' matter

under its exclusive jurisdiction. While such an attitude is presumably in line with traditional public international law concepts on territoriality and jurisdiction, it cannot be excluded that public international law evolves in such a way as to accept universal jurisdiction in certain circumstances which remain to be more clearly defined.

As is illustrated in more detail in the Howse and Regan article in this issue, states are allowed in some limited circumstances under existing public international law to prosecute and punish criminal offences committed outside their own jurisdiction. Examples include piracy, slave trade, hijacking of aircraft, genocide, war crimes and certain acts of terrorism. With regard to conservation measures, the relevant questions would be whether there is an internationally agreed conservation method, whether there is an imminent threat of extinction or severe and irreversible damage to a rare or endangered species, and the importance of that species for the universal 'genetic pool'. If it can be shown by applying these criteria, or other criteria which environmental experts may be able to develop, that the damage to, or the extinction of, a rare or endangered species has effects beyond the territory of the state in which that species lives, we are prepared in Europe as well to consider this as a matter of international concern which might justify action beyond the boundaries of a classic approach to the limits imposed on states by the territoriality principle. However, as this example shows, we are only prepared to consider a more flexible interpretation of the territoriality principle in situations where international cooperation and widely accepted international agreements cannot be reached sufficiently in time in order to achieve an internationally recognized purpose.

In my view, the European approach is thus characterized by extreme prudence and limited flexibility with regard to attempts by individual states to usurp the role of the 'world policeman'.