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Guest Post: The Unilateralization of Trade Governance: Constructive, Reconstructive, and Deconstructive Unilateralism

This is a guest post by law professor Geraldo Vidigal. A revised version of this post will appear in the next issue of Legal Issues of Economic Integration.

1. **Introduction**

The year 2022 was a paradoxical one for global trade governance. On the one hand, Members of the World Trade Organization (WTO) defied expectations and proved that the organization remains a forum for meaningful negotiations and rule-making. The *Fisheries Subsidies Agreement*, adopted in June 2022, is one of the rare WTO Agreements adopted since the creation of the organization in 1995, and the first-ever WTO Agreement whose commitments aim not at furthering reciprocal trade interests but at promoting a common objective of the Membership: the end of governmental subsidization of destructive and self-defeating overfishing. Other initiatives, though less spectacular or more controversial, have also bore fruit, including the Joint Initiative on Services, or are slowly building towards it, such as the Trade and Environmental Sustainability Structured Discussions.

These instances of agreement are overshadowed by the normalization of unilateral action as a tool, used openly and in pursuit of any of a range of policy objectives, by WTO Members with significant market power to reshape their trade relations. As regards the United States (US), hopes that unilateralism would be a short-lived policy were shattered when the Biden administration continued virtually all of the previous administration's policies on trade, including the marginalization of the WTO as a forum for US trade relations and the crippling of its dispute settlement system. In 2022, the European Union (EU) also concluded that unilateral trade measures are the most effective way available to pursue its objectives internationally, not only to further economic interests but also to promote so-called 'European values': halting deforestation, preventing climate change, safeguarding animal welfare and requiring compliance with labour standards – all of it on a global scale.

Assessing this unilateralization of trade policy requires going beyond the form of these measures and considering their different objectives and consequences. A certain view of the multilateral trading system would call for equal rejection of all unilateral measures. Grounds for this may be economic (they may be captured by protectionist interests), political (they produce trade wars and heighten the risk of conflagration), or simply legal (they fall outside the legal framework for global trade and amount to unilateral renegotiations of the WTO bargain). Putting all unilateral measures in the same category, however, obscures important differences between measures, with impact for their effect on the multilateral trading system. They are more profitably understood as falling within three different categories, which I will call constructive, reconstructive, and deconstructive.

2. **Constructive Unilateralism: De-Institutionalized Rule Enforceent**

Alan Sykes crafted the term 'constructive unilateralism' to refer to the United States's resort to unilateral measures, in the pre-WTO era, in response to what the US saw as others states' violations of their trade commitments to the US. The argument, as Sykes put it, was that '[w]hen concern for reputation is not enough to induce nations to honor their commitments and when trade agreements do not provide effective third-party dispute resolution with the power to coerce compliance, a powerful argument can be made for unilateral or "self-help" measures to penalize a breach of promise'. The logic is that of countermeasures in general international law: in the absence of an adjudicator with the ability to establish the existence of a violation, proportionate self-help measures are a means for states to induce compliance by other states with their international obligations.

The argument for constructive unilateralism has re-emerged since, in 2019, the demise of the Appellate Body made it possible for WTO Members to prevent final adjudication of their measures through dispute settlement. To secure their ability to respond to violations, WTO Members such as the EU and Brazil have amended their domestic trade laws to allow retaliation on the basis of a condemnatory panel report appealed into the void, coupled with a refusal by the condemned party to allow final resolution of the dispute. This type of unilateral measure, by which members take the law in their own hands as a second-best alternative in the absence of effective adjudication, may, if used properly and proportionately, ensure a degree of enforcement of substantive WTO rights and obligations that the WTO as an institution can no longer provide. Additionally, the prospect of unilateral responses creates incentives for agreement to a form of institutionalized dispute settlement – whether by accepting the results of the WTO panel process, by resorting to the semi-institutionalized "appeal arbitration" under the Multi-Party Interim Agreement (MPIA), or by resorting to other forms of arbitration or appeal arbitration.

Under an isolated reading of the WTO Dispute Settlement Understandings (DSU), unilateral responses are unlawful, even when based on a panel report appealed into the void. DSU Article 23 prohibits WTO Members from acting upon their own view of the WTO-inconsistency of a measure and requires retaliation to be grounded on an authorization from the Dispute Settlement Body (DSB), which a defendant can now prevent from emerging by appealing a condemnatory panel report into the void.

However, a broader reading of the WTO system in light of public international law suggests that the DSU only prohibits unilateral response *because* it provides the possibility of compulsory adjudication. A claimant state, acting in good faith and bringing its claims before an adjudicatory system, faced with a defendant that blocks its operation, would be permitted under general international law to resort to countermeasures to induce that other Member either to comply with its obligations or to agree to a means of settling their dispute. In other words, constructive unilateralism employs unilateral measures as a means to preserve the overall normative framework of the WTO; if used in good faith, it can further rather than undermine the objectives of the multilateral trading system.

3. **Reconstructive Unilateralism: Reshaping the Global Market**

A second form of unilateralism aims to reconstruct the rules of international trade, modifying through unilateral measures the features of the global market while adhering to the principles of the WTO: security and predictability of trade relations and non-discrimination in the application of trade policy.

Present-day reconstructive unilateralism is characterized largely by the unilateral imposition, by importing states, of requirements relating to the mode of production of imported products. The reconstructive purpose is evident in a series of regulations enacted by or proposed, chiefly by the EU, over the past year. In the second half of 2022 alone, the EU has approved the Deforestation Regulation, the Carbon Border Adjustment Measures (CBAM) Regulation, the Foreign Subsidies Regulation, and the Forced Labour Regulation. In the US, the adopted the Uyghur Forced Labor Prevention Act seeks to prevent imports of all products 'mined, produced, or manufactured wholly or in part in the Xinjiang Uyghur Autonomous Region of China' – a level of targeting that calls into question its reconstructive rather than deconstructive character – while the proposed Fostering Overseas Rule of law and Environmentally Sound Trade (FOREST) Act would prohibit 'import[ation of] any product made wholly or in part of a covered commodity produced from land that undergoes illegal deforestation on or after the date of the enactment of the FOREST Act'.

Reconstructive unilateralism is not necessarily WTO-inconsistent. The EU in particular explicitly relies, in the text of reconstructive measures, on the broad interpretation, developed largely by the WTO Appellate Body, of the right of WTO Members to deviate from their WTO commitments to pursue legitimate objectives. A long line of WTO rulings, the most important of which remains *US – Shrimp*, has established the principle that WTO law does not prohibit Members from adopting trade restrictions, or from distinguishing between otherwise similar products, to pursue legitimate objectives, insofar as the measures and distinctions adopted have an objective basis and demonstrably fulfil a legitimate non-trade objective. This applies even to restrictions and distinctions concerning production processes that take place abroad, leaving no trace on the product as imported. The key limitations imposed by WTO law are (i) to require evidence of the contribution of the restriction to its stated objective and (ii) to require evidence of the non-discriminatory application of the measure to other WTO Members, unless justified by the objective of the measure.

This is not to say that reconstructive unilateral measures are uncontroversial. From the perspective of Members affected by these measures, they amount to unilateral renegotiations of the rights and obligations originally negotiated and agreed in a treaty. And, while formally non-discriminatory, these measures are usually adopted by large, developed Global North

economies, and usually require most drastic changes in production in less developed economies in the Global South. As a matter of diplomacy, the legal permissibility of reconstructive unilateralism only partially mitigates the impression, among producers and governmental representatives in developing countries, that it is a means for the most powerful WTO Members to make unilateral changes to the economic bargain they struck in consenting to WTO rules. Regardless of its legal merit, the broad interpretation of the right to regulate allows mostly developed countries to circumvent the requirement to reach agreement with developing countries to modify the WTO bargain. It allows developed countries to impose their chosen objectives on developing countries, as well as to specify the means to attain them – unburdening the former from the need to offset the economic costs for producers in their less developed trade partners trough corresponding bonuses, in the form of technical or financial assistance or alternative forms of market access.

The challenge posed by reconstructive unilateralism is thus not its legal permissibility or the prospect that these measures might be condemned in adjudication. What reconstructive unilateralism achieves is the circumvention of the negotiated WTO bargain, especially that between developed and developing countries. This is made possible by interpreting 'general exceptions' in the WTO's General Agreement on Tariffs and Trade (GATT), and similar provisions in other trade agreements, as general authorizations to unilaterally impose on other (largely, developing) countries production standards that reflect values and priorities that have been developed in, are promoted by, and correspond to the developmental level of, consumers, producers, and the civil society in developed countries.

One may agree on the substance with many and even all of the objectives pursued by the reconstructive unilateral measures in 2022, which generally align with, and draw legitimacy from, the Sustainable Development Goals (SDGs) adopted unanimously by the United Nations. Rationally speaking, some of the objectives they pursue, in particular decarbonization of production, may be indispensable for the subsistence of a planet inhabitable for most humans. And, in the absence of a world legislature capable of providing collective legitimacy to such measures, unilateral reconstruction of the global market, limited by the requirement of genuine contribution to a legitimate objective and on condition of non-discrimination among Members, may be the second-best alternative at hand – meaning the first-best under real-world conditions. These reflections notwithstanding, the North-South dynamics that inevitably lurk behind the unilateral imposition of production process requirements remain an uncomfortable element in the reconstructive project.

4. **Deconstructive Unilateralism: Geoeconomic Trade Measures**

Constructive unilateralism aims to preserve trade rules and reconstructive unilateralism aims to make adjustments to the normative underpinnings of global trade. Neither harms the core principles of the multilateral trading system, and both arguably further either these very principles (constructive unilateralism) or the broader objectives of the international legal system as a whole (reconstructive unilateralism). Deconstructive unilateralism, by contrast, ostensibly rejects the premise of non-discriminatory rules for international trade relations. Deconstructive unilateralism is the attempt to replace rules-based international trade with trade relations guided by Members' momentary perception of their immediate interest.

Deconstrucive unilateralism features measures of two types. The first serve the purpose of pursuing economic dominance. These measures can be termed 'protectionist', when they operate in the domestic market and favour domestic over imported production, or, more broadly, 'self-preferential', since they can also operate on the global market to favour a Member's exports over the production of other Members. A potential example, on the border between reconstructive and deconstructive unilateralism, is the EU's Foreign Subsidies Regulation, which allows it to block investment into the EU that it deems to have been subsidized by third countries.

These ordinary self-preferential deconstructive measures do not pose a particular challenge for the international trading system. They are precisely the type of measure that the WTO system was developed to address. They can be brought before trade adjudicators, who can then provide a ruling on their lawfulness, leading either to a modification of the measures or to a renegotiation intended to make the specific measures tolerable to other Members. Concerns with self-preferential measures should become acute only if they amount to a full-blown rejection of the WTO system, with a structure and scale suggesting that, despite any lip service paid to the multilateral trading system, a Member has no intention of seeking to justify its measures on the basis of a credible legitimate objective or to apply them without discriminating against other WTO Members. Even large-scale self-preferential governmental programmes have been dealt with relatively successfully by the WTO system.

The real challenge comes from what one may call "geoeconomic measures". These are measures adopted to pursue stated geopolitical or strategic goals, with no grounding on a shared objective and no attempt at a credible, universalizable

justification. These measures, targeting specific trade relations or seeking to reshape particular industries, simply do not lend themselves to non-discriminatory application: their entire purpose is to discriminate against certain other WTO Members, to favour the adopting Member's industry or that of its political allies (so-called 'reshoring' and 'friendshoring'), to weaken the targeted Member's economy or remove it from a specific production chain, or simply to target a portion of its industry in response to that Member's unwelcome behaviour in an unrelated area of international relations.

Unilateral measures in pursuit of geoeconomic goals have recently become a staple of great power trade policy. While China and Russia have often adopted such measures claiming that they are either part of regular trade administration or a response to measures adopted by others, the US and the EU have openly empowered themselves to adopt, and adopted, measures with deconstructive effects, bypassing multilateral institutions judged too slow or too ineffective to deal with geopolitical challenges. The various measures the US adopted to achieve decoupling from China, from the 2018 'trade wars' extra tariffs to the export controls on microprocessors, would fall under this category, as would the variety of sanctions adopted by the US and EU following Russia's full-scale invasion of Ukraine in 2022. Although purportedly defensive in character, the European Commission's proposed Anti-Coercion Instrument, empowers the EU to apply unspecified 'Union response measures' whenever it determines that conduct by another state 'interferes in the legitimate sovereign choices of the Union or a Member State', sanctioning third countries and/or designated 'legal or natural persons'. The argument that some such measures are necessary to respond to forceful, sometimes unwritten similar measures taken by other Members, does little to alleviate the blow that the multiplication of geoeconomic measures and counter-measures deals to the ideas of a multilateral trading system characterized by rules-based interactions and institutionalized dispute resolution.

It is possible for an adjudicator to set aside the geoeconomic aspect of deconstructive measures and proceed to a traditional application of WTO law. The position of WTO panels so far has been precisely to disregard the deconstructive element, i.e. the explicit or implicit claim that certain measures are not bound by WTO rules, and to apply to them the legal principles, techniques and procedures developed to address 'regular' self-preferential, trade-restrictive or discriminatory measures. Panels consider the textual grounds under which the measure could be justified, the contribution the measure makes to its stated objective, and, where applicable, the requirement of non-discriminatory application of the measure.

This may indeed the best response that a legal apparatus can offer to an attempt to suspend its applicability in certain circumstances, or to matters considered to be too vital – or 'political' – to be usefully addressed through legal arguments and procedures. At the same time, political decision-makers who believe themselves to be in the midst of high-stakes geopolitical confrontation are likely to grow ever more impatient at the prospect of having their views and motivations disregarded by what they see as a legally-minded bureaucracy, perpetually attached to terminological analysis detached from the surrounding political context.

Indeed, perhaps the acuteness of deconstructive unilateralism lies not in the objective features of the measures adopted, but in Members' subjective attitude towards the significance, for their decision-making process, of the rules and institutions of the multilateral trading system. From this perspective, the strongest assertion of deconstructive unilateralism was the reaction by the United States to the December 2022 panel reports in *US – Steel and Aluminium Products* and *US – Origin Marking Requirement (Hong Kong, China)*. Both panels assessed the US's measures and found that they were not justified under the Security Exceptions of GATT Article XXI – rejecting, as part of their reasoning, the US argument that WTO panels cannot review any measures that a Member declares that 'it considers necessary for the protection of its essential security interests'.

The US not only appealed these reports into the void but openly rejected the panels' findings, including their very entitlement to review measures once a Member invokes a security exception. In statements that followed both reports, the United States Trade Representative (USTR) affirmed that the US had 'held the clear and unequivocal position, for over 70 years, that issues of national security cannot be reviewed in WTO dispute settlement, and the WTO has no authority to second-guess the ability of a WTO Member to respond to what it considers a threat to its security' – and stated that it 'd[id] not intend to remove' the challenged measures as a result of the reports, implying that this would remain true also for any other adjudicatory reports or awards. If generalized, this statement would enable every WTO Member and every party to a trade agreement to adopt any measures it deems useful at any point, and prevent review of these measures by

adjudicators, by unilaterally asserting that the measures involve issues of national security and are thus justified under the security exceptions.

The deconstructive character of this stance lies not so much in how it affects relations between WTO Members and the WTO as an institution as in how it affects relations between WTO Members. If, due to the prospect of Article XXI being invoked, adjudication becomes unavailable in practice as a means to settle trade disputes, this does not deprive other Members of all response to what they perceive as illegitimate trade restrictions. It merely removes the multilateral avenue for challenging a measure. Deconstructive unilateralism thus leaves unilateral action – outside of institutionalized dispute settlement – as the sole means available for an aggrieved Member or treaty party to seek to enforce its rights.

5. **Conclusion: Unilateralization and the Legal System**

Unilateral trade measures are increasingly employed, especially by the largest WTO Members, to pursue, individually or jointly, objectives of various types: domestic economic objectives, normative objectives, societal objectives, and geopolitical objectives. While measures that pursue economic objectives raise issues familiar to trade lawyers, the coexistence of economic objectives with normative, societal and geopolitical objectives challenges important, and in some cases fundamental, assumptions of the global trade regime.

Constructive unilateral measures, pursuing normative objectives, can be integrated within the rules-based international trading system. Although questions of jurisdiction and applicable law will inevitably arise if trade adjudicators are asked to consider these measures, overall the requirements of a credible legal claim (backed up, for example, by a report appealed into the void) and of proportionality of response will allow the international trading system to coexist, even in less-than-ideal form, with constructive unilateralism. As long as the WTO system's legal apparatus remains incomplete, a legal system backed up by the threat of coercion in case of non-compliance is in principle more credible than one without any such threat.

Reconstructive measures, which seek to reshape the global market to meet determinable objectives, can also be integrated into the system. As long as they pursue objectives on which there is a high degree of global consensus (even if only in discourse), these measures can be integrated into trade law through the various provisions that protect the right of parties to trade agreements to adopt regulations for legitimate purposes. One may demand that these provisions remain scrutinizable, to make sure their application is non-discriminatory, and perhaps takes into consideration the different relative compliance costs and compliance times, especially for developing countries. At the same time, the likely outcome of contestation over these provisions is not the elimination of the reconstructive measures but a negotiation on their permissible scope and acceptable level, as well as on different members' access to compliance verification and legitimate exemptions.

It is more difficult to see how a rules-based trade order can coexist with deconstructive, or geoeconomic, unilateral measures. It was long thought that these measures were better off never taken to the WTO or other adjudicator for legal assessment, given, on the one hand, their patent and even avowed inconsistency with regular WTO tenets, and on the other hand the vital importance that states attach to geopolitical competition and its irreducibility to legal principles. The past few years have shown that the WTO is at least capable of developing criteria to assess, with a relatively high degree of deference, whether invocations of the security exception are warranted and justify the particular trade-restrictive or discriminatory measures taken by a Member.

In theory, state sovereignty can operate as an escape valve of last resort, permitting the adoption of legally impermissible measures on the basis of self-judged political necessity. This would pose little problem if WTO rules were regarded as a mere complex contract, where Members can freely withdraw certain concessions to preserve their perceived interests while accepting that other Members will withdraw their own concessions towards them. This is not, however, how Members have been treating WTO rules. Rather, at every opportunity Members demand substantive compliance with WTO law, and treat non-compliance less as a contract breach than as an administrative failure to be remedied by the Member in breach. The success of this attitude in addressing commercial disputes coexists with some long-standing challenges in cases, most emblematically *EC – Hormones*, in which Members deem that economic aspects of a measure are secondary to their ultimate objective and seek to renegotiate the relevant matter with their trade partners.

The multiplication of unilateral trade measures, together with the plurality of purposes these measures are asked to fulfil, marks a new phase for the multilateral trading system. Although the WTO as an institution is likely not going anywhere, it will have to continue to operate in a context far more hostile to legal assessments than that which prevailed for its first 20

years, especially with respect to deconstructive measures. It is possible that the best the WTO can offer at this stage is continuing to do what it does best: providing in-depth enquiries into Members' policies, technical assessments of their trade impacts, and a forum for debate and justification. At the same time, continued activity does not equal continued relevance. Without a Member-driven redefinition of the basic terms of the WTO bargain, merely continuing to perform bureaucratic tasks is likely to prove insufficient to allow the organization to recover its centrality to global trade governance.

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