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Non-Tariff Barriers to Trade

by Liesel Quambusch, Köln *

Over the past three decades the non-tariff barriers to trade have grown in importance inversely to the import duties which have been lowered under GATT auspices. In the current GATT negotiations — the Tokyo round in which the contracting parties have been at work since the autumn of 1973 to solve the acute trade-political problems — non-tariff trade barriers are for the first time playing a major role.

Non-tariff barriers to trade are not a new phenomenon of our time — new is only the term. State authorities have been attempting to intervene in exchange relations by protectionist means ever since they embarked on a modern trade policy involving deliberate intervention in the economic process. The term "non-tariff trade barriers" made its first appearance in the early sixties. It has been used increasingly since in economic literature and in the press so that it is by now a common technical term.

It is not always clear, especially outside the English-speaking countries, to what particular trade obstacles the appellation "non-tariff" should be applied. The English-speaking reader understands at once that the term comprises all trade barriers other than customs tariffs. For him the only question is: What is a trade barrier? To give just one example: Are the different languages of two countries trading with one another — certainly a natural barrier *par excellence* — to be regarded as non-tariff barriers to trade in the meaning of the term? In the present article the term "trade barriers" will be used for any act of intervention in the economic process by which foreigners are consciously discriminated against.¹

Definitions

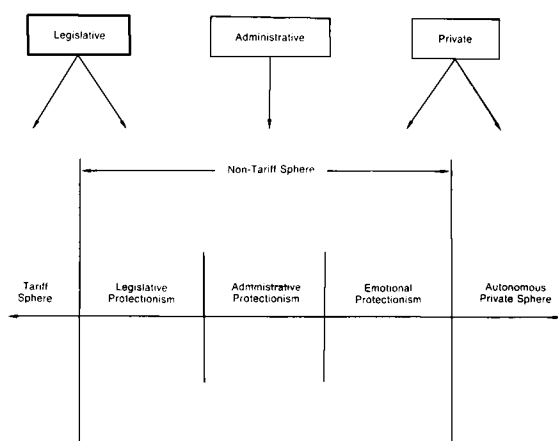
This wide definition of the term "trade barrier" covers a multitude of highly heterogeneous measures. To apprehend to what an extensive range of measures the term is applicable one should call to mind a scale which at one end comes up against the trade obstacles in the nature of a customs tariff — i.e. including all types of customs duties (import duties, anti-dumping duties, countervailing duties, etc.) and at the other end bor-

ders on the antipole of the autonomous private sphere in which non-official economic subjects or organizations engage in discriminating trade practices. Between these two termini are to be found all those trade barriers which are not customs duties (the limit at the left end of the scale) but derive from deliberate intervention by the state or are at any rate operated with the consent or acquiescence of the state (the limit at the right end of the scale).

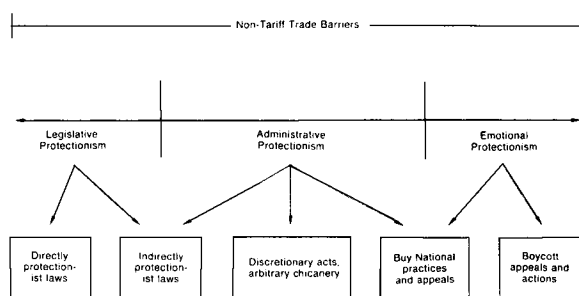
The entire scale of non-tariff trade barriers can be divided into three major sections according to the degree of state influence — the spheres of the legislative, of the executive and of private groups and organizations. The influence of the state is greatest and most immediate where its intervention is based on legislation, as is the case with import duties. The general designation for non-tariff trade barriers which presuppose a will by the executive to take political action and originate within the administrative sphere is "administrative protectionism". When private groups and organizations such as trade associations, trade unions or certain industries resort to discriminatory practices against foreigners, the collaboration by the state does not as a rule go beyond approval for or acquiescence in such actions. Private intervention is usually directed at working on the chauvinistic instincts of the populace. The common term for such appeals to national sentiment in literature is "emotional protectionism".

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¹ A detailed account of the origin of the term, its content and the manifold forms in which non-tariff trade barriers present themselves can be found in: L. Quambusch, Nicht-tarifäre Handelshemmnisse. Ein Beitrag zu ihrer Systematisierung, Anwendung und Beseitigung (Non-tariff trade barriers — A contribution to their systematization, application and elimination), Untersuchungen des Instituts für Wirtschaftspolitik, Cologne University, No. 35, Cologne 1976.



The grading of non-tariff trade barriers according to the agents who are exercising political will and influence makes it possible to draw certain conclusions about dissimilarities between protective devices. Protectionist intervention is seen to occur with the greatest regularity in the sphere of legislative protectionism whereas administrative obstacles and obstruction of trade by private groups pertain to particular instances. The forms of protection associated with the various agents exerting influence can be sub-divided according to their comparability with import duties.



Legislative Protectionism

The term "legislative protectionism" comprises all enactments made for the direct purpose of bringing a protectionist influence to bear on the foreign trade, viz. (1) measures which affect prices, (2) trade barriers involving quantitative restrictions, and (3) regulations prescribing the use of domestic products in preference to foreign ones. Most important among the non-tariff trade barriers with an influence on prices are the special impositions on imports and exports, subsidies for domestic industries and measures for the promotion of exports. The trade barriers involving quantitative restrictions include import embargoes, import quotas, voluntary self-restraint agreements for

exports, export embargoes and export quotas. Amongst the regulations for the furtherance of the use of domestic products are for instance computative additions to the import value of foreign products, the utilisation of foreign goods in quantitative dependence on domestic products, limits on profit margins, other forms of price control which impede the sale of foreign products, and discriminatory taxes and fees.

Administrative Protectionism

The measures of protection on a legislative basis include regulations originally or allegedly issued for other than protectionist purposes which the administration can, if they so wish, misuse for the restriction of trade. They are to be regarded only indirectly as protectionist laws; in fact they are part of the administrative protectionism. Under this heading fall protective regulations providing safeguards for the consumer (compulsory labeling, marketing regulations), protection of human, animal and plant life and health, copyright protection, standard specifications and safety regulations. To this group belong also various rules of procedure for the issue of import and export licences, customs clearance (import and export formalities, tariff classification, customs value determination, customs complaints procedure) and regulations on the levying of anti-dumping and countervailing duties.

Equivocation, concealment and inconsistency are frequently the mark of a third group of instruments which range from purely discretionary decisions and secret government directives to arbitrary acts by the executive and even administrative chicanery. These are the classic instruments of administrative protectionism.

Emotional Protectionism

Appeals to national sentiments form a fourth group. They may emanate from organs of the state; but they may also be elicited by private groups and organizations. The measures encompassed by this group of discriminatory appeals and practices are of virtually unlimited versatility in the light of changing requirements for protection. Most important amongst them are discriminatory practices in connection with public tenders and appeals to the buyers' patriotism.

Appeals and actions for the boycotting of foreign products are the fifth group of protectionist instruments. Measures of this kind are mostly initiated by private groups; frequently they are an expression of overt xenophobia and often go beyond

appeals to avoid buying foreign products. As a rule they involve physical action such as picketing by agitators with placards and loud-speakers. In extreme cases entry to department stores or trade fairs may be barred and services may be withheld, e.g. by stevedores or transport workers.

Importance, Extent, Effects

The non-tariff trade barriers have been likened to rocks and shoals protruding from the sea when the tide runs out; the subsiding sea stands in this simile for the falling tariff level. The adoption of non-tariff trade barriers is thus not independent from the level of the import duties. The assumption is that at a sufficiently high tariff level the non-tariff trade barriers will disappear or at least dwindle. Such a correlation between tariffs and non-tariff barriers has been observed in the past thirty years, albeit to varying degrees in the case of particular trade barriers. From this it may be inferred that the characteristic features of a trade barrier are significant for its use, irrespective of its protective effect. Besides, the non-tariff trade barriers chimed in with the trend of the external economic relations in these last three decades when tariff reductions were the sole aim. Since most non-tariff trade barriers are in any case proscribed by GATT, they were not — at least until the Kennedy round — the object of multilateral negotiations and therefore less exposed to open criticism. Non-tariff barriers to trade made it thus possible for a country to resort to protectionism without attracting much notice or committing an overt violation of its treaty obligations to the GATT partners as would be the case if tariff concessions were cancelled.

Attempts have often been made to compute the protective effect of non-tariff trade barriers. But it is difficult to gain a complete picture of the nature and extent of the non-tariff trade barriers used in a country. The "Inventory of Non-Tariff Barriers" compiled by GATT in 1968/69 listed more than 800 individual trade barriers in several volumes. It could not however be claimed to be comprehensive when it came out and did not even show the position at the time of publication. The only apparent limit to the number of non-tariff trade barriers that can be devised is the inventive genius of man.

Moreover, it usually takes quite some time for foreign trade measures by one state to be exposed and pilloried by others as obstacles to trade. Finally, it is normally impossible to quantify the protective effect of non-tariff trade barriers even if the details are known. A few attempts to quantify the protective effect have actually been

made in recent years. There is for instance a certain dyestuff in the US customs tariff² the duty on which is calculated by the controversial customs value determination method based on the American Selling Price (ASP). It has been calculated that but for ASP the tariff rate would have to be fixed at 172 p.c. to equal the effect of the 40 p.c. rate of the US tariff.³ It is in the nature of the various trade barriers that some of them are not quantifiable. One need only think of delaying tactics at frontier posts, the propaganda for domestic products or calls for the boycotting of foreign goods.

Possible Easements

Seeing that non-tariff trade barriers are such an eminently suitable means of giving the domestic economy a wide measure of protection without attracting notice or censure, it is easy to understand why the states are so reluctant to divest themselves of this expedient for hiding their true intentions, effecting swift changes in their protective devices and curbing the flow of commerce. The greatest obstacle to the removal of the non-tariff trade barriers are therefore their typical characteristics. Besides, it has to be remembered that a number of trade barriers were introduced mainly for balance of payments reasons. This is true for instance of the import surcharges and import deposits. GATT has sanctioned them by implication although the GATT regulations provide in the event of currency difficulties only for imposition of quotas.⁴ No matter whether the existing GATT arrangement is considered sensible or not, it must be said that when a country is beset by serious balance of payments difficulties, it does not hesitate to employ any expedient trade-policy instrument in order to cope with its predicament.

Added to these general difficulties there exists a special impediment in that under the prevailing conditions in world trade GATT is the only suitable international forum for the removal of non-tariff trade barriers. GATT however possesses neither the material nor the institutional qualifications for this task. The history of GATT in the past thirty years shows that the contracting parties have achieved only very meagre results in regard to the removal of non-tariff trade barriers.⁵ One reason for this is the basic concept of GATT that the customs duties only are to be tackled through

² Vat yellow 10, TSUS Position 406.50.

³ Cf. US Tariff Commission, TC Publication 181, Washington, D.C., 1966, p. 14.

⁴ Art. XII GATT.

⁵ Quantitative restrictions for other than balance of payments purposes are exceptional.

negotiations while the erosion of tariff concessions was to be prevented by the ban on certain non-tariff trade barriers. It is however manifest that the rules designed thirty years ago do not measure up to present requirements. It has become apparent that guidelines must be drawn up and principles established by which non-tariff trade barriers can be judged. For this the institutional framework has to be altered, and the techniques used must be adapted to the specific characteristics of non-tariff trade barriers. It has to be noted, besides, that GATT has hitherto been operated only as an interim measure in accordance with the "Geneva Protocol on the Provisional Application of the General Agreement on Tariffs and Trade (GATT)" of October 30, 1947. This provides that Part II of GATT is adopted insofar as its regulations are compatible with the legislation in force. Besides amending the text of GATT itself, the contracting parties will therefore have to renounce their rights under this Protocol by a deliberate act. Any new arrangement must, furthermore, cover the trade barriers for which no regulations have yet been made under GATT.

Gaps in GATT

There is no mention in GATT of the instruments of legislative protectionism which only gained ground in the last few years — import levies, import deposits, export subsidization by fictitious credit terms and voluntary self-restraint on the part of exporters. Most of the import levies currently coming in for criticism are entry levies imposed under EC agricultural market orders. A GATT injunction against variable import duties must therefore include the possibility of a dispensation for the EC levy system as practised for years past with GATT sanction. A GATT injunction would nevertheless be desirable in contemplation of any import levies which other countries may introduce in future.

Regulations concerning import deposits must be considered in the larger context of a revision of the existing GATT provisions regarding the introduction of trade barriers to safeguard the balance of payments. The divergent credit terms for export finance in the individual countries require international harmonization. As for the self-restraint agreements for exports, their nature makes it inappropriate to subject them to the prohibition in principle of export restrictions under Art. XI GATT because the voluntary limitation of exports to avert import restrictions by another country is only in a formal sense a constraint on exports in the conventional meaning. In practice it is a trade barrier *sui generis*. But it would be unrealistic to believe that it could be done away with by amend-

ing the text of GATT. It would be important however to fix at least the conditions under which existing voluntary export quota arrangements could be retained and future ones regulated.

Clarification of Specific Points

Apart from the general need for more precise formulation of the GATT regulations and for information about particular trade barriers in order to make their evasion as far as possible impossible, there are a number of specific GATT regulations which call for special consideration. The compensatory taxation of imports is still a topical issue. There are grounds for criticizing the existing GATT regulation although economic science cannot by itself offer a practicable solution. Whatever arrangement is reached by way of negotiation will be the result of a political compromise. Another clause in GATT which is obsolete and needs revising is that which concedes a special position to purchases by the state. The public requirements cannot be satisfied simply by abolishing this clause; its retention on the other hand would sanction discrimination in respect of public contracts. The aim should be a code of conduct laying down limits within which domestic suppliers may be given preferential treatment. Internationally harmonized rules of procedure must be arranged for public tenders. It follows from Art. XI GATT by inverse inference that extra price charges may be imposed on exports. The need for an internationally recognized arrangement on export charges was demonstrated by the oil crisis in the past few years. It could take the form of a code of conduct. The exemption from the provision in Art. III para 4 for equal treatment with residents in regard to official grants is also unsatisfactory. In what circumstances and for which purposes grants may be made should be judged in accordance with strict yardsticks to be included in GATT. The term "export subsidies" must be given a narrower and more precise definition.

Terminological Harmonization

In the sphere of indirect legislative protectionism the misuse of laws is often due to different ideas about norms and standards in individual countries. Harmonization of these ideas could lead to the elimination of many protective and procedural provisions. The present national customs valuation and classification procedures should be aligned. This could be done by adoption of the Brussels tariff nomenclature by the USA, Canada and other countries. The methods of customs value determination should be geared to GATT principles and be put on a uniform cif or, preferably, fob basis.

Administrative protection methods cannot be nullified by injunctions. More efficient administrations with simplified and more explicit, comprehensible and equitable operational procedures are indispensable for their elimination. Guiding principles for the work of the administrative organs should be included in the text of GATT.

It is equally true that injunctions are not a suitable means for dealing with forms of intervention due to emotional protectionism because they originate in the majority of instances from private quarters. It must be made mandatory for the state authorities to keep a check on such private intervention according to strict rules which distinguish between permissible propaganda and strikes on the one hand and illicit trade obstruction on the other.

Institutional Requisites

A suitable institutional framework and adequate procedural techniques are essential to put the substantial amendments of GATT into effect. It is consonant with the decentralized nature of GATT that it has no authoritative organ capable of pronouncing judgement in case of disputes and no mechanism to safeguard adherence to the provisions of the agreement. The philosophy of GATT rests on the assumption that there exists a balance of rights and duties and of mutual (tariff) concessions and counter-concessions by the partners, a view which is corroborated by the history of GATT. The sanctions available under GATT are therefore of a political character; viewed as substantial measures they are far from adequate. Disputes are, as a matter of principle, settled by way of negotiation and not submitted to a court of justice; nor is there an internal arbitration tribunal. The only sanction which can

be imposed on a contracting party violating the agreement is the suspension of previously granted concessions. The unavailability of retaliatory measures operates in favour of the state which violates the regulations and to the disadvantage of the contracting parties which honour their obligations.

Enforcement of GATT regulations is rendered difficult by a number of exceptional arrangements and the continuing existence of "grandfather clauses". The institutional set-up does also not really fit GATT for extensive new tasks.

Nevertheless it should be possible to create the legal and organizational prerequisites for the elimination of non-tariff trade barriers provided that the political will for such action exists and national interests take second place behind the free working of the international economic system. The political resolve alone however cannot guarantee a world economy untrammelled by trade barriers. As the need to protect the consumer and the environment calls forth new official intervention, standards and sanctions and as multinational corporations extend their operations ever more widely beyond national frontiers, new, previously unperceived opportunities present themselves for the erection of non-tariff trade barriers. Since the oil crisis in the autumn of 1973 the developing countries have, moreover, registered new demands which could not be fulfilled without incisive changes in the existing international economic system. The hope for complete elimination of the non-tariff trade barriers is therefore utopian. An international control system and a functioning mechanism for the removal of the obstacles could however help to keep them within bounds.

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