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thought of as the price to be paid for ending the present stalemate and imposing some discipline on the use of selective measures. Whether the price is too high depends on what is expected to be accomplished by a system of trade rules. If the purpose of these rules is to eliminate completely discriminatory policies, then perhaps the price is high. By contrast, the partial and temporary deviation from ideal policies. These rules provide an escape valve that releases protectionist pressure before it damages other aspects of trade relations.

What are the prospects for reform of Art. XIX? That will happen only if GATT members perceive benefits for themselves. This paper has argued that there is scope for a change in the rules that could be in the interest of

all countries, without causing damage to the foundations of the GATT system. Moreover, a reformed Art. XIX will induce a reduction in the use of VERs only if it is accompanied by stricter and more explicit rules on export restrictions.

Ultimately, however, no international rules can prevent predatory trade behaviour. Governments may resort to more anti-dumping action and private companies may still continue in secret with their collusive arrangements. Private actions fall outside the scope of GATT. Therefore, the only real guarantee for unimpeded trade is reform of domestic legal systems and institutions giving equal rights of market access to foreign products and reducing the bias in favour of producers' interests.

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Rudolf Adlung\*

## Non-Tariff Barriers and the Uruguay Round

*The use of non-tariff barriers to trade, which began to be important in the 1970s, has continued to increase throughout the 1980s. Notwithstanding the difficulties and limitations it faces, the Uruguay Round probably presents the only present opportunity of coming to grips with many existing exemptions to, and distortions of, GATT rules.*

Former GATT Rounds have been noticeably successful in dismantling tariff protection. The Dillon, Kennedy and Tokyo Rounds each resulted in tariff cuts of approximately one fourth. To date, average rates in industrial countries amount to about 5 to 6 percent (manufacturing sector).

To a large extent tariff reduction was tantamount to a reduction of overall protection, thereby contributing considerably to international market integration, to more efficient resource allocation and the exploitation of economies of scale. Apparently, trade liberalization and economic growth have been mutually linked in a virtuous circle. This process, however, was jeopardized and partially interrupted in the course of the 1970s, with increasing intensity.

Oil-price shocks, rising pressure from new competitors (especially some Asian NICs) and the persistent current-account imbalances of major trading partners have fostered the revival of protectionist moods and corresponding political initiatives. The trading system has been under increasing strain. Due to sluggish economic growth and the lack of new job opportunities, governments have felt bound to cushion or to avoid painful adjustment processes by external protection. And in many cases, rather than applying tariffs, the appropriate instruments as provided for in the GATT, they have resorted to intervention outside the scope of the General Agreement.

A salient feature of "new" protectionism is the increasing use of non-tariff measures, often of a bilateral, discriminatory nature. Having tied their own hands by high degrees of bound tariffs – at least in the industrial sector – prominent trading partners have tried

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to bypass the rather cumbersome procedures of tariff renegotiations according to GATT Art. XXVIII. More and more they have treated the slippery ground of the grey areas outside the GATT, for example in the form of voluntary export restraint or orderly marketing agreements (VERAs and OMAs). Such agreements tend to function expeditiously and can be applied in a rather discreet and targeted manner – intrinsic benefits at least from the vantage point of larger trading partners with some coercive power.

But this does not change the fact that, from a global economic perspective, the resort to bilateral, sector-specific solutions constitutes a standing repudiation of basic GATT principles. This approach tends to isolate national economies from world market trends. It favours the cartelization of the sectors involved, and it contributes to undermining their adjustment capacities. Overall economic performance is hampered. The accretion of structural rigidities in the course of time – not only in the foreign trade sector – has perhaps been the most prominent factor in flattening the long-term growth rates of mature OECD economies: this is our so-called Eurosclerosis.

Failure tends to breed failure – with trade intervention gradually intruding upon more and more segments of international exchange. Empirical evidence is suggestive of this trend. According to calculations by the UNCTAD-Secretariat, the import coverage ratio of selected non-tariff measures (NTMs) increased from 18.5 percent in 1981 to 21.4 percent in 1988 (non-fuel trade only).<sup>1</sup> For reasons of fairness it should be added, however, that these figures do not only encompass illegal measures under GATT or bypassing activities. Antidumping or countervailing duties which – possibly – can be justified under GATT and restrictions under the Multi-Fibre Arrangement (MFA) are included as well.

On the other hand, one should bear in mind that the GATT legal status in and of itself is not sufficient to

invalidate economic concerns. Restrictions in prominent sectors such as textiles and agriculture might well be covered by GATT or the MFA. Nevertheless, they distort the national and international allocation of resources by granting special privileges to a limited range of economic activities.

To a certain degree such exemptions are due to the fact that GATT commitments are not negotiated in a political vacuum but between governments which – quite naturally – are under pressure from vested interests. This pressure may be markedly higher now than in the pioneering days of the late 1940s, when many old institutional structures had disappeared and new ones were not yet firmly established. Under current circumstances at least, negotiated results not only reflect sound economic reasoning but differences in the internal lobbying activities of relevant groups<sup>2</sup> and in the external strength of related governments.

### Relevant Issues in the Uruguay Round

Notwithstanding such limitations, the Uruguay Round probably presents the only opportunity of coming to grips with many existing exemptions and distortions. The time seems ripe for change. Even ardent proponents of sector-specific rules, for example in the field of agriculture, are meanwhile accepting the fact that present policies are not sustainable – at least for budgetary reasons – and that there is an urgent need for internationally coordinated reforms.<sup>3</sup> And it has become increasingly evident that individual grey area measures are adding up to an unacceptable burden on the economy as a whole and causing painful losses in terms of income and employment. In the political arena these developments have provoked growing resistance from affected sectors left to pay the bill via the tax system and/or trade policy repercussions.<sup>4</sup>

There is solid evidence that this message has got through to the negotiating tables in Geneva. It seems indeed to be the common view among participants that a future safeguards mechanism (GATT Art. XIX) should reduce the possibilities of, and incentives to, non-transparent actions outside the GATT. This widely shared perception might even help overcome a long-standing dispute on (consensual?) selectivity in the application of safeguards. A Trade Policies Review Mechanism has already been established – on a provisional basis and subject to final agreement at the end of the Round – to shed more light on the trading activities of contracting parties.

It is in the sector-related negotiations on agriculture and textiles where, perhaps, the widest gaps must still

<sup>1</sup> These figures should be interpreted with care. It should be acknowledged that the longer protectionist trends prevail and the more restrictive they are, the greater the possibility of underestimation. If certain measures are applied with increasing intensity to the same segments of trade, coverage ratios might even drop because of the decreasing share of relevant product groups within overall trade.

<sup>2</sup> As Mancur Olson has prominently pointed out, there are inherent distortions in the lobbying process e.g. in favour of old industries.

<sup>3</sup> It is true that due to exogenous factors (e.g. droughts) current harvests and available stocks have been reduced, thereby contributing to rising world market prices. This relatively relaxed situation, however, might deteriorate very quickly as long as policy fundamentals remain unchanged (see, for example, recent OECD reports on National Policies and World Agricultural Trade).

<sup>4</sup> The Federation of German Industry, for example, recently submitted several studies urging profound market-oriented changes in the Common Agricultural Policy.

be bridged. At the midterm review in April 1989 agreement was reached at least on the objective of liberalizing agricultural trade and progressively reducing agricultural support and protection. In textiles, negotiations shall aim for modalities to phase out the MFA and to integrate this sector under strengthened GATT disciplines. Moreover, there is a Negotiating Group on Non-Tariff Measures where specific NTMs (e.g. resulting from domestic regulations) could be tackled.

For the sake of completeness it should be mentioned that a certain range of NTMs can be challenged under existing GATT rules. This might be the case according to Art. III if regulations do not comply with the principles of national treatment or according to Art. XXIII(1) if benefits under GATT, e.g. tariff concessions, are nullified or impaired (irrespective of the legal status of relevant measures).

### Technical Barriers

On the surface, one might therefore conclude that the realm of tariff substitutes, grey area measures, and specific policies affecting and distorting trade will soon be under control – at the latest by the end of the Uruguay Round. Nevertheless, this could well turn out to be a profound error. There are still loopholes.

This is certainly true for certain technical barriers to trade (TBTs) which – because of the intricate evaluation problems, the emotional content, and the value judgements sometimes involved – are extremely difficult to handle. But redress must be given here as well. TBT issues are already a contentious matter and they will increasingly be so in future – especially if they prove to be an attractive device to circumvent strengthened GATT disciplines in other areas.

It has to be acknowledged that legitimate public concerns such as preservation of the environment could be closely linked with illegitimate trade policy intentions. And it is very difficult to assess whether and to what extent new regulations are subject to the one or other motive.

Existing GATT provisions, mainly the Code on Technical Barriers to Trade, seem to lack any real bite. In essence, the code stipulates that signatories should resort to available international standards except where such standards are inappropriate (which has to be explained upon request). Deviations must be notified if the envisaged regulation has a significant effect on trade. Consultations should then be held if so requested and comments of other parties “taken into account”. To date, regional government bodies and private standard-

setting entities could even escape these commitments. Process-related specifications are not covered by the code since it focuses on product standards.

Notwithstanding those inherent problems, the functioning of the code has also been hampered by some government-internal coordinating defects. Standards sometimes have been worked out, modified or enacted by entities not fully aware of trade policy repercussions or of existing commitments, including that of notification. Trading partners thus only received notice of new regulations in form of their actual trade-inhibiting effects – too late for influencing their framing.

### Standardization Efforts

In the context of the Uruguay Round, negotiations are under way to cope with institutional defects of the code and to extend its coverage. Moreover, it is evident that the negotiating process in itself is positively influencing the standard-setting and notification disciplines of code signatories. As in some other fields, the Round has increased the general awareness of existing commitments and the willingness to abide by them.

Nevertheless, many improvements may only be of limited value as long as incompatible standards coexist. Progress in dismantling technical trade barriers therefore depends not only on current GATT negotiations but – perhaps even more so – on standardization efforts within respective international bodies. And here again, questions related to health and environmental protection seem to be the most intricate ones.

On sanitary and phytosanitary regulations, the midterm agreement sets the objective of strengthening the general exception clause of GATT Art. XX. According to the agreement, measures necessary to protect human, animal or plant life or health shall be consistent “with sound scientific evidence”.

It remains to be seen whether and how this criterion can ultimately be met. To indicate the range of problems: Would it still be legitimate to take measures which are scientifically not defensible but respond to wide-spread public concerns? Can actions be outlawed in open societies just because they are emotionally induced and not supported by objective facts? On the other hand: To what extent must short-lived emotions – often inconsistent in and of themselves, influenced by distorted information and vested interests – be allowed to direct the course of policies? Perhaps one should emphasize here the need for political leadership and resolve, not to exploit but to withstand and fight such

emotional (irrational) moods. But in some cases at least this answer might turn out to be too simple-minded. The so-called hormone-dispute between the EEC and the USA gives ample evidence of problems involved.

### Spill-Over Effects

As regards the use of national resources and the protection of the environment, there is – at least in high-income countries – mounting awareness of international policy impacts. Negative spill-over effects, for example in the form of acid rain, are arousing public alarm. Moreover, the exploitation of certain resources (tropical forests) is increasingly regarded as being to some extent under international responsibility because of worldwide repercussions (climatic changes etc.). And trade policies might be involved again – for several reasons.

In some cases, there is the risk of GATT obligations being overlooked or pushed into the background under the influence of rising environmental and/or health concerns. Excessive trade restrictions have sometimes been applied on the periphery of, or even beyond, existing commitments. To a certain extent this was due to the fact that new institutional entities (Departments of the Environment etc.) had yet to find their place within the coordinating network of public service, including contacts with trade policy experts.

There are also obvious tendencies in public opinion to urge trade restrictions so as to contribute to common (?) international goals and/or to induce *other* countries to change *their* respective policies.<sup>5</sup> And from a politician's point of view, some action along these lines might even be regarded as an attractive manoeuvre to contain "greenist" feelings without risking counterpressure from economically affected groups at home. The beggar-my-neighbour approach of traditional protectionism is thus looming again: trading partners would have to bear the costs of domestic policy defects.

It is surely out of the question to justify trade restrictions to protect *national* resources under GATT (e.g. Art.XX). Importation of certain woods, meats etc. could be prohibited if necessary to avoid the spread of diseases to indigenous forests (animals etc.). The relevant question in our context, however, is slightly

different: are trading partners entitled to act in the well-understood self-interest of third countries or for the sake of common goals which to date are not duly respected by everyone?

Such initiatives certainly would be tantamount to the imposition of value judgements on other – sovereign – countries thereby clearly interfering with basic principles of international law. If other GATT contracting parties were not respected as independent and self-responsible partners in certain cases the contractual system would be bound to collapse. Unilateralism is outlawed by GATT, irrespective of the themes and motives in question.<sup>6</sup>

### Disciplinary Device

Negotiating solutions may appear to be a painful, time-consuming and expensive exercise (expensive in terms of possible counter-requests). But it is the only alternative under GATT and – in a wider context – the only acceptable way of reconciling international conflicts.

Especially in fields such as health, safety and preservation of the environment it might be difficult to agree upon harmonized standards and to contain the divergent economic interests of the countries involved. National value judgements and priorities vary, sensitivities in the respective fields seem to be highly dependent on the level of income. Nevertheless, there are sound examples of international cooperation, the "Montreal Protocol" on substances that deplete the ozone layer being probably the most prominent one. It even includes trade policy provisions.<sup>7</sup>

If some countries feel it necessary to reduce specific natural resource imports, there is always the possibility of renegotiating the relevant tariffs. Of course, a certain price will then have to be paid. Developing countries could well be tempted to urge concessions in products of special export interest to them (e.g. textiles, agriculture). In the end this might even turn out to be an attractive deal for both parties involved – as well as for the ecological and economic systems.

The Uruguay Round can essentially be used as a disciplinary device to funnel existing pressure into such GATT-legal – peaceful – solutions. However, a certain degree of political vision and resolve is indispensable.

<sup>5</sup> The question whether such restrictions are economically efficient should be left aside in this context. One could well argue that reduced demand for some natural resources – and correspondingly decreasing prices – might even contribute to a more extensive exploitation. Economic incentives of resource management could be reduced and alternative uses might then turn out to be more profitable (e.g. agriculture instead of forestry). Here again, public feelings and economic logic probably do not fully coincide.

<sup>6</sup> Perhaps the national-security exceptions of Art. XXI slightly deviate from this principle. However, they are clearly limited to essential security interests.

<sup>7</sup> One could be sceptical, however, as to whether certain provisions of the Protocol are watertight under GATT. Special trade restrictions on imports from non-signatories of the Protocol, for example, might well be in conflict with the national treatment principles of Art. III.