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Policy Brief

NON-TARIFF MEASURES (NTM)[1]

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Economic policy relying on customs duties, or tariffs

States rely on a large number of tools to regulate marketing foreign products within their territory, notably prior to the time at which products are effectively put on the market, i.e. at the time these foreign products cross national borders. The most common instrument for foreign trade policy is the imposition of custom duties, or tariffs.

Tariffs are certainly among the most important instruments of trade policies around the world; their use in history was not restricted at all. Thus, when an economic crisis arose in the end of the 1920s, many countries contemplated protectionism with a view to safeguard national industries and fight unemployment. The US was the first to react in May 1930 and adopted the Smoot-Hawley Tariff Act (or Tariff Act of 1930), which raised import duties to the highest level in American history. Most of its trading partners retaliated against the US and then against each other. For instance, in February 1932 the United Kingdom abandoned its traditional free trade policy and implemented its General Tariff prior to its system of Imperial Preferences among members of the British Commonwealth. From a global perspective, a decline of international trade set off, unemployment increased and the national economic crises deteriorated further. A second means designed at that time to fight national economic crises were bilateral trade agreements. Their proliferation set further hurdles to international trade.

These factors were analysed during World War II; the need for international restraints to national economic policies became apparent. Negotiations to this effect were sponsored by the US government.

At the end of this process, the General Agreement on Tariffs and Trade (GATT) was adopted in 1947. Successive rounds of negotiations have been held since 1947. New legal instruments have been adopted, notably the General Agreement on Trade and Services (GATS) at the Uruguay Round of Negotiations.

[1] This paper relates mainly to trade in industrial goods.

Basic principles enshrined in GATT

The concept of Most Favoured Nation (MFN) treatment, enshrined in GATT article I and in GATS article 2, requires that all trade concessions granted to another country must be applied immediately and without any condition to all other WTO members (principle of non-discrimination). In fact, the MFN principle was not new in the late 1940s, as it can be retraced to trade in the Mediterranean in the Middle Ages.

The MFN principle is also a key for safeguarding imports from the most efficient supplier. Thus, it shapes the theory of comparative advantage among competing companies based in different customs territories.

In addition thereto, GATT stipulates that governmental restraints on the movement of goods should be kept to a minimum and, if changed, they should be reduced, not increased. All conditions applicable to trade should be discussed in a multilateral forum prior to their adoption. Most importantly for the sake of this paper is that no prohibitions or restrictions other than tariffs can be maintained or instituted among GATT contracting parties.

The other basic principle in WTO-law is national treatment (GATT article 3, GATS article 17). It stands for the obligation to treat equally foreign and locally produced goods, at least when the latter have entered the national market.

In contrast to these liberal rules, GATT and GATS provide for exceptions to its general principles, especially to its principle of non-discrimination. While these exceptions are part of WTO law, they can only be applied under strict conditions.

Free trade areas and customs unions (regional integration) are probably the most frequently used exceptions that are permitted in WTO law to the MFN principle. Free trade areas and customs unions discriminate clearly against trade in products originating in third countries. They also encompass a revival of bilateralism to the detriment of multilateralism.

The concept of non-tariff measures (NTMs)

There are various ways to categorize both non-tariff measures (NTMs, or non-tariff barriers) and the reasons for governments to use them in the framework of trade in goods and trade in services.

Among the other most frequently used non-tariff barriers to trade, we can cite here:

- Trade advantages granted to certain categories of countries, more specifically to developing countries and to Least Developed Countries (LDC), as is the case with the General System of Preferences (GSP). The GSP relies on the 1979 GATT Enabling Clause, adopted as Decision ‘Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries’

- Trade restrictions to safeguard the balance of payments positions of members
- Governmental assistance to trade development
- Non-arbitrary and non-discriminatory measures against certain imports, or restricting such imports for reasons including: public moral grounds; health; prison labour; and national historic/cultural treasures
- National security can be conducive to specific actions that breach basic principles in GATT/GATS (most importantly, trade sanctions, embargoes, etc)
- Technical standards, requirements related to testing methods, and conditions applicable to packaging, labelling and marking

Other types of non-tariff measures are still conceivable. Actually, governments use non-tariff measures for a growing number of reasons. There is no limit to the reasons that may be invoked by a given government. In practice, it is not always easy to distinguish legitimate to protectionist measures. Non-tariff measures may take the place of tariffs and border on NTMs that are disciplined in trade agreements. This raises important questions regarding the regulation of NTMs at the international level.

NTMs can be defined as all policy-related, restrictive trade rules from production to final consumption, with the exclusion of tariffs. Broadly speaking, they encompass technical measures (sanitary and phytosanitary measures, technical barriers to trade) and non-technical measures (import licensing and 'red tape' in general, quotas, pre-shipment inspections, rules for the valuation of goods at customs, rules of origin, investment measures including local content requirements and trade balancing requirements).

At present, no WTO agreement contemplates in detail both types of NTMs. WTO members have however adopted an Agreement dealing with Technical Barriers to Trade (TBTs).

NTMs are measures that have the potential to substantially distort international trade; they are not always conceived as protective measures, although foreign producers may perceive them as such not being adequately equipped to comply with them.

<u>The principle of free movement of goods in the EU</u>

The acquis communautaire contained in EU Directives and EU Regulations and in the jurisprudence of the EU Court of Justice combine within the EU territory, non-tariff barriers to trade in line with the principle of free movement of goods.

Harmonised standards designed for protecting EU consumers become also applicable to imports from third countries; they are frequently perceived as trade protective measures. This is not the case, as their main objective is to protect the life and security of the consumer. What cannot be denied however is that such NTMs have an impact on international trade.

Article 34 (for imports) and article 35 (for exports) TFEU relates to intra-EU trade and prohibits quantitative restrictions and all measures having equivalent effect between Member States.

Free movement of goods is one of the most salient success stories of the European Union. It has helped to structure and build the Single Market which benefits now EU citizens and industry alike.

When applied in practice, it is essential that the principle of free movement of goods applies only to industrial products that comply with certain common technical standards. For this reason, technical standards and conformity assessment procedures play a pivotal role within the Single Market.

In retrospect, legislation for the implementation of free movement of goods began in the EU with detailed Directives containing all the necessary technical and administrative details for certain products. This methodology proved to be too cumbersome; a solution to streamline rules for implementing one of the basic principles in the EU was needed.

A “New Approach” developed in 1985: it restricted the content of legislation to essential requirements leaving the technical details to European harmonised standards. This lead automatically to the development of the EU standardisation policy.

Finally, in 2008 the “New Legislative Framework” built on the New Approach and completed the overall legislative framework with all the necessary elements for effective conformity assessment, accreditation and market surveillance (including the control of products from third countries).

In fact, technical standards were already created under the New Approach Directive; they synchronized the technical requirements in all national markets. It is precisely the harmonization process what allows the free flow of goods across national borders within the EU.

Harmonized product standards focus on the safety and security of the consumer and make industry more efficient. National industries are forced to comply with such standards as is the case for foreign producers. It is quite obvious that governments around the world are expected to protect their citizens-consumers from the risks that are inherent to the use of imported products with lower quality standards.

For the producer in third countries, access to the EU Single Market means that EU quality and technical standards become applicable. It would be totally misleading to pretend that robust EU technical and quality standards can be circumvented by importing a product from a third country.

From the perspective of exporting SMEs, the best option may be to market in the EU and within its national boundary the product complying with the more stringent rules,

i.e. those of the EU. By this means, accidents would be averted and, at the same time, access to EU markets would be facilitated.

The term 'measures having an equivalent effect to quantitative restrictions' has been defined by the EU Court of Justice as all trading rules enacted by Member States which are capable of hindering, directly or indirectly, actually or potentially, intra-Community trade. Subsequently, this first definition has been reviewed and completed by the EU Court of Justice. Furthermore, the case law of the Court of Justice includes now famous decisions (for instance, the German Reinheitsgebot, or Beer Purity Law, adopted back in 1487 and established that beer could only be sold in Germany under this name if it was produced exclusively from water, barley and hops).

NTMs under control in EU-Lebanon trade relations

NTMs affecting trade proliferate around the world. As a consequence, trade policy is becoming increasingly complex and multifaceted.

The Euro-Mediterranean Agreement establishing an Association between the European Community and its Member States, of the one part, and the Republic of Lebanon (AA), of the other part, signed on 17 June 2002, which entered into force on 1st April 2006, creates a free trade area over a transitional period not exceeding 12 years from its entry into force. Its Title II concerns the basic principles to be applied to the free movement of goods within the territories of the European Union and the Republic of Lebanon. For industrial products (except for those listed in Annex 1 of the AA), imports into the EU shall be allowed free of customs duties and of any other charge having an equivalent effect. The latter constitute the NTMs in the usual terminology of the EU. This provision will fully apply on 2nd April 2018.