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NON-TARIFF PROTECTIONISM – A NEW SETTING

1. THE MODERN FACE OF NON-TARIFF PROTECTIONISM

Nicholas Sarkozy, the right-wing ex-president of France, and Arnaud Montebourg, the current leftist Minister of Industrial Renewal, are two of the many French politicians who in spite of their different political outlooks have been extraordinarily unanimous with respect to one issue. European economy, they say, has been increasingly suffering from the aggressive, and underhand, competition of non-European industry, mainly of Asian origin, and mainly in the branch of automobile production. Particular criticism was directed at KIA Motors and Hyundai, the two South Korean manufacturers, who – claims the French political class – have taken over the auto market by means of simple dumping. The general, most emphatically expressed opinion is that these inadmissible actions caused a violent slump in demand for home car models, traditionally purchased in France and produced mainly by the PSA consortium, contributing to further deterioration of the already failing French labour market. The political class of France has spoken as one – these practices definitely have to be stopped. Accordingly, the French government has appealed to the European Commission urging to terminate these imports. Incidentally, French politicians, irrespective of their political affiliations, hold long cultivated mercantilistic views, to the point of combating imports, perceived as a threat to the existence of domestic enterprises¹. The French entrepreneurs, thus motivated to a singular ‘economic patriotism’,

¹ More on this subject in: J. Wiczorek, *Znaczenie środków i barier pozataryfowych dla polskiego eksportu na rynkach rozwiniętych krajów kapitalistycznych* [Importance of non-tariff measures and barriers for Polish exports to developed capitalist markets], SGPiS, Monografie i Opracowania, nr 273, Warszawa 1989.

are encouraged to invest only at home, or to repatriate the capital invested elsewhere².

At this stage it is difficult to judge what position EC is going to take. However, aside from the strictly procedural issues which determine both if the antidumping proceedings are instituted, and these proceedings' possible results, this case gives occasion to frame several relevant observations.

First, during a slump in the world economy, clearly indicated by the present recession in many developed countries, and particularly acute in the heavily indebted and even less competitive economy of France, the appeals for increased protection of economic sectors from the 'threat of unfair competition' occur with more or less automatic regularity.

Second, the liberalization of international exchange – already accomplished or still under multilateral negotiation in the present WTO Doha round – has seriously limited the room for manoeuvre within the accessible and, in WTO's opinion, legal methods of restricting undesirable import.

Third, survey of the use of protective measures suggests that non-tariff measures (NTMs) are the ones most willingly selected. Their variety, and especially their discretionary nature – dependent, among other things, on home legislation, rather opaque to external monitoring – makes them convenient for unrestricted use, free from outside interference.

Fourth, non-tariff measures are usually used at the demand of strong groups of interest, which exert a decisive influence on the workings of a given economy. These groups are as a rule well organized, well prepared to frame and adequately support their arguments, well equipped to raise them with appropriate state economic authorities and to effectively monitor the results of any NTMs applied. These are usually the producers, determined to look after their business. Their outlook and behaviour make them radically different from the consumers, who generally benefit from free competition, but are as a rule much dispersed and, if only for that reason, unable to competently present and enforce their demands.

Fifth, by limiting outside competition and eliminating the potential advantages of international exchange, protectionist measures generate costs which are borne mainly by the consumers, so, in the long run, by the society as a whole.

² At the insistence of political authorities and trade unions the Italian manufacturer of FIAT cars transferred the production of the popular Panda model from Poland to Italy. Incidentally, similar premises lay at the root of the concept to 'renationalize' Polish banks, the great majority of which was in the hands of foreign capital.

Sixth, in terms of policy, the negative aspects of non-tariff protectionism might be summed up as ‘impoverish thy neighbour’, since it is the outside producers and exporters who ultimately ‘pay’ for such policy, especially as empirical research shows that they usually operate from less developed countries³.

2. AMBIVALENT NATURE OF NTMS

The WHO *World Trade Report 2012. Trade and Public Policies: a Closer Look at Non-tariff Measures in the 21st Century* supplies an interesting assessment of NTMs. The introduction by WTO Director General Pascal Lamy provides some reasons behind the decision to take up this issue. The first of these seems obvious: since the liberalization of tariff measures, reached uni- or multilaterally, decreased their protective potential, their function was gradually taken by non-tariff measures. Secondly, the general nature of NTMs has changed – no longer reduced to the so-called border measures, they have increasingly become an element of domestic economic policy (e.g. related to health care or environment protection). The growing

³ Cf. e.g. reflections on non-tariff protectionism in: *Globalizacja i regionalizacja w gospodarce światowej* [Globalization and regionalization in world economy], R. Orłowska, K. Żołądkiewicz, eds, PWE, Warszawa 2012, pp. 86–95; J. Świerkocki, *Zarys ekonomii międzynarodowej* [Outline of international economy], PWE, Warszawa 2011, pp. 134–141; *Handel zagraniczny. Perspektywa europejska* [Foreign trade. A European perspective], A.Z. Nowak, W.M. Koziół, eds., Wydawnictwo Wydziału Zarządzania Uniwersytetu Warszawskiego, 2011, pp. 217–221; H. James, *The End of Globalization: Lessons from the Great Depression*, Mass: Harvard University Press, Cambridge 2001; K. Budzowski, *Ekonomiczne problemy handlu międzynarodowego* [Economic problems of international trade], Krakowska Szkoła Wyższa im. A. Frycza-Modrzewskiego, Kraków 2008, pp. 119–141; R.R. Ludwikowski, *Handel międzynarodowy* [International trade], C.H. Beck, Warszawa 2006, pp. 72–108; T. Rynarzewski, A. Zielińska-Głębocka, *Międzynarodowe stosunki gospodarcze. Teoria wymiany i polityki handlu międzynarodowego* [International economic relations. Exchange and policy theory of international trade], Wydawnictwo Naukowe PWN, Warszawa 2006, pp. 326–348; T. Białowąs, *Rozwój handlu międzynarodowego po II wojnie światowej* [Growth of international trade after WWII], Europejskie Centrum Edukacyjne, Toruń 2006, pp. 57–61; J. Misala, *Wymiana międzynarodowa i gospodarka światowa. Teoria i mechanizm funkcjonowania* [International exchange and world economy. Functioning theory and mechanics], SGH, 2005, pp. 392–395 and 401–429; T. Rynarzewski, *Strategiczna polityka handlu międzynarodowego* [Strategic policy of international trade], PWE, Warszawa 2005; *Globalizacja a stosunki międzynarodowe* [Globalization and international relations], E. Haliżak, R. Kuźniar, J. Symonides, eds., Oficyna Wydawnicza Branta, Bydgoszcz–Warszawa 2004, pp. 87–95.

anxiety caused by the extremely complex nature of non-tariff measures, their diverse forms, increasing numbers and very different effects, was another reason why NTMs were deemed to be deserving of a careful scrutiny. P. Lamy also mentions the sheer scope of the problem, not only in terms of substance, but also territory: the globalization process, through which world economy events gain an international dimension, tends to intensify the effects of NTMs on a world-wide scale. Last but not least, in view of the fact that NTMs with increasing frequency are an cause for discord between WTO members, there is no escaping the crucial question: what exactly is meant by NTMs? The literature on the subject hardly clarifies the problem; note, for example, that NTMs, implemented within a broad economic policy, domestic or foreign, are known by different names in different places. They appear under the name of non-tariff measures, non-tariff barriers, non-tariff distortions or non-tariff obstacles, while the term NTMs is also known as ‘non-tariff restrictions’, sometimes with additional qualifiers (e.g. restrictions on import or quantity)⁴. The report gives only a very general definition of these measures. For the authors, NTMs are just that – measures which are non-tariff. They make no attempt at evaluation, saying merely that NTMs influence the goods trade. Similar measures affecting the services trade, also discussed in the report, appear under a separate name of ‘services measures’⁵.

It is difficult to miss the authors’ reluctance, in their definition of NTMs, to formulate any a priori suggestion that these measures might have a negative effect on international exchange. In other words, they make no attempt to charge NTMs with a restrictive nature through calling them, for instance, ‘non-tariff barriers’⁶. Evidently, the WTO report is loath to clearly explain why such a simplified NTMs definition was adopted, however, the provided analysis implies that it might be impossible to determine theoretically how they

⁴ A detailed discussion of NTMs definition can be found in: J. Wieczorek, *Znaczenie środków i barier...* [Importance of non-tariff measures and barriers...], *op. cit.*, pp. 45–58.

⁵ *World Trade Report 2012*, *op. cit.*, p. 39. This paper is mainly focused on NTMs impact on the goods trade.

⁶ Measures such as non-tariff barriers (instruments of economic policy and formal/legal regulations) are imposed by the central economic authorities both on the national and the supranational level. Because of their discriminatory character (implied by their nature and application mode) they alter the conditions for the participants of the international division of labour and, in consequence, restrict the dynamics, size and structure of international economic flow. On the other hand, non-tariff measures are those which have the potential to affect the international division of labour and economic flow in the manner described above’ – see J. Wieczorek, *Znaczenie środków i barier...* [Importance of non-tariff measures and barriers...], *op. cit.*, p. 54.

affect the international exchange. This end can only be achieved by empirical surveys, where the results would be open to various interpretation by all interested parties. In consequence, not only the results of these measures but the procedures governing their use gain paramount importance. For example, environment protection measures (e.g CO₂ emission norms) are judged by one side to have a positive effect both on it and the international community, while the other side, for different reasons, considers the effect negative (see the case of Poland). Another reason for the authors' reluctance to provide a precise NTMs definition may be inherent in the nature of WTO itself: as a conflict mediator, this organization does not intend, as it were, to determine in advance which side might be in the right with relation to NTMs use.

Obviously, it is difficult to reach a conclusive definition of NTMs, not to mention a precise assessment of their changing role and importance. No wonder, therefore, that in international trade non-tariff measures are treated as a kind of 'moving target'⁷. In its early days, GATT focused mainly on issues involving balance of payments, employment and development; nowadays WTO dedicates more time to the technical, health and environmental problems of international exchange. This of course implies that the arsenal of accessible economic policy measures, including NTMs, must be constantly adjusted to meet the changing aims of economy. Meanwhile, even a most superficial overview of GATT/WTO regulations concerning NTMs reveals that the ambivalent nature of these measures, in direct proportion to the bargaining position of the member states, has led in the past to the waiving or abuse of the generally accepted rules. Which, in turn, might lead us to conclude that although everyone is perhaps equal under the law, Orwell's observation that 'some are more equal than others' is not as absurd as it seems. For example Art. XI GATT explicitly forbade the introduction of new quantitative restrictions and recommended the elimination of existing ones. However, from this general rule there were three exceptions. The first allowed quantitative restrictions when dealing with problems related to balance of payments deficit. The second exception permitted to use NTMs in agricultural market protection policy, moreover – says the report – initially this proviso was dictated by US interests (note that the EU common agricultural policy is a classic example of 'legal' protectionism). Finally, the third exception allowing the 'legalization' of quantitative restrictions operated with relation to the least developed countries (LDC) as a support policy for their economic development (the so-called infant industries). Note that a similar strategy,

⁷ *World Trade Report 2012, op. cit.*, p. 222.

differentiating between the status of GATT members both legally and in practice, functioned for years within the Multi-Fibre Arrangement. The selective, bilateral and discretionary nature of quantitative measures used by that body under the name ‘negotiated import restrictions’ in the form of ‘orderly marketing arrangements’ (OMA) or ‘voluntary export restrictions’ (VER), was perhaps the most explicit example of a selective approach to the rules of international trade. The discriminatory character of these measures in practice renounced the basic principles of an organization established expressly for the liberalization of international exchange. It should be stressed that the ‘negotiated import restrictions’ affected mainly imports from less developed countries with an exceptionally weak bargaining power, forced to apply ‘self-restriction’ by the more affluent importers.

The OMA/VER mechanism is a perfect illustration of the ambivalent, even cynical, attitude of many developed countries to the idea of ‘free trade’, often readily given the appellation ‘regulated’ or ‘organized’⁸. In essence, the ‘negotiated import restrictions’ allowed these countries to avoid not only the sanctions to which they might be liable for illegally applying traditional quantitative import restrictions, but also the odium attached to such practices. The functioning of NTMs in present-day international exchange seems to show that the process of liberalization hasn’t wrought much change in the way different parties are treated, at least within the WTO. Most recent empirical NTMs surveys clearly indicate that any negative effects of technical barriers to trade (TBT) and sanitary/phytosanitary measures (STS) are concentrated mainly in developing-country exports to developed countries⁹. The impasse in the negotiations at the WTO Doha round is essentially a clash of conflicting attitudes to the problem of liberalization demonstrated by two groups: the developed countries, and the developing ones¹⁰.

⁸ More on the so-called ‘organized liberalism’ in: J. Wieczorek, *Znaczenie środków i barier...*, *op. cit.*, pp. 41–45.

⁹ *World Trade Report 2012*, *op. cit.*, p. 145.

¹⁰ The problem of export subventions provides interesting existential proof of a dualistic (some would say: ‘schizophrenic’) approach to the issue of ‘legal’ and ‘illegal’ NTMs. Export subventions are forbidden by the rules of international trade, which does not in the least prevent participants of international exchange to use them in one way or another. During the recent presidential election campaign US president accused China of illegally subsidizing its exports. It was necessary, B. Obama argued, to protect 770 thousand workplaces in the US automobile industry and elsewhere. In this he was supported by *Alliance for American Manufacturing*, an organization representing the interests of the US industrial sector, which claimed that since 2000 some 400 thousand workplaces disappeared in the US as a result of China persistently violating WTO

3. NTM INVENTORIES

One of the basic aims of international economic structures is the monitoring of world trade with respect to the use of different measures which might affect its volume and dynamics. Accordingly, information gathered by WTO is reviewed in two trade policy reports, regularly prepared by the members and observers of this organization. The first report, which appears twice a year, covers the changes in measures, both tariffs and non-tariffs, relative to the exchange of goods and services. The second, also published twice a year jointly by WTO, OECD and UNCTAD, is a follow-up of the G-20 proposition to monitor the measures related to trade and investments. Moreover, to help access information on measures used by WTO members which affect their international exchange, the organization Secretariat has developed an on-going information medium: the Integrated Trade Intelligence Portal (I-TIP) (Table 1).

As it is difficult to run conclusive studies of all NTMs used by any given country and their effects on trade, the WTO inventory concentrates only on these measures which directly affect international exchange. The inventory does not uniquely distinguish which of these measures are strictly non-tariffs. This has been the subject of separate analysis, particularly relative to frequency of NTMs use.

In relation to the cited WTM report, the most complete collection of information on NTMs has been developed by UNCTAD in the form of Trade Analysis and Information System (TRAINS) database. TRAINS provides information on non-tariff measures used by 86 countries collected over the period 1992–2010 (Table 2).

Of course, we might ask: what is the practical worth of the NTM information collected by UNCTAD? Entrepreneurs participating in international exchange might see it as rather limited, since the data presented in Table 2 is quite general. On the other hand, inventories such as these are certainly much more valuable for state institutions, as the information they provide undoubtedly proves useful during any negotiation process.

rules. However, the observers of US economy have noted that the advocates of protectionist measures against import from China seem to forget that since 2008 the US government granted ‘help’ (read: different subsidies) amounting to 80 billion USD to American car manufacturers, so that the US Treasury stake e.g., in General Motors reached almost 27% (cf: *En campagne, Obama attaque la Chine à l’OMC*, ‘Le Figaro’, 18.09.2012).

Table 1

Measures covered by WTO trade policy reviews

1. Measures directly affecting imports
• Customs procedures
• Duties, taxes and other charges
• Customs valuation
• Pre-shipment inspection
• Rules of origin
• Import prohibitions, quotas, and licensing
• Anti-dumping, countervailing duties, safeguard regimes
• Government procurement
• State trading enterprises
• Other measures
2. Measures directly affecting exports
• Procedures
• Export taxes
• Export restrictions
• Export subsidies
• Export promotion
• Special economic zones
3. Measures affecting production and trade
• Regulatory framework
• Technical barriers to trade
• Sanitary and phytosanitary measures
• Trade-related intellectual property rights

Source: World Trade Organization, 2011, in: *World Trade Report 2012, op. cit.*, p. 99.

Table 2

Classification of NTMs according to UNCTAD

• Sanitary and phytosanitary measures
• Technical barriers to trade
• Pre-shipment inspection and other formalities
• Price control measures
• Licences, quotas, prohibitions and other quantity control measures
• Charges, taxes and other para-tariff measures
• Finance measures
• Anti-competitive measures
• Trade-related investment measures
• Distribution restrictions
• Restrictions on post-sales services
• Subsidies (excluding export subsidies)
• Government procurement restrictions
• Intellectual property
• Rules of origin
• Export-related measures

Source: United Nations Conference on Trade and Development, 2010, in: *World Trade Report 2012, op. cit.*, p. 101.

In order to supply the participants of world trade with some essential facts about NTMs, the International Trade Center (ITC), aided by UNCTAD and two UN regional commissions, prepared an inventory of so-called ‘procedural obstacles’, defined as ‘issues related to the application of NTM rather than to the measure itself’¹¹ (Table 3).

The extent to which procedural obstacles are able to hinder imports is best illustrated by an example. An importer, to bring in a certain product, may be obliged to obtain a certificate (nothing but a NTM) from an appropriate authority or testing laboratory. However, getting such a certificate may

¹¹ *World Trade Report 2012, op. cit.*, p. 101.

be extremely costly, troublesome and very sluggish, for example when the said institutions are located in remote areas. Through this practical and simple measure, hard to challenge as discriminatory (since formally applied to everybody without exception) foreign competition may be effectively constrained. Given that the scope of possible variations in the domain of procedural obstacles is limited solely by the human imagination, we may quite safely observe that all undesirable imports can be restricted or even totally eliminated in the majesty of the law, and that challenging this state of affairs on the international forum is frequently just a waste of time.

Table 3

Inventory of Procedural Obstacles according to ITC

• Administrative burdens
• Information/transparency issues
• Inconsistent or discriminatory behaviour of officials
• Time constraints
• Payment
• Infrastructural challenges
• Security
• Legal constraints
• Other

Source: *International Trade Center 2011*, in: *World Trade Report 2012*, *op. cit.*, p. 102.

More information on trade restrictions can be found on the World Bank Temporary Trade Barriers Database website. It contains data on different national governments' use of antidumping and countervailing duties since 1980, as well as information on global safeguards collected since 1995. Admittedly, the above data on duties do not meet NTMs criteria, however, the database's practical worth cannot be overestimated. Additional knowledge on trade exchange difficulties can be obtained from the dataset documenting all stages of WTO dispute settlement proceedings, also hosted on the TTBD website.

Another interesting instance of an internationally developed database containing national-level measures which might possibly affect competition in international trade are the OECD indicators of product market regulations

for member states. These indicators were designed to quantify qualitative data on laws and regulations, however, this undoubtedly ambitious attempt does not distinguish between the individual governments' discriminatory and non-discriminatory measures.

US and EU NTM collections are outstanding. In 2002 the United States International Trade Commission used an original methodology to create an inventory, augmented by the achievements of WTO and UE, which has been systematically updated throughout the last decade. Moreover the Commission publishes a yearly report on trade barriers hindering American export overseas, where the active part played by US Embassies' in collecting data on these obstacles is especially significant. Meanwhile, UE's Market Access – Trade Barriers Database, an inventory of trade barriers restricting the access of members export to foreign markets, lists the following NTMs: registration; documentation and customs procedures; quantity-related measures; investment-related problems; sanitary and phytosanitary measures; government procurement; subsidies; other non-tariff measures. Finally, a noteworthy project is the Global Trade Alert initiative, developed by the Centre for Economic Policy Research to monitor and collect NTMs in team with independent research institutes from around the world. The CEPR's objective was to increase the current awareness of state measures that may affect trading partners' commercial interests, broadly defined as imports, exports, foreign investments (including intellectual property), and foreign employees. It is their opinion that a combination of peer pressure plus up-to-date, reliable and comprehensive information will provide grounds for rationally motivated decisions which would serve the interests of all parties and help 'avoid the historic mistakes of protectionism of previous eras'¹².

The main guideline of the presented inventories has thus been made very clear. Their purpose is to create a favourable climate and feasible aim-oriented conditions both for eliminating the current restrictions in world trade and for preventing the creation of new ones. Certainly, state and/or supra-state authorities must take the lead as liberal policy agents, however, it is crucial in this respect to recognize the complementary input of various international projects. 'Codes of good conduct' in international trade still have a promising future, despite mixed feelings raised by such a claim. For it would be very naive to imagine that all parties to this exchange, inspired by the ideals of free trade, will in the foreseeable future abandon the idea of restricting outside competition on their markets.

¹² *World Trade Report 2012, op. cit.*, p. 104.

4. FREQUENCY OF NTM USE

The frequency with which NTMs are applied provides some essential information about their effect on the size, dynamics, and the commodity and geographic structure of international trade. The data collected over the years by GATT/WTO show that there are obvious trends in the rate of these measures, closely correlated to the developments in international exchange (see Table 4).

Table 4

Frequency of non-tariff measures as notified by GATT/WTO members for non-agricultural products (share of NTM's by inventory category in the years 1968, 1973, 1989, 2003 i 2005)

DESCRIPTION	Inventory 1968	Inventory 1973	Inventory 1989	NAMA 1 st inven- tory 2003	NAMA 2 nd inventory 2005
1. Government participation in trade and restrictive practices tolerated by governments	11,9	15,3	20,9	7,1	7,0
• Government aids	2,7	6,6	7,3	1,8	1,7
• Countervailing duties	0,6	0,4	0,5	0,2	0,0
• Government procurement	3,7	3,4	6,4	0,9	0,7
• Restrictive practices tolerated by governments	0,0	0,8	2,0	3,8	4,3
• State trading, government monopoly practices	4,9	4,1	4,6	0,4	0,3
2. Customs and administrative entry procedures	14,8	14,6	11,9	23,5	26,2
• Ant-dumping duties	1,1	1,5	2,3	1,5	2,3
• Valuation	5,5	4,8	4,1	2,3	5,3
• Customs classification	1,3	0,7	0,5	0,7	3,3
• Consular formalities and documentation	4,7	6,4	3,4	2,3	3,0
• Samples	0,7	0,4	0,2	0,1	0,0
• Rules of origin	1,3	0,0	0,4	7,4	2,6
• Customs formalities	0,2	0,8	1,1	9,1	9,6

DESCRIPTION	Inventory 1968	Inventory 1973	Inventory 1989	NAMA 1 st inven- tory 2003	NAMA 2 nd inventory 2005
3. Technical barriers to trade	6,1	9,2	8,2	29,9	37,1
• General	0,0	9,2	1,6	3,2	8,9
• Technical regulations and standards	5,2	0,0	3,0	15,8	13,2
• Testing and certification arrangements	0,9	0,0	3,6	11,0	14,9
4. Specific limitations	36,7	31,5	31,7	34,9	26,8
• Quantitative restrictions and import licensing	20,7	15,6	13,9	12,8	7,0
• Embargoes and other restrictions of similar effect	5,0	5,6	5,3	0,8	4,0
• Screen-time quotas and other mixing regulations	1,9	3,6	1,6	0,0	0,7
• Exchange control	2,3	1,2	1,2	1,3	1,3
• Discrimination resulting from bilateral agreements	0,8	1,5	1,1	0,1	0,7
• Discriminatory sourcing	0,5	1,0	0,0	0,3	1,7
• Export restraints	1,6	0,4	0,4	0,2	1,0
• Measures to regulate domestic prices	1,6	0,5	1,2	0,2	0,3
• Tariff quotas	0,2	0,3	0,5	0,3	1,3
• Export taxes	0,0	0,0	2,1	0,2	1,0
• Requirements concerning marking, labelling and packaging	1,6	1,6	2,1	7,2	6,3
• Other specific arrangements	0,3	0,1	2,1	11,5	1,7
5. Charges on import	29,2	29,4	27,3	4,4	1,7
• Prior import deposits	1,9	1,9	1,6	0,2	0,0
• Surcharges, port taxes, statistical taxes, etc.	13,5	10,5	10,5	3,0	1,3
• Discriminatory film taxes, use taxes, etc.	11,1	4,0	4,5	0,2	0,3

DESCRIPTION	Inventory 1968	Inventory 1973	Inventory 1989	NAMA 1 st inven- tory 2003	NAMA 2 nd inventory 2005
• Discriminatory credit restrictions	1,3	1,4	1,2	0,2	0,0
• Border tax adjustments	0,9	11,2	8,6	0,2	0,0
• Emergency action	0,5	0,4	0,9	0,8	0,0
6. Others	1,4	0,0	0,0	0,2	1,3
Total	100,0	100,0	100,0	100,0	100,0
Number of items in categories	873	731	561	2556	302

Source: *World Trade Report 2012, op. cit.*, p. 45.

These data must be treated with great caution. They come from different collections created by different methodologies, and so may distort any attempt at analysis. For example, one result of GATT Uruguay round was the so-called tariffication of quantity-related restrictions, which actually meant their transformation into *ad-valorem* tariffs. Thus, the disappearance of NTMs need not necessarily imply automatic relaxation of market protection, because, as in this case, only the nature of protection is changed.

The above data, in any case relevant only for a fragment of world trade, clearly indicate that the nature of NTMs used in international exchange has undergone a basic evolution. True, restrictions used at customs barriers are still significant, especially in imports, but the function of border NTMs is increasingly replaced by domestic measures, mainly in the form of technical barriers and various marketing requirements for a given product. This follows directly from the ongoing transformation of the material structure of global exchange. Intra-industry trade made a significant impact on competitive practice where quality is of utmost importance. What with the elimination of quotas and the ineffectiveness of *ad-valorem* tariffs, calculated with respect to the price of imported products, it became imperative to find more effective protection solutions.

Research projects conducted by other international organizations confirm the dominance of technical and sanitary/phytosanitary barriers (TBT and SPS) over other NTMs. An analysis by UNCTAD shows that member countries impose in their trade TBT on 30% products, and SPS on 15% of products. ITC surveys of developing countries indicate that this proportion is even greater when the exporting country is less-developed or on the same level of

development as its partner. In the first case the share of TPT/SPS measures in burdensome NTMs rises to around three-quarters, whereas in the second it falls to around half¹³. ITC survey-based evidence also suggests another problem concerning the domination of the discussed NTMs in contemporary trade policy. By posing ‘practical problems’ in the form of procedural obstacles, the developed countries surround themselves with a ‘sanitary cordon’ which the developing countries find virtually impossible to breach. However, because a significant number of the less developed economies offer no manufactured goods which could technologically compete with products on developed markets, in their case the prohibitive character of TBT/SPS becomes somewhat relative.

Exporters from highly developed countries also find TBT/SPS burdensome; it has already been stressed that these measure are very effective when eliminating undesirable competition. According to ITC, TBT/SPS appear to be a major concern for more than half (52%) of EU exporters trying to access foreign markets¹⁴. Admittedly, there is no information whether they mean the EU domestic market, or markets in outside countries, but even so, some conclusions can be articulated.

The first, most emphatically repeated conclusion, is that the quality of the product, as measured by its technical and technological advancement, is the most powerful instrument in the competitive struggle for world markets, while TBT/SPS are the most effective competition-limiting counterweapons. It is no accident that many experts view the ‘patent war’ waged by Apple against Samsung in mid-2012 as an symptom of weakly masked protectionism¹⁵. The case brought new life to the ongoing and otherwise familiar dispute whether the globalization in the field of patents, in the context of proliferation and procedural consequences might seriously impede both scientific and technical progress and international trade. Empirical ITC research indicates that while US exporters especially complain about violations of their intellectual property rights, EU firms also cite it as a problem¹⁶. It’s a well-known fact that the greatest generator of such unwelcome events is China; in the opinion of some observers, its accession to WTO might help eliminate the norm-breaking trade practices of that gigantic exporter.

¹³ *World Trade Report 2012, op. cit.*, pp. 111 and 115.

¹⁴ *World Trade Report 2012, op. cit.*, p. 113.

¹⁵ On August 24th 2012 r. a US court pronounced in the above case, sentencing Samsung to 1 billion USD of compensation for damages following the infringement of six Apple patents – see: *iPhone, uCopy, i Sue*, ‘The Economist’, 1–7.09.2012, p. 9.

¹⁶ *World Trade Report 2012, op. cit.*, p. 113.

Evidence collected by ITC business survey shows that access to markets is disproportionately more difficult for agricultural exporters than manufacturing firms. Exporters of agricultural products report more problems related to TBT/SPS measures than exporters of manufactured goods (59% for the former, 34% for the latter)¹⁷. Note that the survey concentrated on developing countries, which would indicate that their agricultural exports were mainly to developed markets. Actually, it would be a cliché to repeat the popular argument about the agricultural protectionism of the latter (especially in relation to EU); even less novel is the suggestion that they are deeply reluctant to relinquish or significantly revise their attitude to the major economical and political problem of global agricultural trade. While this attitude remains unchanged, it is hard to envision a successful closure of the Doha Development Round in the foreseeable future.

Some evidence also points to TBT/SPS measures being particularly trade restrictive for small and medium-sized firms. Smaller financial resources make them less adaptable to market conditions, both in terms of knowledge and in relation to testing, inspection and certifying compliance with TBT/SPS measures, all of which entail costs, and are often extremely time-consuming, putting these companies in a hopeless position from the very start¹⁸.

The next conclusion is closely related to the economic situation. It is an unquestioned fact, supported by empirical data, that in deteriorating trade conditions countries immediately resort to increased protectionism, especially when faced with a crisis. According to WTO monitoring reports, there was a sharp increase of the number of new restrictive measures from 53 in 2008 to 346 in 2009 at the height of the crisis. New restrictive measures then fell back to 306 in 2010 but increased again to 344 only in the first 10 months of 2011¹⁹.

All in all, empirical research indicates an increasing share of TBT/SPS in NTMs currently used. There is a clear correlation between technical, sanitary and phytosanitary barriers, and the level of economic development of the global trade participants. These restrictions are the most powerful weapon wielded by developed countries against unwanted imports. Moreover, the restrictive thrust of TBT/SPS is most keenly felt by less-developed exporters, especially those specializing in agriculture. In other words, the historical impulse to ‘impoverish thy neighbour’ by protectionism has once again been acted upon through TBT/STS. In these conditions countries with

¹⁷ *Ibidem*, p. 117.

¹⁸ *Ibidem*, p. 147.

¹⁹ *Ibidem*, p. 120.

low *per capita* GDP are automatically condemned to remain in the vicious circle of poverty. Moreover, developed countries find technical barriers increasingly convenient as a way to protect their big firms' international interests. Protectionist measures of an extremely specialized nature (see e.g. the discussed case of Apple vs. Samsung), provide the latter with extensive weaponry to effectively withstand competition on the global market.

More interesting, although as yet uninvestigated, is the role played by NTM in the protection and promotion of firms with the state as a major shareholder. Indeed, the subject of so-called state capitalism deserves a separate analysis, let us just note here that the Chinese model with its various protectionist ramifications (hidden subsidies through preferential crediting) is far from unique in modern world economy²⁰. Therefore, it may be safely assumed that the less liberal the economy, the more acute the protectionism.

4.1. Ways to reduce TBT/SPS protectionism

One of the ways to reduce the trade-hindering consequences of TBT/SPS is to introduce uniform standards both with respect to the form and to the application of these measures – that is harmonization and mutual recognition. The first implies a common definition of both the policy objective and the technical requirements to achieve it, while the second refers to the reciprocal acceptance of the measures applied in both sides of such an agreement. Both approaches are considered trade-enhancing as they produce economies of scale and permit a more efficient allocation of resources. However, empirical surveys indicate that besides their undisputable advantages, both methods can have some negative effects. For example, harmonization leads to more

²⁰ The rapid expanse of the Chinese telecom giant Huawei is due almost exclusively to its political and financial cosiness with the powers that be – see: *The company that spooked the world*, 'The Economist', 4–10.08.2012, p. 19. For more, see special report: *State capitalism*, 'The Economist', 21–27.01.2012, p. 47. Note, for example, the traditional high involvement of state capital in different sectors of French economy, e.g. in the energy production sector. The government of France has a stake of 84,44% in the company EDF (estimated worth of 26 billion euros), and 36,36% in GDF SUEZ (14,70 billion euros) – see: *Big Brother is back*, 'The Economist', 3–9.11.2012, p. 55. Banque publique d'investissement, founded by the new socialist French cabinet seeking to revive the country's economy, will surely become an important instrument of state intervention. Historically, the statist approach in France has usually resulted in a mercantile and protectionist attitude to outside competition, and this policy will probably maintained or even enhanced in the foreseeable future.

homogeneous standards, reducing the transaction costs and increasing the consumers confidence about the quality of imported products, but it also reduces the number of varieties in the market. Moreover, harmonization generates more costs than mutual recognition²¹.

The positive effects of harmonization and mutual recognition of TBT/SPS measures induce the interested parties to consider these provisions in regional/preferential trade dealings. The WTO analysis of the content of preferential trade agreements (PTAs) in 2011 shows that approximately 60% of them include such provisions. Incidentally, note that significant differences exist in terms of PTAs tendency to include harmonization of technical regulations between EU-type and North American-type agreements. For example, while the agreements signed by the European Union typically include harmonization provisions, PTAs involving North American countries tend to include mutual recognition of technical regulations²².

Evidently, regional integration means that any initiative to remove obstacles to the free flow of goods and services gains fundamental importance. For example, the harmonization of TBT/SPS in the EU, as an important factor of regional market-building, should be trade-enhancing both within the region and with respect to third countries. Even so, evidence suggests that trade partners may be affected differently, relative to their economic development and the type of integration ties²³. It has been shown that harmonization of TBT/SPS stimulates US exports to the EU, and improves the presence of small and medium-sized firms in the market by reducing the costly and time-consuming procedures of TBT/SPS conformity assessment. However, when the existent cooperation mechanisms foster harmonization and unification of technical standards in the community, this may lead to preferential treatment of member countries. The exchange of goods and services with partners outside the region is then diverted to domestic trade, resulting in the so-called 'trade diversion effect'. Observation of EU integration process fully confirms this conclusion. Furthermore, while harmonization and mutual recognition foster the trade exchange between developed countries, they tend to have a negative effect on less developed economies. First, because the low technical quality of the latter's manufactured products, the limited variety of these goods or their total absence from the export offer, and the low quality of agricultural products, which often diverge from international standards,

²¹ *World Trade Report 2012, op. cit.*, p. 150.

²² *Ibidem*, p. 151.

²³ *Ibidem*, pp. 149–153.

reduces the potential profits of these countries or even permanently excludes them from the trade markets. Second, TBT/SPS are an element of domestic regulations applied *erga omnes*, so any charges of discrimination are easily refuted. This, as has already been mentioned, makes TBT/SPS a difficult subject for international negotiations, which – if they do take place – are usually limited to an exclusive ‘club’ of highly developed countries.

The cited World Trade Report is rather pessimistic, especially with regard to those countries which for various reasons are not able to benefit from introducing uniform TBT/SPS standards. There is a risk of a ‘lock-in’ effect, whereby the regional harmonization of standards discourages incentives for further trade opening. And, as a result, there is also a risk of a multi-tiered regulatory world emerging, with different co-existing levels of liberalization, in which developing countries are permanently marginalized or excluded²⁴. The recent negotiative impasse in the Doha round unquestionably proves the reality of this effect for global trade exchange.

In order to reduce the protectionist impact of NTMs the multilateral trading system must undertake actions seeking to improve their transparency. It has been repeatedly stressed that one of WTO’s main tasks is to promote such modes of conduct for member countries which serve to increase their confidence during mutual trade dealings. Positive effects were achieved by TBT/SPS agreements which involve procedures and obligations requiring publication and notification of NTMs and services measures, as well as periodic reviews of member countries’ trade policy; also, relevant WTO committees have been working to identify good regulatory practices (GRP).

To encourage convergence in NTMs use, WTO closely cooperates with other international organizations. Regarding sanitary and phytosanitary measures WTO – together with the Food and Agriculture Organization of the United Nations (FAO), the World Organisation for Animal Health (OIE), the World Bank, the World Health Organization (WHO) – jointly established the Standards and Trade Development Facility (STDF). In case of SPS, WTO expressly recognizes three international standard-setting bodies: the Codex Alimentarius, the World Organization for Animal Health, and the International Plant Protection Convention. A important aim of these initiatives is to help developing countries adapt to the practice of international SPS standards and provide them with the opportunity to participate in and influence the standard-setting process. Incidentally, international standard-

²⁴ *Ibidem*, p. 153.

setting cooperation runs smoothly mainly in the area of SPS; technical barriers, being more specific, are not so easily regulated.

Transparency is thus an important dimension of international cooperation and WTO practice on NTMs origin and use. As for the monitoring reports, the 8 th WTO Ministerial Conference in December 2011 directed the monitoring mechanism to be continued and strengthened. The situation will improve significantly when all the information is made available through the recently launched WTO database – Integrated Trade Intelligence Portal. Hopefully, it will be possible to consolidate cooperation and expand the recent collection through partnership with similar datasets developed by some international institutions and organizations – the Multi-agency Transparency in Trade Initiative²⁵.

4.2. Perspectives of NTMs

At present, the new-sprung non-tariff restrictions cover a greater portion of global trade than all Africa's exports²⁶. However, there is hope that this gloomy overall image of modern global trade may soon be brightening up. In a new long-run forecast, the global banking firm HSBC predicts that world trade will grow by close to 90% over the next 15 years – at first advancing modestly, because of the euro crisis, then vigorously²⁷. What then should be the sources of this positive scenario?

In expert opinion, much depends on whether the failing Doha round, launched by WTO in 2001, will revive in the immediate future to boost the dynamics of international exchange. According to the Peterson Institute, the potential gains would be around 280 billion USD a year²⁸.

Unfortunately, so far the results of multilateral negotiations disappoint; Doha, a laudable multinational undertaking, seems to have been largely consumed by ambition and overblown expectations. The first problem was the number of countries: the current negotiations started with 155 WTO members, compared to 23 countries involved in the first round of GATT talks in 1947. Within such a huge group, divided by diverse economic levels and national interests, reaching agreement on some areas has proved extremely difficult. Second, the idea of Doha was to achieve a grand bargain in which practically all areas of world trade would be liberalised. It deliberately set

²⁵ *Ibidem*, p. 207.

²⁶ *Goodbye Doha, hello Bali*, 'The Economist', 8–14.09.2012, p. 10.

²⁷ *Protectionism alert*, 'The Economist', 30.06–6.07.2012, p. 13.

²⁸ *Goodbye Doha...*, *op. cit.*, p. 10.

out to cover not only traditional trade – manufactured goods, agriculture and services – but also a host of things more indirectly related to trade, for example antitrust, intellectual property and foreign-investment rules. With such fuzzy priorities the negotiative effort was bound to be fragmented and diffuse. Finally, the initially accepted general rule that ‘nothing is agreed until everything is agreed’ was virtually impossible to put into practice.

A chance of positive results in the present crisis might be offered by the so-called ‘Global Recovery Round’²⁹. The project proposes to do away with the ‘all-or-nothing’ Doha rule, and allows the possibility of separate deals, progressing independently of one another. In line with this ‘pragmatism’, two solutions are suggested. First, since manufacturing represents around 55% of total trade, and services account for 20%, the Global Recovery Fund should focus on these two basic areas. Second, in view of the fact that bilateral free-trade agreements are the primary tool for liberalising international exchange, there is no reason to deprecate them as an alternative for Doha multilateralism. Another WTO principle – the ‘most-favoured-nation’ (MFN) clause – would then hold, meaning that mutual concessions between the sides of a free-trade deal would be applied to all WTO members, even if they do not reciprocate. In this way all bilateral agreements would gain multilateral status. The authors count on WTO to finish the Global Recovery Round by the next big meeting in Bali in December 2013.

The above idea deserves careful scrutiny, as it has evident strong points, offering precise and pragmatic solutions. However, it also possesses several drawbacks. First of all, its proposals generally favour the production/exports interests of developed and highly developed countries, which largely monopolize the world market in manufactured goods. It is therefore obvious that they seek to improve their access to markets. Less-developed countries represent a different option: their main interests lie in opening world markets to their agricultural products. However, the developed economies are not interested in liberalising agricultural markets. And so, the when agricultural products were excluded as a negotiation target of the proposed Global Recovery Round, the reaction was immediate and scathing. Countries with agricultural products as the key exports (exceeding 60% in some developing economies) complained against holding agricultural trade hostage to the successful completion of the Doha round. Admittedly, said their representatives, agriculture makes up (depending on the source) only 7 to 9.2% of the total exchange, but this relatively small share is not

²⁹ *Ibidem*, p. 10.

merely a result of economic backwardness, but also the intensifying farm protectionism of the rich³⁰.

Indeed, the new deal of the Global Recovery Round has many weak points, in terms of policy. An interesting proposition in itself, it will probably share the fate of many previous attempts aimed to bring Doha to a quick conclusion, and further expand the voluminous archives of wishful thinking. All in all, the present economic crisis does not encourage either serious discussions or actions of a liberalising nature.

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³⁰ See letter of ambassadors to WTO of the following countries: Argentina, Brazil, China, India, Nigeria and South Africa, published in 'The Economist', 6–12.10.2012, p. 20.

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NON-TARIFF PROTECTIONISM – A NEW SETTING

Summary

The analysis of non-tariff protectionism presented in the article in the context of its reasons, forms and influence on international trade results in a conclusion that we deal with a phenomenon that has immanently become part of the mechanism of global economy; both in the context of its structural form and opportunistic manifestations of activeness. Rather paradoxically, the countries that have achieved a high level of economic development try to protect their financial status with the use of NTM. Non-tariff protectionism demonstrates its restrictive form especially in the periods of crisis and hits

the weaker links of international exchange – less developed countries. The changeable form of contemporary protectionism measures, often defined as a ‘moving target’, makes liberalization activities more difficult. They are more and more complex in the light of changes that are taking place in the contemporary world due to a more and more dynamic scientific and technological progress. That is why TBT/SPS have become so important in the whole range of non-tariff measures and difficulties with curbing their restrictive influence occur. Undoubtedly, it is necessary to increase efforts in order to awaken the conscience about threats resulting from the selfish use of NTM in international exchange and look for effective ways of fighting against non-tariff restrictions. It can be assumed that the efforts on the arena of the WTO and other international organizations that aim at the above-mentioned principles will reach an adequate critical mass necessary to start liberalization activities in international trade in the predictable future.

PROTEKCJONIZM POZATARYFOWY – NOWA ODSŁONA

Streszczenie

Dokonana w artykule analiza protekcjonizmu pozataryfowego zarówno w kontekście jego przyczyn, form, jak i wpływu na wymianę międzynarodową prowadzi do wniosku, iż mamy do czynienia ze zjawiskiem immanentnie wpisanym w mechanizm globalnej gospodarki w kontekście jej strukturalnej postaci i koniunkturalnych przejawów aktywności. W sposób dość paradoksalny to właśnie te kraje, które osiągnęły wysoki poziom rozwoju gospodarczego, starają się za pomocą NTM chronić swój status materialny. Protekcjonizm pozataryfowy objawia swoją restrykcyjną postać szczególnie w okresach kryzysowych, uderzając przy tym w słabsze ogniwa wymiany międzynarodowej – kraje mniej rozwinięte. Zmienna postać współczesnych środków protekcjonistycznych, określanych niejednokrotnie jako „ruchomy cel”, utrudnia przy tym działania liberalizujące. Są one coraz bardzo złożone w świetle przemian, jakie zachodzą we współczesnym świecie, pod wpływem dokonującego się, coraz bardziej dynamicznego, postępu naukowo technicznego. Stąd takie znaczenie w arsenale środków pozataryfowych, jakie zyskały w ostatnim okresie TBT/SPS i trudności z ograniczaniem ich restrykcyjnego oddziaływania. Bezspornie należy wzmocnić wysiłki na rzecz budzenia świadomości zagrożeń wynikających z egoistycznego stosowania NTM dla wymiany między-

dowej i szukać efektywnych sposobów walki z restrykcjami pozataryfowymi. Można założyć, że wysiłki podejmowane na forum WTO i innych organizacji międzynarodowych, stawiających sobie za cel powyższe pryncypia, osiągną jednak w dającej się przewidzieć przyszłości stosowną masę krytyczną do uruchomienia działań liberalizacyjnych w handlu światowym.

НЕТАРИФНЫЙ ПРОТЕКЦИОНИЗМ – НОВОЕ ИЗДАНИЕ

Резюме

Проведённый в статье анализ нетарифного протекционизма как в кон тексте его причин, форм, так и влияния на международный обмен, приводит к выводу, что мы имеем дело с явлением, по существу вписанным в механизм глобальной экономики. Как в контексте её структурной формы, так циклических проявлений активности. Достаточно парадоксальным образом именно те государства, которые достигли высокого экономического уровня, стараются при помощи NTM защищать свой материальный статус. Нетарифный протекционизм проявляет свои ограничительные формы особенно в кризисные периоды, при этом поражая более слабые звенья международного обмена – слаборазвитые страны. Изменяющаяся форма современных протекционистских мер, неоднократно называемых «движущейся целью», утрудняет при этом меры по либерализации. Они становятся всё более сложными в свете перемен, происходящих в современном мире, под влиянием имеющего место и всё более динамического научно-технического прогресса. Отсюда такое значение в арсенале нетарифных мер, которое приобрели в последнее время TBT/SPS, и трудности с приостановлением их ограничительного воздействия. По общему признанию, следует активизировать усилия по способствованию осведомлённости об угрозе, которую несёт за собой эгоистическое применение NTM для международного обмена, и искать эффективных способов борьбы с нетарифными ограничениями. Можно предположить, что усилия, предпринимаемые на форуме WTO и других международных организаций, целью которых является соблюдение этих принципов, достигает однако в прогнозируемом будущем соответствующей критической массы для при ведения в действие мер по либерализации в мировой торговле.