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University of Oslo

# Non-tariff barriers

Yuliya Chernykh



All government imposed and sponsored actions or omissions that act as prohibitions or restrictions on trade, **other than** ordinary custom duties and other duties and charges on imports and exports.

- WTO Glossary: Non-tariff measures, such as quotas, import licensing systems, sanitary regulations, prohibitions, etc. Same as “[non-tariff barriers](#)”.

- While tariff barriers have been systematically reduced since the late 1940s, non-tariff barriers have in recent decades gradually become an ever more prominent instrument of protection;
- Unlike tariff barriers, non-tariff barriers not only affect trade in goods but also trade in services;
- While non-tariff barriers have become a prominent instrument of protection, they often also serve important public policy objectives.

- Prohibitions – absolute or conditional
- Quotas – global or bilateral
- Licensing – automatic or non-automatic, and usually contain some form of quota
- Indirect: e.g. State trading operations, mixing regulations; minimum price, voluntary export constraint

1. Quantitative
2. Others

NB! Trade Monitoring Database

<http://tmdb.wto.org/searchmeasures.aspx?lang=en-US>

Quantitative restriction is a measure that limits the **quantity** of a product that may be imported or exported.

The General Agreement on Tariffs and Trade (GATT) requires the general **elimination** of these restrictions — **except** in defined circumstances.

Members' **notifications** on quantitative restrictions are compiled in a WTO database which is accessible to the public.

WTO QR Database

<http://qr.wto.org/Private/Welcome.aspx?ReturnUrl=%2fReports%2fHome.aspx&lang=en>

Indicative list in is provided in [Annex 2](#) of [G/L/59/Rev.1](#).

[https://www.wto.org/english/tratop\\_e/markacc\\_e/59R1A2.pdf](https://www.wto.org/english/tratop_e/markacc_e/59R1A2.pdf)



- Tariff quotas may be distinguished from import quotas.
- A tariff quota permits the import of a certain quantity of a commodity duty-free or at a lower duty rate, while quantities exceeding the quota are subject to a higher duty rate.
- An import quota, on the other hand, restricts imports absolutely.

## Why are custom duties preferred over quantitative restrictions?

- Tariffs are more transparent
- Price increases with tariffs go to government but with quantitative restrictions they go to domestic competitors ('quota rent')
- Open to less corruption in the setting
- They do not impose absolute limits on trade

**EC — Bananas III para. 33.**

- *"In contrast to quantitative restrictions, tariff quotas do not fall under the prohibition in Article XI:1 and are in principle lawful under the GATT 1994, provided that quota tariff rates are applied consistently with Article I. Members are required, in accordance with Article II, to provide treatment no less favourable than that bound in their Schedules of Concessions. Accordingly, in-quota and out-of-quota tariffs must not exceed bound tariff rates, and import quantities made available under the tariff quota must not fall short of the scheduled amount. In addition, tariff quotas are, under the terms of Article XIII:5, made subject to the disciplines of Article XIII."*

- Non-discrimination at the core?
  - Additional elements
    - Quantitative restrictions (border measures?)
    - Customs formalities (border measures, not in focus)
    - Market access – unnecessary trade barriers
    - Market access – harmonization of technical regulations and standards
  - The range of domestic measures covered
    - The issue of «attribution»
  - The role of external actors and additional commitments
- [https://www.wto.org/english/tratop\\_e/markacc\\_e/qr\\_e.htm](https://www.wto.org/english/tratop_e/markacc_e/qr_e.htm) (video overview of QR)

- Lack of transparency
- Unfair and arbitrary application of trade measures
- Customs formalities and procedures
- Government procurement laws and practices
- Others.

- The General Agreement on Tariffs and Trade (**GATT**)
- Technical Barriers to Trade Agreement (**TBT**)
- The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (**SPS**)

Article III *National Treatment on Internal Taxation and Regulation*

1. The contracting parties recognize that **internal taxes and other internal charges**, and **laws, regulations and requirements** affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and **internal quantitative regulations** requiring the mixture, processing or use of products in specified amounts or proportions, **should not be** applied to imported or domestic products so as to afford protection to domestic production.\*

Article XI *General Elimination of Quantitative Restrictions*

1. No prohibitions or restrictions other than duties, taxes or other charges, whether made effective through quotas, import or export licences or other measures, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.



Application:

- *EC-Asbestos*: Article III (not XI) applies because EU rules applied to both importated AND domestic products.
- *India-Autos*:
  - Both Article III and XI can apply separately.
  - Article III applies when competitive opportunities on the domestic market are affected
  - Article XI applies when the opportunities for import are affected

## Equally applicable to import and export

- *India-Autos*: Trade balancing requirement fell under GATT XI (p. 280)
- *China-Raw Materials*

## Broad range of measures

### - *Colombia-Ports of Entry*

- However, Article XI interpreted broadly to include restrictions on import emerging from *'measures which create uncertainties and affect investment plans, restrict market access for imports or make importation prohibitively costly'*
- *'Other measures'* in Article XI to be interpreted broadly

### • *Argentina-Hides and Leather*

- Panel was stricter though in requiring proof of trade effects

## Broad range of measures

- Minimum import and export prices
- Restrictions on points of entry
- Non-mandatory measures covered (*Japan Semi-Conductor*)
- Also indirect («*de facto*»)

## The special issue of «sensitive» products

- Primary products – extending to fish, textiles
- See exceptions in Art XI: 2 but also requirements
- *China Raw Materials*:  
[https://www.wto.org/english/docs\\_e/legal\\_e/gatt47\\_e.pdf](https://www.wto.org/english/docs_e/legal_e/gatt47_e.pdf)

*Article XIII Non-discriminatory Administration of Quantitative Restrictions*

1. No prohibition or restriction shall be applied by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation of any product destined for the territory of any other contracting party, unless the importation of the like product of all third countries or the exportation of the like product to all third countries is similarly prohibited or restricted.

- Relationship to GATT, the SPS and GP Agreements (art. 1.4 and 1.5)
- (1) Technical regulations  
«Mandatory»
- (2) Standards
  - Voluntary, but *de facto* mandatory(?)
  - National standards vs. international standards
- (3) Conformity assessment procedures  
[https://www.wto.org/english/res\\_e/publications\\_e/tbttotrade\\_e.pdf](https://www.wto.org/english/res_e/publications_e/tbttotrade_e.pdf) (NB! page 13)
- Which actors? Non-governmental?

## Non-discrimination, art.2

- Note: only very recent case law!
- Same as GATT Arts. I and III?
  - «Like products»? Too early to tell?
  - «Treatment no less favourable»?
  - The fact that GATT Art. XX is not available
  - Preamble to the TBT Agreement
- Legitimate regulatory distinction
- Even-handedness

## **Unnecessary obstacle, art. 2.2**

- Applies also to standards (Annex 3.E) and conformity assessment (art. 5.1.2)
  - Why has it not yet been applied?
- Complex provision
  - Trade restrictive – how restrictive?
  - Legitimate objective – which objectives? Link to measure
  - Not more trade restrictive than necessary to achieve objective + risk of non-fulfilment

## Harmonization, art. 2.4

- Pros and cons of harmonization
- Applies also to standards (Annex 3.F) and conformity assessment (art. 5.4)
- Which standardizing bodies? Open-ended?
  - ISO and IEC + SPS Agreement bodies
  - Openness and recognition
- Which standards
  - State consent/majority decisions? Performance (art. 2.8)
- Used as basis – shifting burden of proof
  - The presumption art. 2.5.
- Effectiveness and appropriateness of standard



TBT Transparency requirement

p.25

[https://www.wto.org/english/res\\_e/publications\\_e/tbttotrade\\_e.pdf](https://www.wto.org/english/res_e/publications_e/tbttotrade_e.pdf)

TBT Information Management System

<http://tbtims.wto.org/>

1. **Two WTO Members that are also signatories to a regional integration agreement with a dispute settlement system have a controversy about a technical standard. The technical standards falls simultaneously under both the regional trade agreement and the WTO Agreement (in particular, the TBT Agreement and Article III of GATT 1994). Is it possible to initiate WTO dispute settlement proceedings right away?**
  - 1) No. The dispute settlement system of the regional trade agreement has priority. The DSB will reject any request for the establishment of a panel until the regional procedure is completed.
  - 2) Yes. Dispute settlement systems under regional trade agreements are available only after the completion of the WTO procedure. The complainant must thus always start by bringing its complaint to the WTO.
  - 3) Yes. The complainant can start with either forum for initiating the dispute, but it can only use one of the two and it must choose. This is to avoid contradictory outcomes in two separate disputes.
  - 4) Yes. As far as dispute settlement is concerned, the two systems are separate and independent one from another. Under each dispute settlement system the adjudicatory body would decide according to the rules governing that system.

**2. Patria has brought a complaint against Tramontana about apple import restrictions that are inconsistent with Article XI:1 of the GATT 1994. Tramontana had claimed in the prior bilateral consultations that its measures are justified, inter alia, by Article XI:2 of GATT 1994 but in the panel proceedings it does not submit arguments relating to Article XI:2. Should the panel examine the case under Article XI:2 on its own initiative?**

- 1) Panels are responsible for applying the WTO law to assess whether a violation has actually occurred. If Article XI:2 is applicable as a matter of scope, the panel must apply that provision.
- 2) Yes. The consultations prior to the panel procedure are part of the dispute settlement process and the content of the discussions are known to the panel. It is sufficient for Tramontana to have invoked Article XI:2 in the consultations.
- 3) The panel should examine the case under Article XI:2 and include findings in this regard in its report, but it should ignore these findings for its conclusions about the case.
- 4) Panels consistently examine only those provisions on which the complainant bases its case and those on which the respondent relies in defence. Unless the respondent invokes Article XI:2 - possibly in response to a question by the panel - the panel should not examine the case under Article XI:2 of the GATT 1994.

**3. In a WTO dispute, the complainant has claimed 15 different violations (in its request for the establishment of the panel and further in its submissions and oral statements) of the same covered agreement. The panel would like to know whether it has to address all of these claims.**

- 1) The request for the establishment of the panel determines the terms of reference for a panel. The panel's mandate, therefore, is to address each single claim of violation raised by the complainant.
- 2) The panel is free to choose among the different claims, but it must at least deal with one of the claims, irrespective of whether this results in a finding of a violation or not.
- 3) The panel must stop its examination as soon as it has found one violation of the covered agreement in order to respect the principle of judicial economy.
- 4) The panel only needs to address the claims that are necessary to fully resolve the matter at issue and may exercise judicial economy as regards the other claims.

#### 4. Who bears the burden of proof in a WTO dispute?

- 1) The panel bears the burden of proof because it is responsible for establishing the facts and has the authority and means to conduct the fact-finding.
- 2) The complainant bears the burden of proof in every situation. This means that if there is any uncertainty, the complainant loses the case.
- 3) Who bears the burden of proof depends on a case-by-case analysis and will be decided according to principles of fairness and due process.
- 4) The complainant must assert and prove its claim of a violation or other nullification or impairment, and the respondent bears the burden of proof that the conditions of exceptions are met.

Thank you for your attention!

Yuliya Chernykh

[Yuliya.chernykh@jus.uio.no](mailto:Yuliya.chernykh@jus.uio.no)