

Prominence of Technical Trade Barriers in Current Public Policy Debates

The focus on technical trade barriers in the 1990's stems from a number of developments in both the public and private sectors. The single most important factor behind the rising interest in these measures has likely been the Uruguay Round multilateral trade negotiations, which culminated in the 1994 Agreement Establishing the World Trade Organization (the WTO Agreement). The WTO Agreement continues the historical progression of multilateral trade negotiations that periodically augmented and steadily reinforced rules for the use of technical trade barriers over the past 50 years (Roessler).

Most of the principal multilateral disciplines on the use of technical trade barriers are found in the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and the WTO Agreement on Technical Barriers to Trade (TBT Agreement).² Another annexed Agreement, the Agreement on Agriculture (Agriculture Agreement), contains no disciplines on the use of technical measures, but rather provides a key motivation for adoption of disciplines on regulatory measures. Negotiators recognized that the reinstrumentation of

² Although the new SPS Agreement and the revised TBT Agreement establish most of the current multilateral rules for the use of technical trade barriers, other Uruguay Round legal instruments discipline the use of these measures as well (GATT, 1994). The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), for example, establishes rules for the use of geographical indications to differentiate products in the market. Even the General Agreement on Trade in Services contains provisions related to technical trade barriers: Article XIV allows WTO Members to adopt restrictions on trade in services (such as tourism or shipping) if "necessary to protect human, animal or plant life or health." Some of the WTO rules for the use of technical trade barriers remain unchanged from the Tokyo Round, most significantly GATT Article XX, which disciplines the use of measures related to the conservation of exhaustible natural resources, or protection of animal, plant, and human health in circumstances not covered by other agreements.

policies under the Agriculture Agreement, and subsequent lowering of the level of protection provided by tariffs and many NTB's, would increase the relative and absolute importance of existing and potential technical barriers in international markets. The new trade regime was especially important in agricultural markets, since the use of most agricultural NTB's had not been disciplined before the Uruguay Round. By reducing the ability of governments to protect domestic producers through various other border and domestic support measures, negotiators feared that the Agriculture Agreement would inadvertently create an incentive to replace former NTB's with new technical barriers. The new disciplines in the SPS and TBT Agreements were viewed as critical to prevent governments from resorting to regulatory compensation to appease domestic interests.

The most significant of these new disciplines on technical measures that affect trade in primary and processed agricultural goods are in the new SPS Agreement. The agreement defines SPS measures as regulations adopted by a nation to protect human, animal, or plant life and health within its territory from certain enumerated biological and toxicological risks. The new substantive requirements in the SPS Agreement suggest a normative basis for technical barriers, while new procedural obligations facilitate decentralized policing of such measures (Roberts, 1998a). In broad terms, the SPS Agreement recognizes the right of each WTO member to adopt measures that provide any chosen level of health and environmental protection for its citizens, but requires such measures to be based on a scientific assessment of the risks and to be applied only to the extent necessary to achieve its public health or environmental goals. The principal procedural obligation in the SPS Agreement is the requirement to notify trading partners of changes in SPS measures that could affect trade. Together, the substantive and procedural requirements of the SPS Agreement have generated a broad-based regulatory review among WTO members as major agricultural exporters and importers determine whether they and their trading partners are in compliance with the new disciplines (Thiermann).

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unchanged from the Tokyo Round. Countries are still permitted to adopt technical measures to realize legitimate objectives (inter alia, the quality of exports, protection of the environment, and the prevention of deceptive practices) as long as imported products are treated no less favorably than “like” domestic products. However, three key revisions in this agreement will affect the multilateral legal environment for technical measures related to trade in agricultural products. First, the TBT Agreement was converted from a plurilateral to a multilateral agreement so that all WTO members must comply with the terms of the treaty. Second, the legal definition of “technical regulation” now includes measures that regulate “related processes and production methods,” which the Tokyo Round Agreement had omitted. Finally, although the Uruguay Round TBT Agreement continues to discipline the use of many technical measures that affect agricultural trade, it explicitly notes that its provisions no longer apply to health and environmental measures that the SPS Agreement defines as SPS measures.

The new multilateral rules on technical trade barriers, together with strengthened dispute settlement procedures,³ have increased requests for WTO panels to review technical restrictions, which has heightened their profile. Two of the most prominent cases have

³ The new WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (known as the Dispute Settlement Understanding) provides the legal infrastructure for enforcement of the provisions of the WTO Agreement. It establishes rules for all legal proceedings, from initial consultations to the final review of a ruling by the Appellate Body. If formal consultations do not result in a mutually agreeable solution between the parties to a dispute, a member can request a WTO panel to rule whether the measure is in compliance with the disciplines set forth in the agreement. The panel submits its recommendations for consideration by the WTO Dispute Settlement Body, where all WTO member countries are represented. If a panel finds that a measure violates one or more provisions of the WTO Agreement, the member is obliged to implement the panel’s recommendations and to report on how it has complied, unless the DSB decides by consensus not to adopt the panel’s report, or unless one of the parties appeals the decision. Appeals are limited to issues of law and legal interpretation by the panel. It is no longer possible, as it was before the Uruguay Round, for a single country to block DSB adoption of a report.

been the U.S./Canadian complaint against the European Union’s (EU) ban on imports of hormone-treated beef and the complaint by several Asian countries against the U.S. prohibition on imports of shrimp caught with nets lacking turtle extruder devices. Other formal complaints have led to negotiated settlements, such as South Korea’s change in policy regarding government-mandated shelf-life standards. The U.S. Government questioned the scientific basis for uniform shelf-life requirements during formal WTO consultations in 1995, after which South Korea agreed to allow manufacturers of frozen foods and vacuum-packed meat to set their own use-by dates. Public debate over GATT/WTO jurisprudence on technical barriers has raised provocative questions about issues such as the use of trade measures to protect the global commons, “downward harmonization” of standards, and recognition of the “precautionary principle” as a justification for technical barriers (Farber and Hudec; GATT, 1995).

Regional trade liberalization agreements have also put technical barriers in the public policy spotlight. When nations within a region try to harmonize their technical regulations so as to permit the free intra-regional movement of goods, their external trading partners frequently face new technical requirements for gaining entry to the unified market. These external regulatory changes, or even proposed regulatory changes, can create trade conflicts. New regional trade alliances—as well as the enlargement and deeper integration of older alliances—have been one of the most important factors in the increase in technical barriers that have been brought to the attention of U.S. policymakers by exporters who face either new requirements or uncertainty about potential requirements.

Incipient regulatory reform initiatives in some developed countries have likewise brought technical barriers to the fore of trade policy, particularly in the United States (Roberts, 1998b). These initiatives aim to improve the quality of regulatory decisions, primarily by establishing guidelines for assessing costs and benefits of measures, as well as guidelines for the subsequent use of such assessments as a normative basis for decisions. These reform efforts have led to a widespread reexamination of health and environ-

mental regulations, including those that affect trade (OECD, 1997). A few recent studies of agricultural technical barriers have raised the prospect that this reexamination has been overdue (Orden and Romano; MacLaren; Paarlberg and Lee). Another study notes that most countries' national quarantine policies pay virtually no attention to the effect of SPS trade restrictions on consumer prices, and further that "SPS policy assessment currently is about where environmental policy assessment was two or three decades ago" (James and Anderson). Regulatory reform initiatives have prompted substantial debate among elected officials and regulatory authorities as injunctions to weigh the costs and benefits of technical barriers and other health and environmental measures often run counter to the longstanding practice of promulgating measures that reduce risks to negligible levels (Kopp, Krupnick, and Toman).

However, the current prominence of technical barriers does not arise solely from recent public-sector policy events. Changes in regulatory policies that track private sector innovations in products, produc-

tion and processing technology, and pathogen detection and control are routine, and these changes continue to spawn disagreements between importers and exporters. Bio-engineered products, for example, have been at the center of perhaps the most prominent debate over technical trade barriers in recent years, as importing countries consider whether these products pose a risk to consumers or to biodiversity, or violate ethical norms. Trade officials are drawn into public debate when exporters believe that lengthy regulatory review of new products or new pathogen-reducing technology might be motivated by a desire to protect the commercial interests of domestic producers, rather than by public health or environmental concerns. There is no reason to expect that the number of agricultural product and technology innovations—or the number of measures to regulate their entry into importing countries—will diminish. Technical trade barriers will therefore remain an important topic of discussion in both the international regulatory and trade policy venues well into the foreseeable future.