

# 非关税壁垒

## 行政指导

覃红著

The Study on Administrative Guidance  
of Non-Tariff Barriers

廣東省出版集團  
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# 序

周佑勇\*

目前行政法学界对行政指导的法律属性尚未达成统一认识,对其制度性的研究也比较欠缺,但是行政指导的柔软性、灵活性、协商性等特点在服务型政府中所发挥的作用是毋庸置疑的。日本作为最早运用行政指导的国家,从“二战”至今的理论研究和实践经验也证实了行政指导的积极作用。覃红博士的《非关税壁垒行政指导》一书,将行政指导运用于非关税壁垒领域,首次对非关税壁垒行政指导问题作出了系统而深入的研究,无疑具有重大的理论价值和鲜明的现实意义。

首先,本书率先将行政指导的非强制性、利益诱导性和弱权力性等理论体系引入非关税壁垒领域。这并非凭空设计:WTO规则中体现的规则统一、法律平等、公开透明、充分救济、主权限制的法治精神以及WTO框架下的非关税措施在透明度、协调、等效和相互承认等方面的要求与行政指导所体现的效率、平等、透明、公正等特点相一致;非关税壁垒的复杂性、隐蔽性、多样性需要政府对企业适度指导;非关税壁垒法律体系的行政法属性为行政指导的引入提供了法律依据。

其次,书中将行政指导所体现的法律优先、法律保留、信赖保护、行政适度(比例原则)、行政公开和行政参与原则等行政法基本原则贯穿于非关税壁垒行政指导之中,角度新颖,见解独到。

再次,本书系统梳理了非关税壁垒行政指导的方式,具有很强的可操作性。本书把国内外政府指导企业和中介组织应对由非关税壁垒引发的贸易摩擦的实践上升到行政指导的高度进行梳理和总结,探讨将其制度化和规范化的方式,为政府开展非关税壁垒行政指导提供了有益的参考。

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此外，作为一种新型的行政行为，非关税壁垒行政指导在法律依据、程序规范、法律救济的法律规范的不足导致了行政法学界对其合法化的争议。对此，本书还结合我国实际，提出了制度完善、程序安排、法律救济等可行性见解。

覃红博士作为专门从事进出口公平贸易工作的政府官员，善于结合工作实际学习和钻研，难能可贵。我相信本书无论是对从事外经贸工作的政府公务员还是相关的行业协会、企业，在应对贸易摩擦方面会有裨益。同时，本书结合非关税壁垒这一实务领域的研究，必将有力地推进整个行政指导理论的纵深发展。

是为序，并予推荐之。

2009年2月25日于南京翠屏东南

## 前 言

我国加入 WTO 后所面临的重大挑战之一就是如何保护国内产业特别是民族产业的健康发展，使之免受国外列强不公平贸易手段的侵害。因此，化解由非关税壁垒引发的贸易争端，从而有效地维护我国产业经济安全和贸易利益已成为我国政府尤其是商务行政部门面临的重要任务。同时，我国在日趋成熟、复杂和多边的 GATT/WTO 贸易规则体系中是个新手和被动的受规则约束方，但作为世界第三大经济体的地位又迫使我们不得不与众多谙熟和参加过规则制定的贸易博弈的老手过招。

在这种情况下，我们不仅需要尽快学会别人的游戏规则，更需要尽快完成从被动守法者向主动运用者角色的转变。在非关税壁垒领域，体现在应对贸易救济措施（反倾销、反补贴、保障措施）、技术性贸易壁垒、知识产权壁垒和运用贸易救济措施以及进行贸易壁垒调查等攻守兼备的贸易摩擦应对机制上。

行政主体与相对人在应对由非关税壁垒引发的贸易摩擦中的角色定位各不相同。以应对反倾销措施为例，企业是应对的主角，政府的作用是服务，行业协会是联系企业和政府的桥梁。由于我国加入 WTO 时间不长，企业和行业协会对 WTO 的游戏规则不熟悉，加上我国经济运行的特殊性等因素，企业和行业协会在贸易摩擦中没能发挥应有的作用，使得非关税壁垒对我国对外贸易的发展形成了严重的障碍。

国际贸易与国内经济活动的不同特点在于存在主权国家对贸易活动的干预和影响。从 15 世纪至今，政府对国际贸易的管理是实施自由贸易政策还是贸易保护主义的争论从来没有停止过，也没有取得过一致的意见。但是历史的经验已证明，政府与国际贸易的融合在理论和实践上都有过成功的范例。

从我国国情上看，政策的作用、政府干预市场的程度以及企业对政府政策的信赖和依赖度都比较高，加上区域和产业发展严重不平衡、人口规模巨大等历史传统和现实体制等方面的特殊性，我国政府在经济和贸易领域要承担更多的责任和义务。加入 WTO 七年多来，我国政府在贸易摩擦日趋严峻的形势下，

以专业的精神指导企业和行业协会妥善应对贸易摩擦，为创造和谐的贸易环境作出了重大贡献。然而，政府在非关税壁垒领域如何指导企业发挥主角作用、行业协会发挥桥梁作用，从而有效化解贸易摩擦，维护国家经济安全和贸易秩序？怎样运作才能既符合行政法理论体系又不与 WTO 框架下的非关税壁垒法律规范相冲突，这是行政法和国际贸易法所要共同解决的问题。

本书将行政法下的行政指导理论引入非关税壁垒领域，试图以最优切入点解决以上问题。本书的结构安排如下：

第一章研究行政指导的内涵和法律属性。本章认为，行政指导是指行政主体在职权范围内依据法定职权，遵循法律位阶原则，通过鼓励、协商、建议、帮助、协调、发布信息、督促、劝诫等非强制性方式，谋求相对人同意或协力，通过利益诱导引导相对人作出或不作出某种行为，以有效实现行政目的的新型行政行为。通过行政指导内涵的界定，明确行政指导的对象不限于特定的行政相对方；行政指导应遵循法律优先的原则，并将法律保留的调整密度保留至组织法；行政指导通过利益诱惑采取非强制性方式促使相对人作为或不作为；行政指导是一种新型的行政行为，其法律效力的产生有赖于相对人的接受，它是一种弱权力行为。行政指导的特点充分体现了现代行政的效率、平等、透明和公正等价值取向，与 WTO 规则中体现的法律平等、公开透明、主权（公权）限制等法治精神相竞合。

第二章论述行政指导在非关税壁垒领域引入的可行性。由非关税壁垒引发的贸易摩擦特性体现在：贸易纠纷双方地位不平等；贸易摩擦的应对行为有明显的“外部性”；贸易摩擦与政府的贸易政策和贸易管理措施有关；行业协会、企业和政府在贸易摩擦中所发挥的作用不尽相同。行政指导与生俱来的淡化强制力色彩、尊重市场主体自主权、由于不直接产生法律效果而易于相对人接受等柔性灵活的特点与非关税壁垒特性相契合，促使行政指导在非关税壁垒领域具有充分的发挥空间。

第三章阐述非关税壁垒行政指导的法律依据。非关税壁垒行政指导所依据的法律规范是由《中华人民共和国对外贸易法》、《中华人民共和国反倾销条例》、《中华人民共和国反补贴条例》、《中华人民共和国保障措施条例》、《中华人民共和国货物进出口管理条例》等一系列法律、法规、行政规章、行政规范组成，但尚未形成完善的法律体系。行政指导的法律属性填补了法律的空白，使

政府在非关税壁垒领域指导企业等行为拥有充分的发挥空间。非关税壁垒行政指导法律规范体系体现了法律优先和法律保留、行政适度、行政参与和行政公开等行政法基本原则。通过对非关税壁垒行政指导法律规范体系的分析可以得出结论：非关税壁垒行政指导能够发挥协助企业和中介组织维护自身权益的作用，从而实现维护国家经济和贸易安全的行政目的；能够发挥调整利害关系方纠纷，居中作出公正裁决的作用；能够预防、抑制非关税壁垒领域当中企业的违规苗头，并能发挥引导企业和中介组织应对贸易摩擦的应诉方向和方法指引的作用。由此非关税壁垒行政指导可分类为助成性行政指导、调整性行政指导、规制性行政指导。

第四章梳理非关税壁垒行政指导的方式。行政指导在非关税壁垒领域大有作为，并且还有许多完善的空间。非关税壁垒助成性行政指导的方式比较丰富，这与行政指导利益诱惑的特性有关。非关税壁垒助成性行政指导主要的方式体现在提供信息服务、法律帮助、方法指引等。非关税壁垒调整性行政指导的方式有限，但它们的均衡协调、疏通功能不可忽视。这种通过居中调停、化解利害关系人贸易纠纷和矛盾以维护市场秩序的独特方式之所以令相对人接受，在于它们的民主、公平、公正的价值体现。调整性行政指导通常运用听证会、审议会、恳谈会、调查问卷等方式进行。非关税壁垒规制性行政指导并非是行政指导最能发挥用武之地的方式。它的微妙之处在于其非强制性和弱权力性，而通常规制是与强制联系在一起的。规制性行政指导与行政命令只有一线之隔，把握好这个边界的关键在于明确规制性行政指导的目的是积极发挥抑制和预防违规、违法行为的作用，而不在于对违规、违法行为事后的消极惩罚。规制性行政指导是行政命令的前置行为，相对人一旦接受，才产生法律效力。非关税壁垒规制性行政指导的方式通常采用建立预警应急机制、规劝、劝诫、劝阻、说服、提醒等。

第五章探讨非关税壁垒行政指导的法律控制和制度完善。非关税壁垒行政指导在法律规范体系 and 实践上存在的主要问题是：规制性行政指导在缺乏行为法依据的前提下，对企业实施了限制和不利的措施，容易导致行政指导异化为强制性的行政命令；由于行为法依据的缺失，法律优先和法律保留原则无法得到相应的体现，造成了某些下位法与上位法的冲突；在立法过程中因过于注重实体规范，忽视了可操作性，影响了行政指导作用的发挥；基于行政指导信赖



保护原则和行政适度原则（比例原则），行政相对人在利益受损的情况下寻求救济的方式得不到保障。依据国内外行政指导的理论和非关税壁垒领域的特性，本章提出从法律依据、程序控制和法律救济三个方面来解决。主要从行政指导的过程公开、指导的信息披露和信息公开、听证程序、告知程序、更正义务等方面提出了程序控制的思路；从行政指导方式不妥的补救、违反信赖保护原则之诉、误导的行政指导之诉、违法的行政指导之诉、异化的行政指导之诉等方面进行法律救济。本章最后从制度和实践两方面对非关税壁垒行政指导提出了完善的方向。在制度方面，本书认为应制定和完善指导应对知识产权壁垒、技术性贸易壁垒、行业协会管理、规制市场竞争秩序、维护产业安全等法律规范；在实践方面，应完善和建立以政府为主导的、行业协会和企业参与的应对贸易救济措施的“四体联动”、“两横一纵”工作机制、维护产业安全的“一体两翼”工作机制和应对技术性贸易壁垒和知识产权壁垒的统一协调机制。

本人目前担任广州市对外贸易经济合作局进出口公平贸易处处长，身处指导广州市企业和行业协会应对非关税壁垒的第一线。入世几年来，本人在非关税壁垒领域参与了大量的社会调查、抽样调查、案件处理等工作，对政府在WTO框架下、在行政法理论范畴内如何指导企业和中介组织应对贸易摩擦的理论和实践进行了深入的专题调研，也取得了一些研究成果。本人还有机会参加国内外不同层次的应对贸易摩擦的专题研讨会、非关税壁垒业务培训班，掌握了国内外该领域的最新动态和专业知识。因此，本人将行政指导引入非关税壁垒领域、非关税壁垒行政指导理论的确立、非关税壁垒行政指导的方式分类、制度完善等观点以及占有的资料是比较新颖的，也是有利于实际操作的。

覃 红

2009年2月于广州

## Abstract

One of the major challenges for China after joining WTO is how to protect the domestic industries, particularly the national industries for healthy development, against the invasion by foreign big powers with unfair trade means. Therefore, the elimination of trade disputes caused by non—tariff barriers, thus maintains the safety of industrial economy and trade interest of China, has become an important task that the Chinese government, especially the commercial administration department faces.

China is a greener and the passive party bound by rules in the increasingly mature, complicated and multilateral GATT/WTO trading system. However, with the position of the world's third—largest economy, we have to compete with numerous experienced trading players knowing well and having taken part in the establishment of trading rules. In such case, we not only need to learn the game rules of others as soon as possible, but also need to complete the conversion from a passive law—abiding player into an active law—applying player. In the non—tariff barriers field, this is reflected in the mechanism for dealing with the trade conflicts which focus on both offence and defense, including response to trade remedy measures (anti—dumping, anti—subsidy, safeguard measures), technical barriers to trade and intellectual property barriers, applying trade remedy measures, and carrying out trade barriers investigation, etc.

The administrative subject and the counterpart play different roles in responding to trade conflicts caused by non—tariff barriers. The enterprises play the leading role in response, the government provides services, and the industrial associations bridge the enterprises and the government. As China has joined WTO not long before, the enterprises and the industrial associations are

not familiar with the game rules of WTO, plus the particularity of China's economic operation, the enterprises and industrial associations have not played their inherent roles, which makes non—tariff barriers constitute a severe obstacle preventing the development of Chinese foreign trade.

The different characteristics of international trade and domestic economic activities are reflected in the sovereign states' interference and influence on trade activities. From 15th century to date, the dispute on whether a government should administer international trade by implementing the free trade policy or trade protectionism has not stopped, and no agreement has been concluded. However, the history has proved that the combination of the government and international trade has successful examples theoretically and practically.

As a government dominated country based on market oriented economy, China has high degree of effect of policies and interference on the market, and the enterprises' trust and reliance on governmental policies, plus the particularity in the historical tradition and practical mechanism, including the severe unbalance of regional and industrial development, huge population, etc. , the government needs to assume more responsibilities and obligations in the field of economy and trade. During the six years after joining WTO, in the increased trade conflicts, the government has professionally instructed the enterprises and industrial associations to appropriately respond to trade conflicts, and greatly contributed to the creation of a harmonious trading environment. However, how the government instructs the enterprises to play the leading role and how the industrial associations play the role of a bridge in the field of non—tariff barriers, thus effectively solve trade conflicts, and maintain the national economic safety and trading order, and how to operate to comply with the theoretical system of administrative laws, and to avoid conflicting with the laws and regulations in relation to non—tariff barriers under the WTO frame are the problems to be solved by administrative laws and international trade laws.

This paper believes that the introduction of the theory of administrative

guidance under the administrative laws in the field of non—tariff barriers is the optimal point of penetration for solving the above problems.

Through the study on the basic theory of administrative guidance, Chapter 1 and 2 demonstrate the feasibility of introducing administrative guidance in the field of non—tariff barriers. Chapter 1 discusses the connotation and legal attribute of administrative guidance. The chapter believes that administrative guidance refers to the new administrative behavior of the administrative subject which, within this scope of authority, in accordance with the legal authority, following the rule of legal hierarchy, through such non—compulsive means as encouragement, negotiation, suggestion, help, coordination, information issuing, supervision and urge, expostulation, etc., seeks the consent or cooperation of/with the counterpart, and leads the counterpart to do or not to do a certain action through benefit induction to achieve the administrative purpose. By defining administrative guidance, it makes clear that the object of administrative guidance is not limited to a certain administrative counterpart; administrative guidance should follow the rule of law priority, and retain the regulation density of law reservation to organic laws; administrative guidance urges the counterpart to do or not to do a certain action with non—compulsive means through benefit induction; administrative guidance is a new administrative behavior which may have legal force only after it is accepted by the counterpart, and it's a kind of behavior of weak powers. The features of administrative guidance fully reflect such value orientation as efficiency, equality, transparency and fairness, etc., which complies with the legal spirit of legal equality, opening and transparency, sovereignty (public right) limitation, etc. included in the WTO regulations. Chapter 2 describes the features of trade conflicts caused by non—tariff barriers; unequal positions of the parties in trade disputes; the obvious “external nature” of the responsive behavior of trade conflicts; the trade conflicts are related to the trade policies and trade administration measures of the government; the different roles of industrial associations, enterprises and the government in trade conflicts. The inherent flexible feature

of administrative guidance of weakening the compulsive force, respecting the decision—making power of the market subject, and being easily accepted by the counterpart due to no direct legal effect agrees with the feature of the field of non—tariff barriers, thus the administrative guidance behavior has adequate space to play its role in that field.

Chapter 3 discusses the legal basis for administrative guidance of non—tariff barriers. The system of laws and regulations on which the administrative guidance of non—tariff barriers is based are composed of Foreign Trade Law of the Peoples Republic of China, Anti—Dumping Regulation of the People's Republic of China, Countervailing Regulation of the People's Republic of China, Regulation of the People's Republic of China on Safeguard Measures, Regulation of the People's Republic of China on the Administration of the Import and Export of Goods, and a series of administrative rules and administrative norms. The laws and regulations in relation to the administrative guidance of non—tariff barriers sporadically appear in the legal system of non—tariff barriers that has not formed an independent legal system and far from cover the many kinds of non—tariff barriers, which are too numerous to be counted. The appearance of administrative guidance has timely filled the legal gap, which allows the government to have adequate space to guide the enterprises in the field of non—tariff barriers. The system of laws and regulations for the administrative guidance of non—tariff barriers reflects the basic principles of administrative law including law priority and law reservation, administrative moderation, administrative participation and administrative openness, etc. Through the analysis of the system of laws and regulations for the administrative guidance of non—tariff barriers, it can be concluded that the administrative guidance of non—tariff barriers can assist the enterprises and the agency organizations to maintain their own rights and interests, thus achieve the administrative purpose of maintaining the national economy and trading safety; can intercede in the disputes between stakeholders and provide impartial awards; can prevent and restrain the symptom of violation of the enterprises in

the field of non—tariff barriers, and instruct the enterprises and agency organizations the direction and methods for responding to actions in trade conflicts. Therefore, the administrative guidance of non—tariff barriers can be divided into further administrative guidance, adjusting administrative guidance, and regulative and controlling administrative guidance.

Chapter 4 discusses the means of the administrative guidance of non—tariff barriers. The administrative guidance plays an important role in the field of non—tariff barriers, and can be improved significantly. The means of further administrative guidance of non—tariff barriers are rich, which is related to the feature of benefit induction of administrative guidance. The major means include information service, fund support, professional knowledge, method guidance, etc. The means of adjusting administrative guidance of non—tariff barriers are limited, but their functions of balancing, coordination and mediation can't be ignored. The reason why this unique means that solves the trade disputes and contradiction between stakeholders through mediation to maintain the market order is acceptable by the counterpart is that they are democratic, fair and impartial. The adjusting administrative guidance often uses the forms of hearing, review conference, talkfest, questionnaire, etc. The regulative and controlling administrative guidance of non—tariff barriers is not a means in which the administrative guidance can best play its role. Its subtlety lies in its non—compulsion and weak powers, while regulation and control are usually associated with compulsion. There is a tiny difference between the regulative and controlling administrative guidance and the administrative orders, and the key to grasp this difference is to understand the purpose of the regulative and controlling administrative guidance being to actively play the role of restraining and preventing, rather than negatively punishing, rule—breaking and violating behavior. The regulative and controlling administrative guidance is the antecedent behavior of administrative orders, and will have legal force once the counterpart accepts it. The forms usually include the establishment of early—warning emergency mechanism, remonstrance, expostulation, dissuasion, per-

suasion, reminding, etc.

Chapter 5 discusses the major problem existing in the system of laws and regulations and the practice of administrative guidance of non-tariff barriers, that is, on the premise of lack of behavior laws, the regulative and controlling administrative guidance restricts the enterprises and take adverse measures, which may easily cause the administrative guidance to dissimilate to administrative orders. Due to the lack of basis of behavior laws, the principles of law priority and law reservation can't be reflected correspondingly, which causes conflicts between some higher-level laws and lower-level laws; the course of legislation excessively focuses on substantial regulations and has inadequate operability, which influences the effect of administrative guidance; based on the principle of confidence protecting and the principle of administrative moderation (proportion principle) of administrative guidance, the issue about how the counterpart seeks relief when his/her interest is impacted is not warranted.

For the problems mentioned above, according to the domestic and foreign theories on administrative guidance and the features of the field of non-tariff barriers, this paper has proposed to solve them in respects of legal basis, process control and legal relief. Chapter 5 proposes the idea of process control mainly in respects of process opening of administrative guidance, information disclosure and opening of guidance, hearing procedure, notification procedure, correction obligation, etc.; with legal relief sought from relief for improper means of administrative guidance, suits against violation of the principle confidence protecting, suits against misleading, illegal or dissimilating administrative guidance, etc. At last, it proposes the direction for the improvement of the administrative guidance of non-tariff barriers in respects of system and practice. In respect of system, this paper believes that the laws and regulations that instruct the response to intellectual property barriers and technical barriers to trade, the laws and regulations on industrial association administration, and those that regulate and control the order of market competition, and maintain industrial safety, etc. should be established and improved; in respect of

practice, the “four — party linkage” and “two transverse, one lengthways” work mechanism led by the government, and participated by industrial associations and enterprises, the “one body, two wings” work mechanism that maintains industrial safety, and the unification and coordination mechanism that responds to technical barriers to trade and intellectual property barriers should be improved and established.



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